
**TUESDAY,
SEPTEMBER 19
SESSIONS**

**EXAMINING THE VALUE
OF THE IRA: AN
OVERVIEW OF THE
STATE OF THE
RENEWABLES INDUSTRY**

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ECONOMIC UPDATE: SECOND WIND

Economic Update: Second Wind

National Trust Closely Held Business Association

September 19, 2023

Ryan James Boyle

Senior Economist

Northern Trust
Global Risk
Management



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Key Takeaways

1

Recession calls were premature, but risks remain.

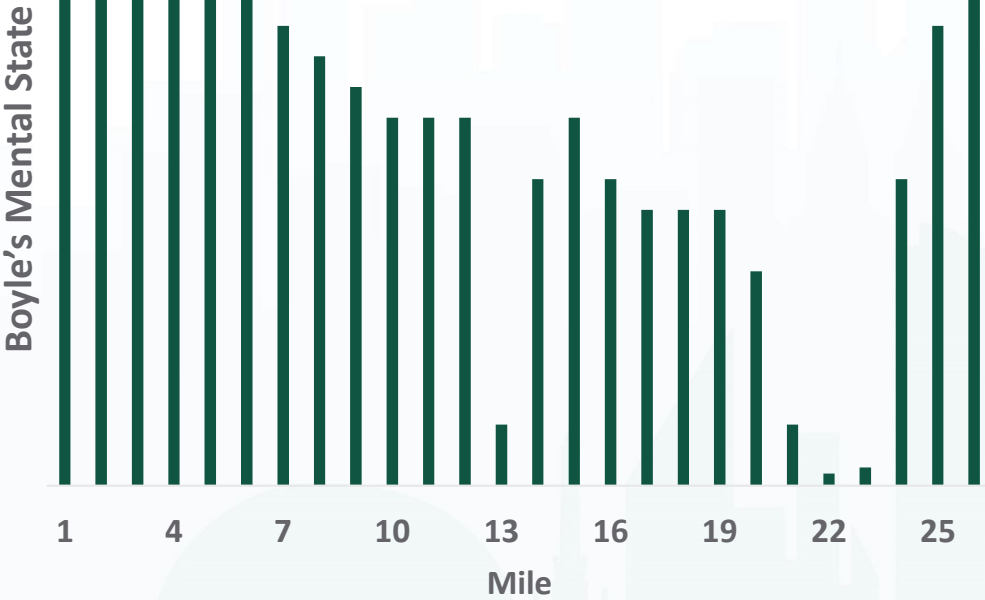
2

The Fed didn't cause inflation and doesn't have the right tools to fight it.

3

Strong labor markets and cooler inflation set the stage for continued growth.

We Can Do Hard Things



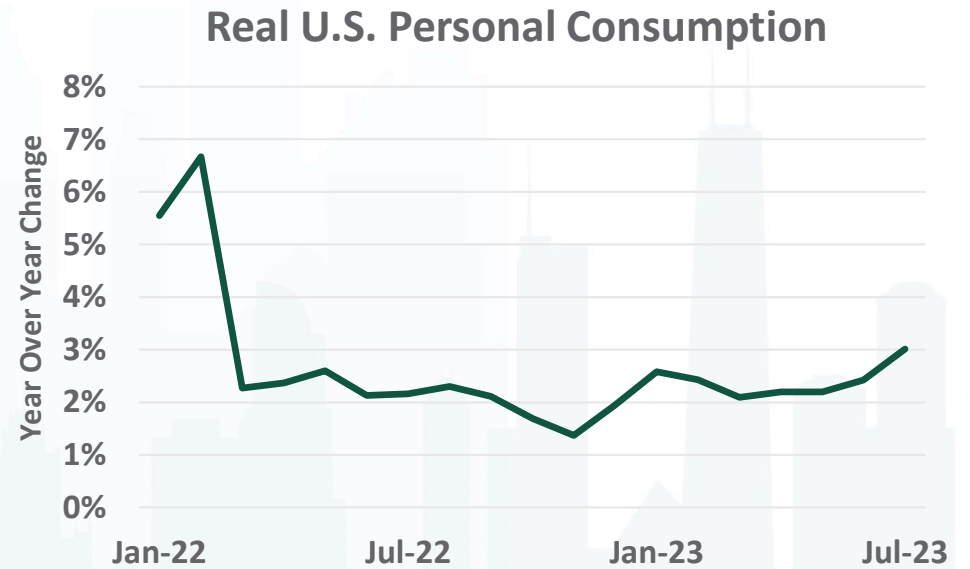
University of Michigan: Consumer Sentiment Index



Sources: Author's Analysis, University of Michigan, Haver Analytics. Data as of August 2023.

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Economic Growth: Exceeding Expectations

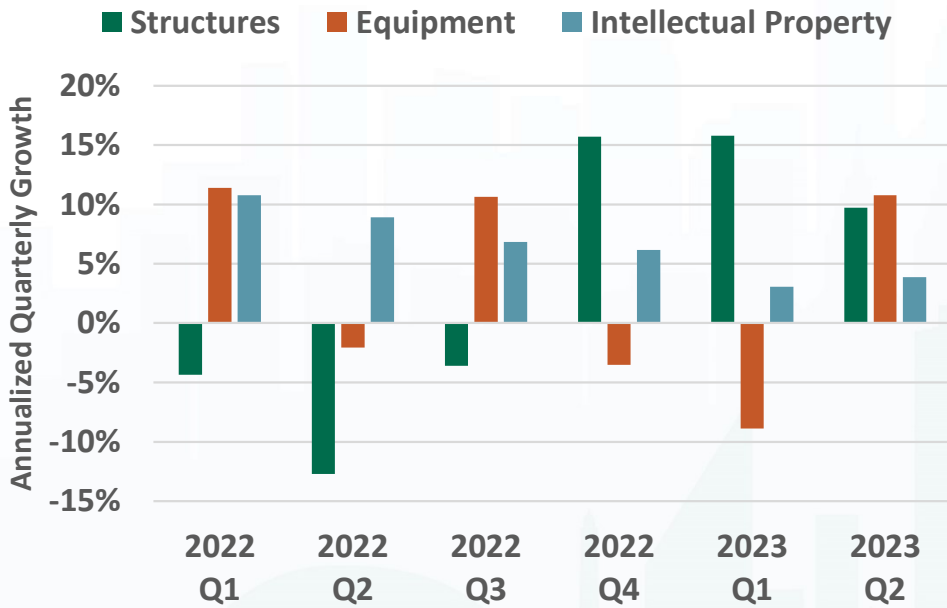


Sources: Bureau of Economic Analysis, Haver Analytics. Data as of September 2023.

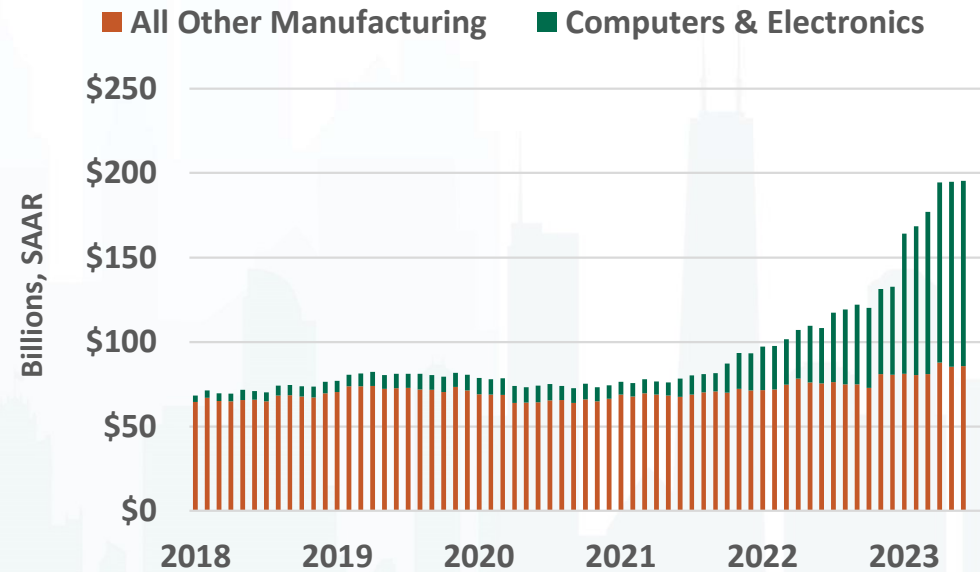
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Consumers Pass The Baton

Business Fixed Investment



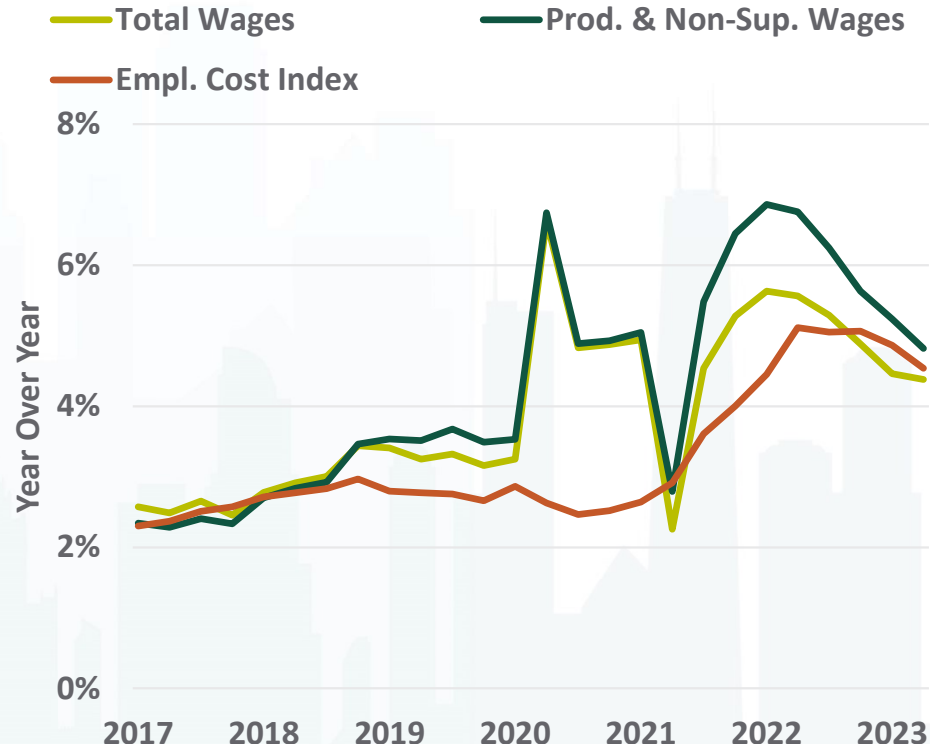
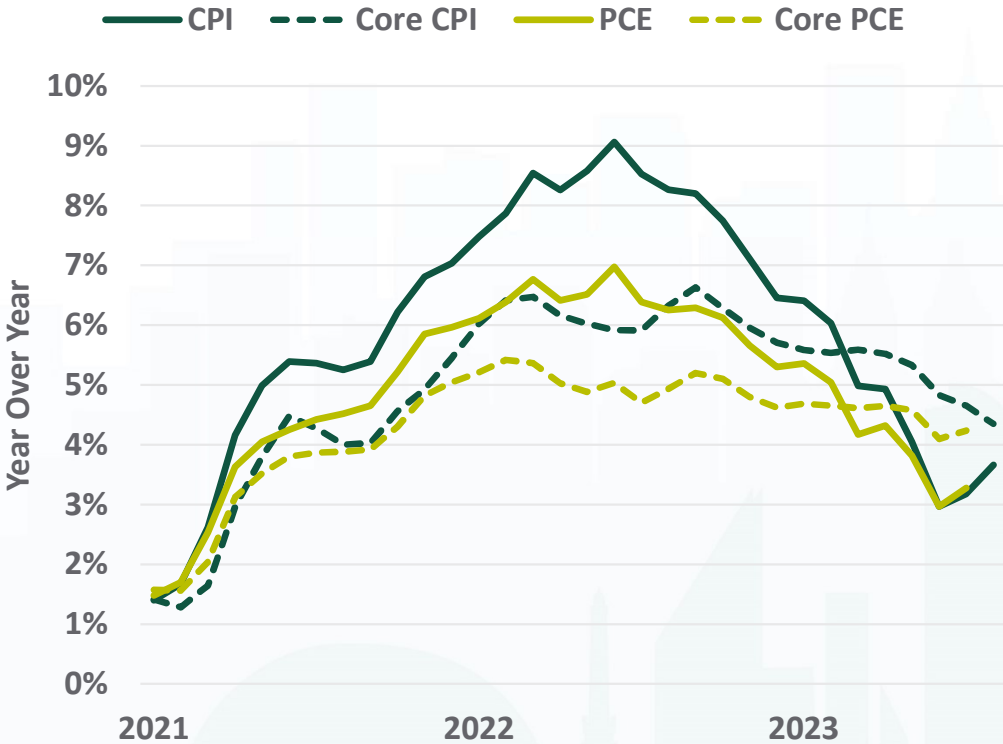
U.S. Construction Spending



Sources: Bureau of Economic Analysis, Haver Analytics. Data as of August 2023.

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Inflation: Better, But Not Good Enough

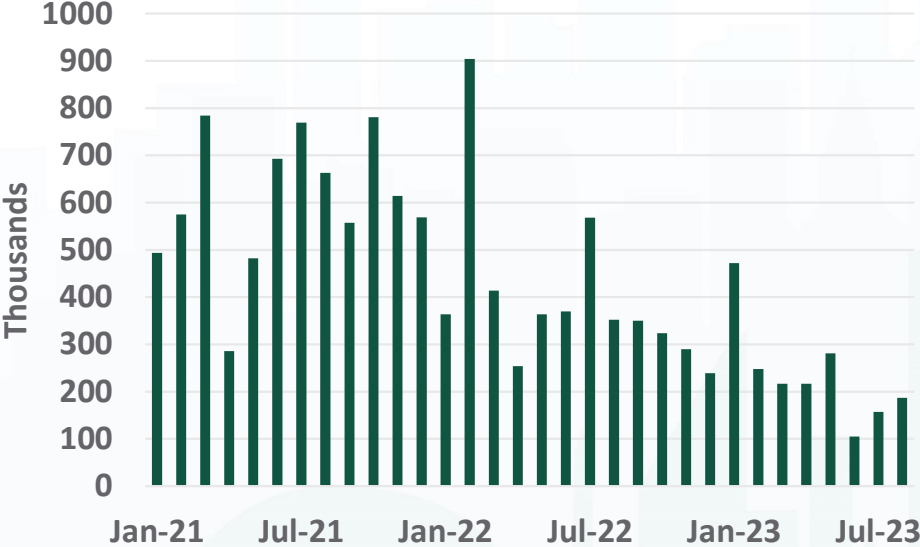


Sources: Bureau of Economics Analysis, Bureau of Labor Statistics, Haver Analytics. Data as of September 2023.

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U.S. Labor Markets: Hints of Cooling

U.S.: Monthly Payroll Increases



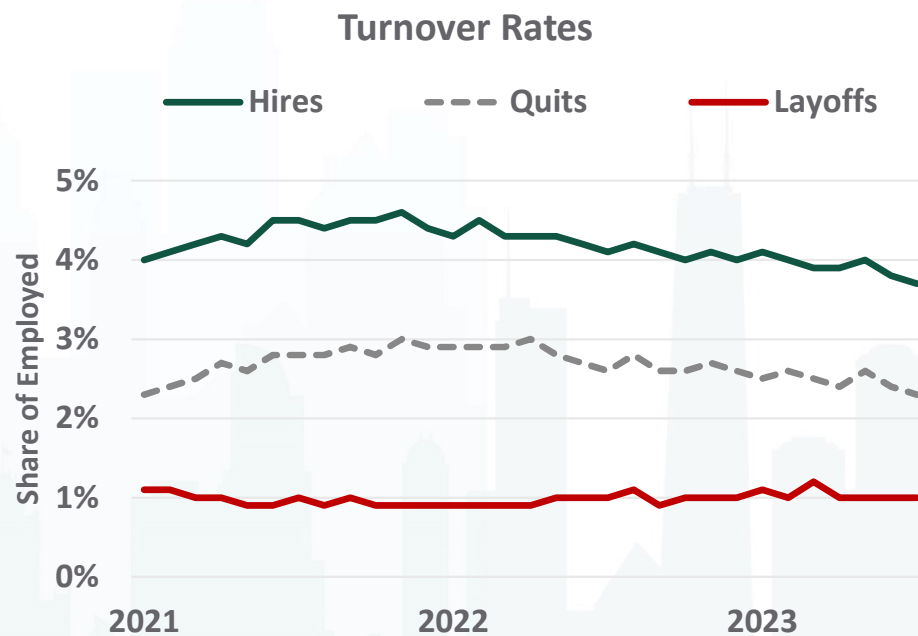
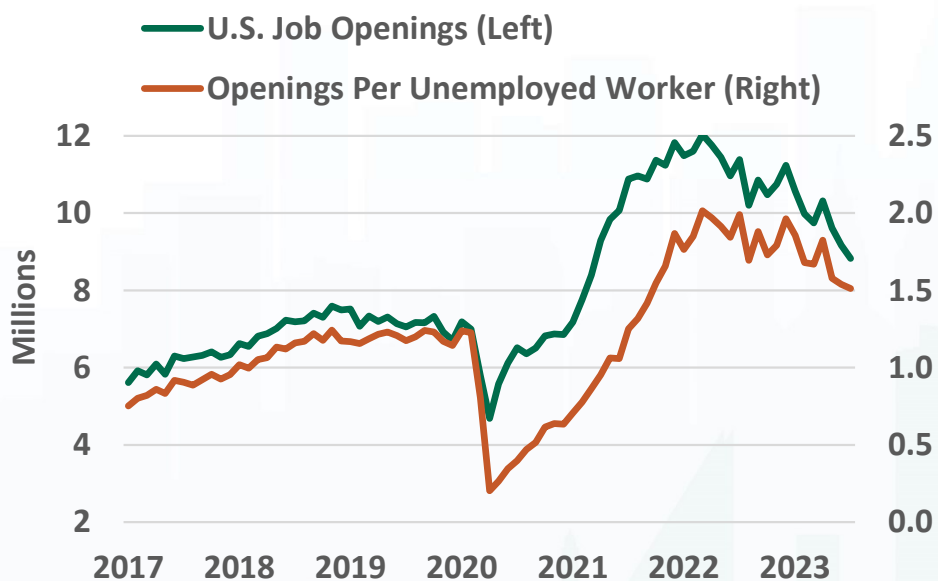
Initial Jobless Claims



Sources: Bureau of Labor Statistics, Department of Labor, Haver Analytics. Data as of September 2023.

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U.S. Labor Markets: Great Resignation Ending



Sources: Bureau of Labor Statistics, Haver Analytics. Data as of September 2023.

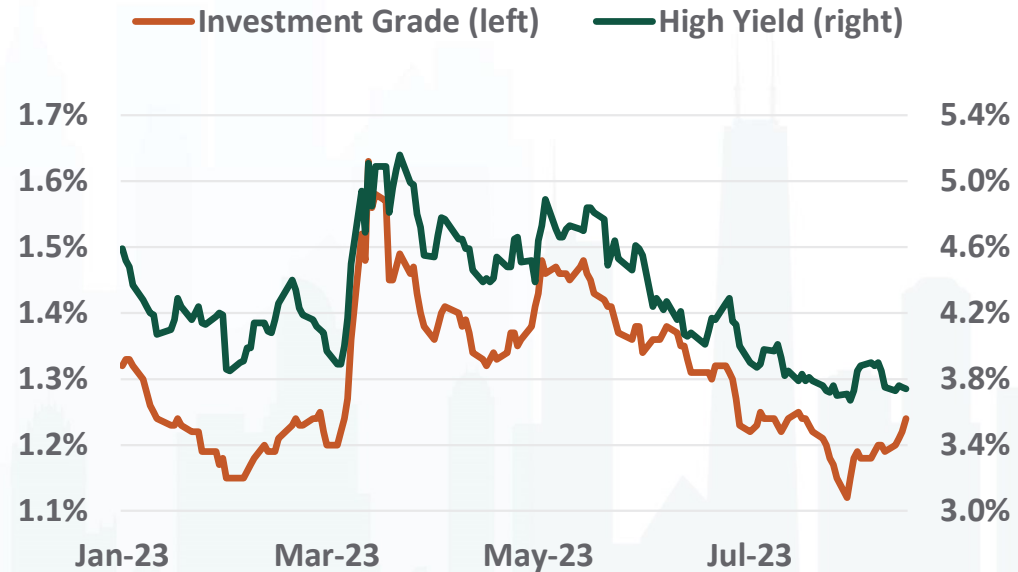
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Market-Based Financial Conditions

S&P 500 Index



Corporate Bond Spreads

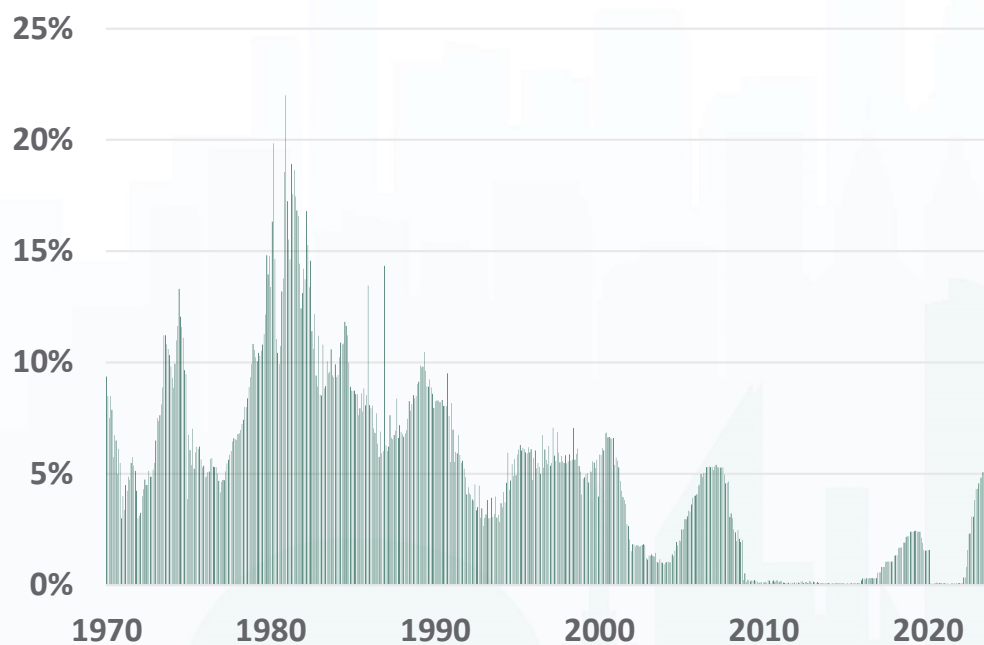


Source: Bloomberg. Data as of August 2023.

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What Comes After Hikes?

Fed Funds Rate



Sources: Federal Reserve, Haver Analytics. Data as of August 2023.

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Peak Month	Peak Rate	Months At Peak	Trough Month	Trough Rate
Aug 1984	11.5%	2	Sep 1986	5.9%
Mar 1989	9.75%	3	Sep 1992	3.0%
Feb 1995	6.0%	5	Dec 1998	4.75%
Jun 2000	6.5%	7	Jul 2003	1.0%
Jul 2006	5.25%	14	Dec 2009	0.1%
Dec 2018	2.4%	7	Mar 2020	0.1%

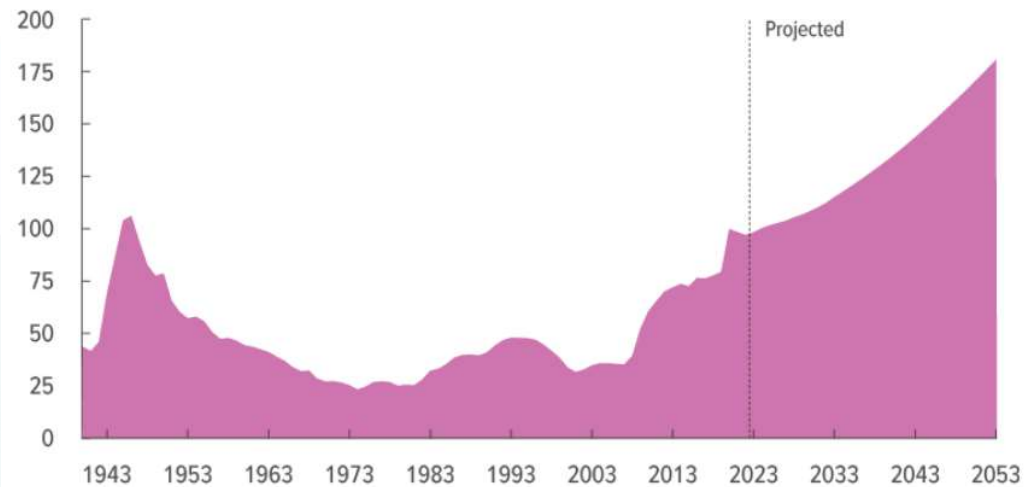
Free As In Freedom

Treasury General Account: Closing Operating Cash Balance



Federal Debt Held by the Public

Percentage of GDP

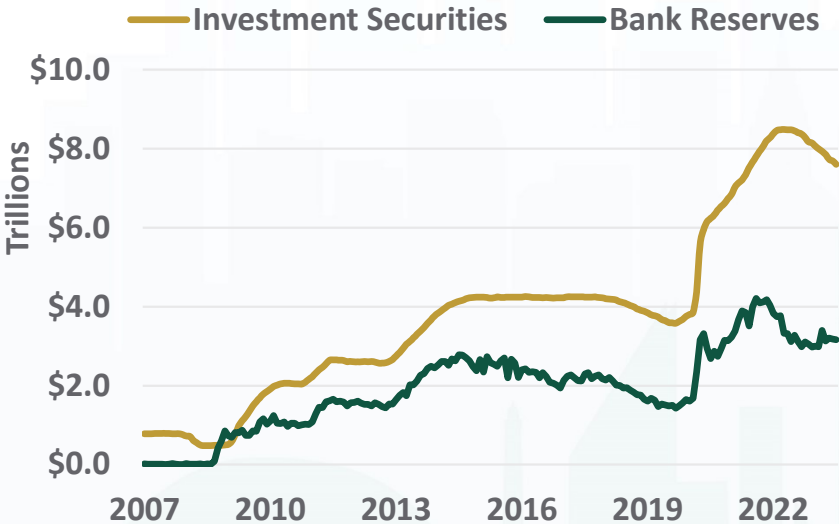


Sources: U.S. Treasury, Haver Analytics, Congressional Budget Office. Data as of September 2023 (left), June 2023 (right).

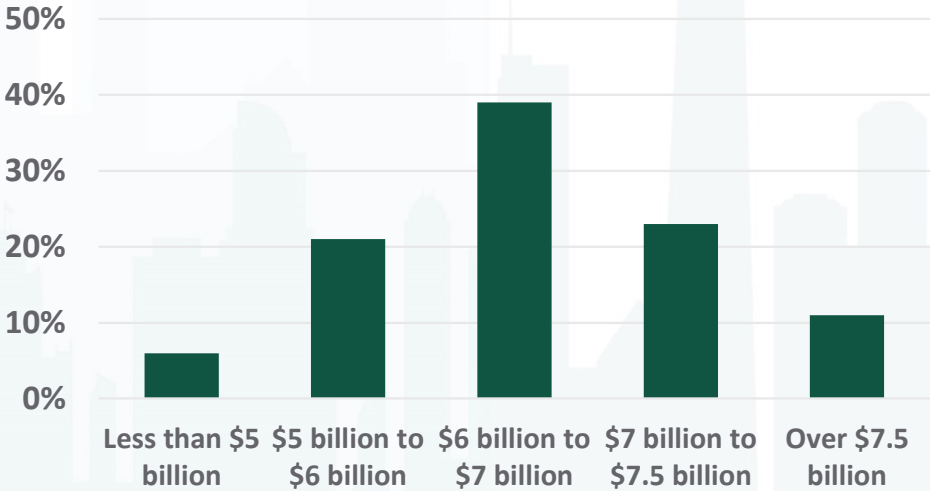
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What's On The QT?

**Federal Reserve
Selected Balance Sheet Items**



**Primary Dealer Survey:
Estimated Fed Portfolio When QT Ends
(level when surveyed: \$7.6 billion)**

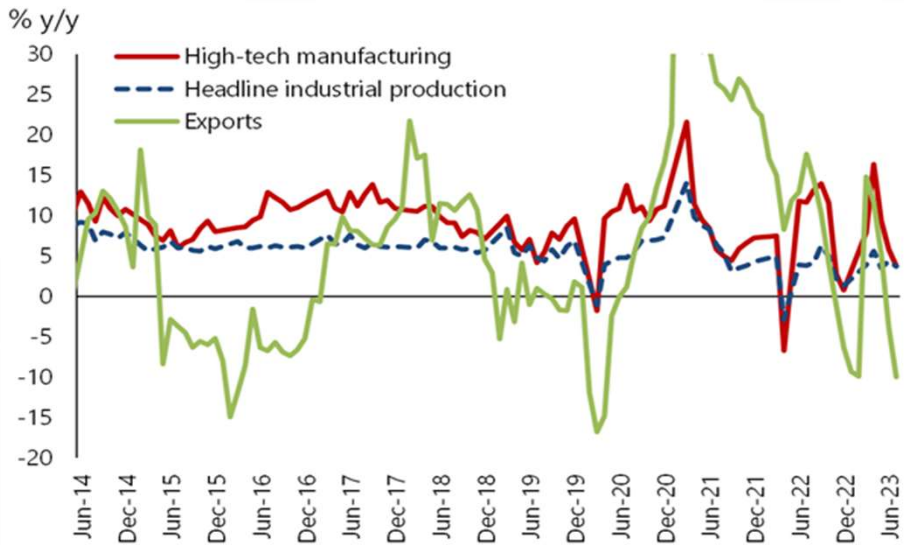


Sources: Federal Reserve, Haver Analytics. Data as of August 2023.

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China's Rapid Descent

China: Exports and Industrial Production



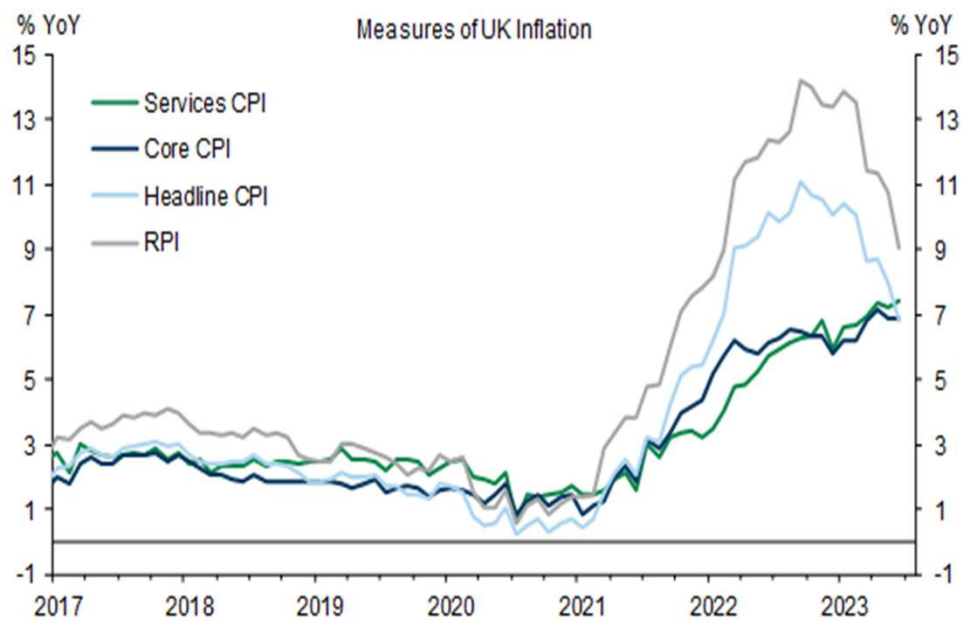
China: FX Rate, 2023



Sources: Oxford Economics, WSJ, Haver Analytics. Data as of August 2023.

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Bank of England: You Brexit, You Buy It



Source: Oxford Economics. Data as of August 2023.

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Our Latest Forecasts

	2022	2023				2024				Q4 to Q4 change			Annual change		
	22:4a	23:1a	23:2a	23:3f	23:4f	24:1f	24:2f	24:3f	24:4f	2022a	2023f	2024f	2022a	2023f	2024f
Real Gross Domestic Product (% change, SAAR)	2.6	2.0	2.1	3.2	0.9	1.2	1.5	1.7	1.9	0.9	2.0	1.6	2.1	2.3	1.5
Consumer Price Index (% change, annualized)	4.2	3.8	2.7	4.0	3.0	2.8	2.4	2.3	2.1	7.1	3.4	2.4	8.0	4.3	2.6
Civilian Unemployment Rate (%, average)	3.6	3.5	3.6	3.7	3.8	3.9	4.0	4.0	4.0				3.6*	3.6*	4.0*
Federal Funds Rate	3.66	4.52	4.99	5.34	5.63	5.63	5.13	4.63					1.69*	5.12*	5.26*
2-yr. Treasury Note	4.39	4.34	4.26	4.95	5.00	5.00	4.75	4.40	4.10				2.98*	4.64*	4.56*
10-yr. Treasury Note	3.83	3.65	3.60	4.10	4.25	4.25	4.10	4.00	3.80				2.96*	3.90*	4.04*

a=actual
f=forecast
*=annual average

Global Real GDP Forecasts 4Q/4Q Change

	2023	2024
U.K.	0.5%	0.6%
Eurozone	0.4%	1.1%
Japan	2.0%	1.3%
China	3.9%	3.9%

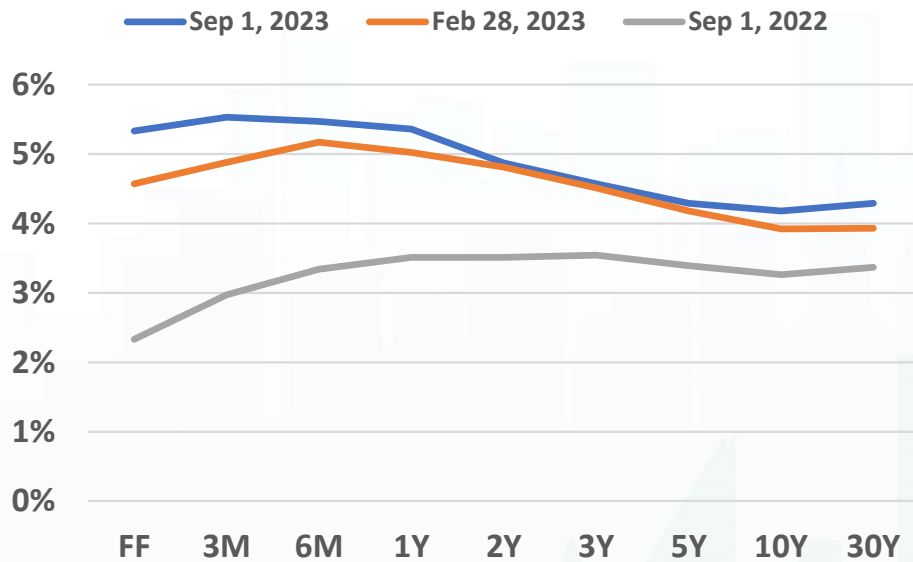
Latest forecasts always available at [northerntrust.com](https://www.northerntrust.com) → Insights and Research → [Economic Trends and Insights](#). Please subscribe!

Source: Northern Trust. Data as of September 2023.

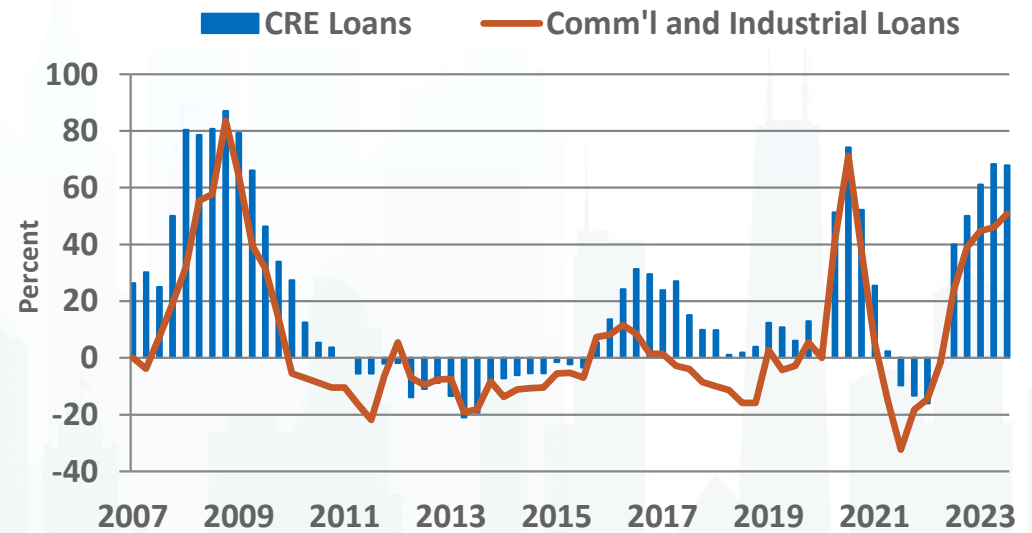
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Risks Ahead: How Long and How Variable?

U.S. Treasury Yield Curve



Net Share Of Banks Tightening Loan Standards

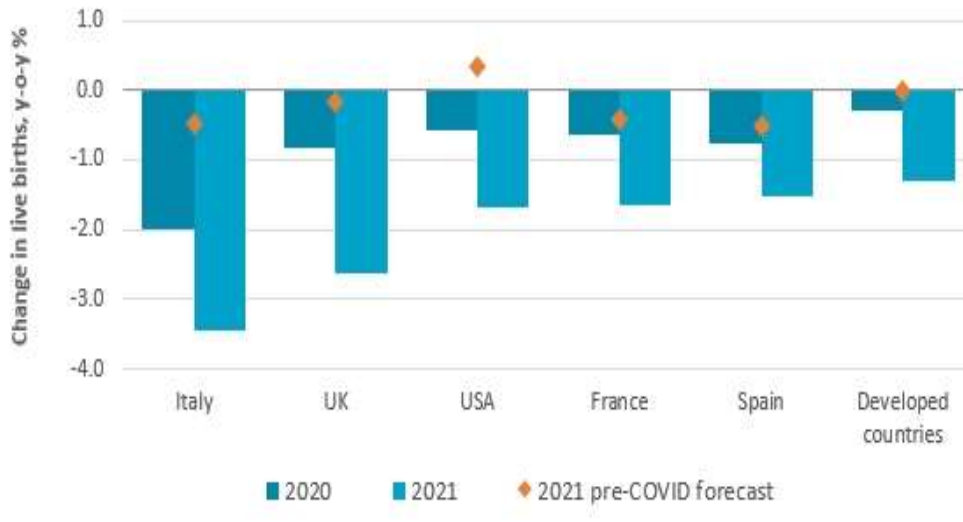


Sources: Federal Reserve, Haver Analytics. Data as of September 2023.

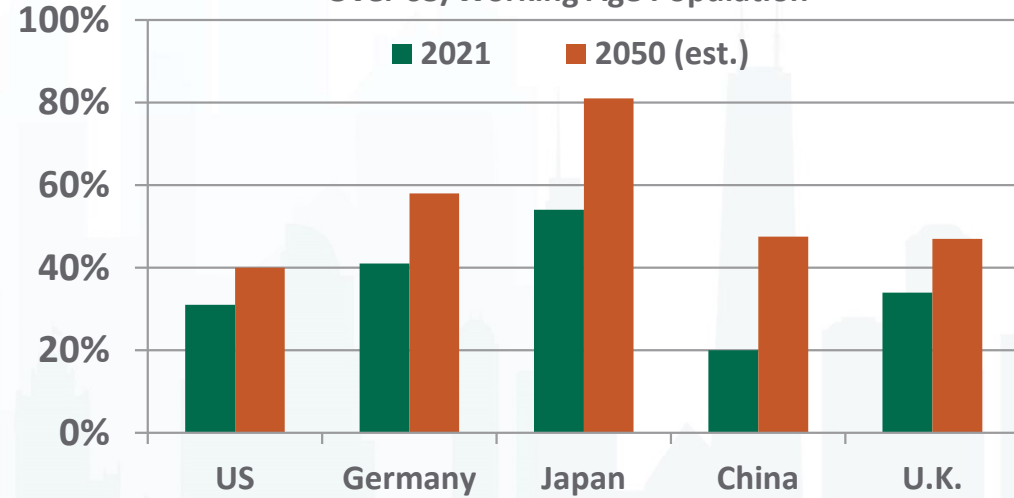
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Long Run: Demographic Worries

Change in Live Births in Developed Countries:
2020-2021



Old Age Dependency Ratio
Over 65/Working Age Population

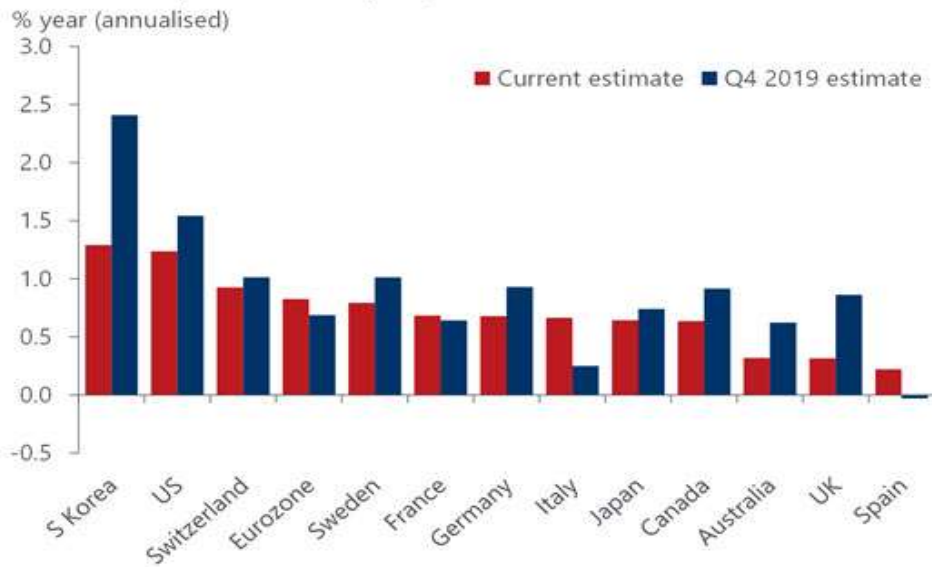


Sources: United Nations, OECD. Data as of January 2023.

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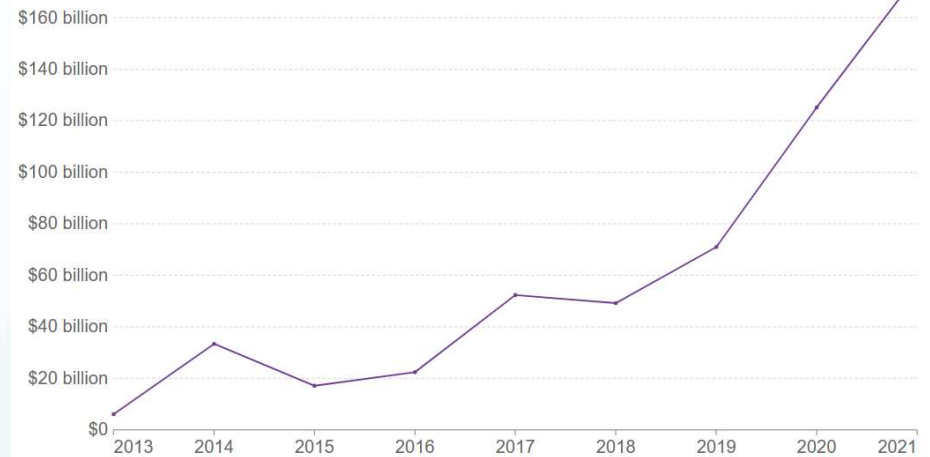
Productivity Falling...A Solution In Sight?

Growth of potential output per worker 2019Q4 - 2025 Q4



Annual global corporate investment in artificial intelligence

Sum of private investment, mergers and acquisitions, public offerings, and minority stakes. This data is expressed in US dollars, adjusted for inflation.



Sources: Oxford Economics, Our World In Data. Data as of March 2023.

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Biography



Ryan James Boyle

Senior Economist
Northern Trust

Ryan James Boyle is a Senior Economist for The Northern Trust. In this role, Mr. Boyle briefs clients and colleagues on the economy and business conditions, and prepares the bank's economic outlook and regular commentaries. He maintains the macroeconomic data required for the bank's stress testing exercises.

Prior to joining Northern Trust, Mr. Boyle researched and reported on consumer lending trends for credit bureau TransUnion, specializing in the auto, card, mortgage, and fintech lending markets. Before his time at TransUnion, Mr. Boyle was a Managing Consultant in the Economics division of Navigant Consulting, supporting expert witness services for legal matters including antitrust, securities class actions, and labor discrimination. Mr. Boyle started his career as a business analyst at LaSalle Bank/ABN AMRO, a global banking organization with \$1 trillion in total assets.

Mr. Boyle holds an M.B.A. from the University of Chicago Booth School of Business and a B.S. in computer science from DePaul University and has completed the Graduate School of Banking at the University of Wisconsin-Madison.

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NORTHERN
TRUST

**UNDERSANDING THE
CORPORATE
TRANSPARENCY ACT**



NATIONAL TRUST CLOSELY HELD BUSINESS ASSOCIATION
46TH ANNUAL CONFERENCE

Understanding the Corporate Transparency Act

Tuesday, September 19, 2023

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Agenda

- Background and Relevant Timeline
- Four Elements:
 - What is a Reporting Company?
 - Who are its Beneficial Owners?
 - Who are its Company Applicants?
 - What Beneficial Ownership Information is required to be reported?
- Penalties and Safeguards
- Next Steps:
 - Private Wealth-Specific Questions
 - Best Practices

Background

- The Corporate Transparency Act (“CTA”) (31 USC § 5336) requires “reporting companies” to report “beneficial owners” and “company applicants” to the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”).
- Purpose*: “Requiring entities to submit beneficial ownership information (“BOI”) to FinCEN and providing timely access to this information to law enforcement, financial institutions, and other authorized users is intended to help combat corruption, money laundering, terrorist financing, tax fraud, and other illicit activity.”
- “The ultimate goal of this regulatory proposal is to combat, to the broadest extent possible, the proliferation of anonymous shell companies or other opaque corporate structures.”

* Per FinCEN’s Fact Sheet on its Notice of Proposed Rulemaking (December 2021)

Timeline

- **January 1, 2021**: CTA was enacted as part of the Anti-Money Laundering Act of 2020 within the National Defense Authorization Act for Fiscal Year 2021, H.R. 6395 (“NDAA”).
 - Section 6403 of the CTA amends the Bank Secrecy Act by adding a new provision entitled “Beneficial Ownership Information Reporting Requirements” (31 USC § 5336).
- **April 5, 2021**: FinCEN issued an Advanced Notice of Proposed Rulemaking (“ANPRM”) regarding Beneficial Ownership Information Reporting Requirements (“Reporting Requirements”), requesting public comment on many questions related to the implementation of the CTA.
- **December 7, 2021**: FinCEN then issued a Notice of Proposed Rulemaking (“NPRM”) regarding Reporting Requirements, Proposed 31 CFR Part 1010.380.
- **February 7, 2022**: Public comments to the Proposed Regulations regarding Reporting Requirements due to FinCEN; FinCEN received over 240 comments.
- **September 30, 2022**: Final Regulations by Treasury published in the Federal Register.

Timeline

- **November 15, 2022**: Lawsuit filed by the National Small Business Association, challenging the constitutionality of the Corporate Transparency Act, National Small Business United et al. v. Yellen et al., U.S. Northern District of Alabama 5:22-cv-01448 (November 15, 2022) (still pending).
- **December 15, 2022**: FinCEN issued a NPRM regarding Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities (“Access Rules”), Proposed 31 CFR Part 1010.955.
- **February 14, 2023**: Public comments to the Proposed Regulations regarding Access Rules due to FinCEN.
- **Anticipated by End of 2023**: Final Regulations on Access Rules are anticipated to be issued by the end of 2023.
- **November 2023**: Third tranche of proposed regulations which will revise the existing Customer Due Diligence Rules applicable to banks/financial institutions are anticipated to be issued by FinCEN in November 2023, according to the Regulatory Agenda.
- **January 1, 2024**: Effective date.

Four Elements

- The CTA requires a “**Reporting Company**” to disclose **specific information** regarding (1) the company itself (per 31 CFR 1010.380)(b)(1)), (2) its “**Beneficial Owners**” and (3) “**Company Applicants**” to FinCEN. 31 USC § 5336(b)(1) & (2).

Reporting Companies: Generally

- Domestic: Corporations, Limited Liability Companies, or other similar entities created by the filing of documents with a US State or Tribal Office. 31 USC § 5336(a)(11)(A).
 - Includes Limited Partnerships, Limited Liability Partnerships, and Business Statutory Trusts
 - Common Law Trusts are not Reporting Companies; but are includable as Beneficial Owners, where applicable.
 - Includes entities formed in US territories (e.g., USVI)
- Foreign: International Corporations, Limited Liability Companies, or other similar entities that are registered to do business in the United States

Reporting Companies: Exemptions

- 23 Current Exemptions (See 31 USC §5336(a)(11)(B)(i)–(xxiii)), including:
 - Large Operating Businesses:** Taxable entities that have greater than 20 full-time employees in the US, have a physical operating presence in the US, and filed a federal income tax return with more than \$5m in gross receipts or sales (aggregate) for the prior year. 31 CFR 1010.380(c)(2)(xxi).
 - Family Offices are not specifically exempted, but certain **registered Banks*** and **Pooled Investment Vehicles** are exempt. 31 CFR 1080(c)(2)(iii); 31 CFR 1010.380(f)(7); 31 CFR 1080.380(c)(2)(xviii).

* As defined under Section 3 of the Federal Deposit Insurance Act, Section 2(a) of the Investment Company Act of 1940, or Section 202(a) of the Investment Advisors Act of 1940

Reporting Companies: Subsidiary Exemption

- **Subsidiaries that are controlled or wholly owned, directly or indirectly, by certain exempt entities** (including Banks or Large Operating Businesses). 31 CFR 1010.380(c)(2)(xxii).
- The direct and indirect wholly-owned subsidiaries of most exempt entities are themselves exempt.
- Example:
 - A Reporting Company is owned solely by a Bank (a qualified exempt entity).
 - The Reporting Company most likely falls into this subsidiary exemption, would be an exempt entity and would not have a reporting requirement.

Reporting Companies: Subsidiary Exemption

- **Note**: In the previously discussed example, the ownership interest in the Reporting Company was **wholly owned** by the exempt entity.
- If the exempt entity has a 90% ownership interest in the Reporting Company, with the remaining 10% ownership interest attributed to another entity/individual/etc. that does not qualify as an exempt entity, the Reporting Company would still be reportable.

Beneficial Owners

- “Beneficial Owner” is an **individual** who, directly or indirectly, either (1) exercises “**substantial control**” over the reporting company or (2) “**owns or controls**” at least **25% of the “ownership interests**” of the reporting company. 31 USC § 5336(a)(3); 31 CFR 1010.380(d).
 - A. Substantial Control Test: Individual who exercises “substantial control” over a Reporting Company.
 - B. Ownership Test:
 - Individual, if any, who owns 25% or more of a Reporting Company, or
 - Individual, if any, who controls 25% or more of the ownership interests of a Reporting Company.

Beneficial Owners: Exceptions

- Minor Children (but parent/guardian information is instead reported).
- Individuals *acting* as nominees, intermediaries, custodians, or agents.
- Employees acting solely in such capacity and not as Senior Officers.
- Individuals with a future interest (e.g., inheritance) in ownership of a Reporting Company.
- Creditors of a Reporting Company (unless they otherwise meet the Ownership Test).
 - See 31 USC § 5336(a)(3)(B); 31 CFR 1010.380(d)(3).

Beneficial Owners: “Substantial Control”

- The Substantial Control test is a fact based analysis.
- In order to determine whether an individual exercises substantial control over a reporting company, look for any of the following factors:
 - Senior Officer: Individual holding the position of (or exercising authority of) President, CEO, CFO, COO, GC, or similar officer of a Reporting Company;
 - Individual who has the authority to appoint or remove Senior Officers or a majority of the Board of a Reporting Company; or
 - Individual who has the power to direct or control important decisions of a Reporting Company (e.g., amendments to Governing Docs; selection or termination of business lines).
 - See 31 CFR 1010.380(d)(1)(A) –(C).
- Catch-All: Individual who has any other form of substantial control over a Reporting Company.
 - See 31 CFR 1010.380(d)(1)(D).

Beneficial Owners: “Substantial Control”, Cont’d

- “Substantial control” can be exercised directly or indirectly, including through an entity that separately exercises substantial control over the reporting company.
- “An individual may directly or indirectly, **including as a trustee of a trust**, exercise substantial control over a Reporting Company through a variety of means, including through board representation.”
 - See 31 CFR 1010.380(d)(1)(D)(ii).
- The inclusion of the above Final Regulation alludes to the idea that some managers / directors on a board of a trustee could have “substantial control”.

Beneficial Owners: “Ownership Test”

- “Total Ownership Interests”, including:
 - Capital equity interests
 - Profits Interests
 - Convertible Instruments
 - Catch-All
 - 31 CFR 1010.380(d)(2)(i).
- An individual’s “total ownership interests” is calculated by comparing said interests to the total outstanding ownership interests of the reporting company. 31 CFR 1010.380(d)(3)(iii).
- For purposes of the Ownership Test, no difference between Voting Ownership and Non-Voting Ownership.
- Joint ownership (31 CFR 1010.380(d)(3)(ii)(A))
- Power of Attorney (31 CFR 1010.380(d)(3)(ii)(B))

Beneficial Owners: “Ownership Test”, Cont’d

- Under the Ownership Test, if a common law trust is an owner of an applicable Reporting Company, the analysis looks through to these specific **individuals** (31 CFR 1010.380(d)(3)(ii)(C)):
 - A beneficiary, if such beneficiary (i) is the sole permissible recipient of income and principal; or (ii) has the right to demand distributions or withdraw substantially all trust assets.
 - Grantors/Settlors, if he/she has the right to revoke the Trust or otherwise withdraw the assets of the Trust.
 - Trustees or other individual(s) with the authority to dispose of trust assets.

Beneficial Owners: “Ownership Test”, Cont’d

- “Other individual(s) with the authority to dispose of trust assets”
 - Despite numerous comments requesting clarification, the Final Regulations do not provide specific transparency with respect to what specific individuals fall into the category of “other individuals who can dispose of trust assets,” (e.g., Trust Protectors, Business Advisors, Distribution Committees, Investment Advisors)
 - “In addition to trustees, the final rule specifies that other individuals with authority to control or dispose of trust assets are considered to own or control the ownership interests in a reporting company that are held in trust.”

Reporting Companies Owned By Trusts

- Likely scenarios where Reporting Companies are wholly owned by Trusts:
 - The Settlers/Grantors of a Revocable Trusts will likely constitute Beneficial Owners under the Ownership Test.
 - In a scenario where there is an Irrevocable Trust where the sole beneficiary who holds a right to income and principal, the beneficiary will likely constitute a Beneficial Owner.
 - Where Settlers'/Grantors' have right to remove and replace a trustee arguably causes such Settlers/Grantors to meet the Substantial Control Test.
- Question: What does this mean for Corporate Trustees/Managers who are Exempt Entities?

What About Corporate Trustees?

- Analysis:
 - Option 1: Does Corporate Trustee qualify as a Beneficial Owner under the Substantial Control Test?
 - Ask the question “Who ultimately controls?”
 - Would have to look through and see if there is a board of directors through representation or an individual within Corporate Trustee that directly or indirectly exercises substantial control over the Reporting Company.
 - Option 2: Does Corporate Trustee qualify as a Beneficial Owner under the Ownership Test?
 - Ownership Test requires specific individuals who own or control at least 25% of the Reporting Company to be disclosed.
 - Note: Does the Special Rule exemption apply here?

Special Rule: Reporting Company Owned by an Exempt Entity

- If one or more exempt entities:
 - has or will have a direct or indirect ownership interest in a reporting company, **AND**
 - an individual is a beneficial owner of the reporting company exclusively by virtue of the individual's ownership interest in such exempt entities, then:
- The beneficial ownership report may include the names of the exempt entities in lieu of the individual's information.
- The rule specifically states the ownership being the exclusive reason to withhold personal information and provide information regarding the exempt entity, **not control**.
- The Special Rule can be interpreted as a very narrow exception.

Special Rule: Example

- Example:
 - ABC Bank, which is an exempt entity, is acting as the trustee of a trust and as such, has ownership interest in a reporting company (first part of the Special Rule is satisfied).
 - However, the second section – an individual is a Beneficial Owner of the Reporting Company solely because s/he is an owner of such exempt entity – most likely does not apply.
 - In ABC Bank’s case, there (most likely in routine trust/trusteeship relationship) is no individual that is a Beneficial Owner of the Reporting Company because of his/her ownership interest in ABC Bank.
 - The Special Rule may not apply here.

Special Rule: Corporate Trustee – Exempt Entity Exception

- Final rule suggests a look through to who controls a Corporate Trustee on behalf of a trust that is a Beneficial Owner of a Reporting Company.
- Final rule affirms no look through for Owners of an Exempt Entity (i.e. the Special Rule).
 - 31 CFR Section 1010.380(b)(2)(i).
- Final rule rejects request to rule out look through for those in control of Exempt Entity.
 - *“FinCEN believes that it would limit the usefulness of the database and create opportunities for evasion of beneficial owners who have substantial control over reporting companies through exempt entities do not need to be reported.”* Federal Register, Vol. 87, No. 189 (Sept. 30, 2022) at pp. 59521-59522.
- Exempt entities may still need to provide information on those individuals exercising substantial control over the entity under the rules.
 - Note: There are additional interpretations of this rule (i.e. draft form based analysis)

Company Applicants

- Up to two Individuals:
 - Individual who files the incorporation, formation, or other creation documentation with a US State (or, if a foreign Reporting Company, files US registration documentation) 31 USC § 5336(a)(2).
 - Individual who is primarily responsible for directing or controlling such filings if more than one individual is involved in the filing of the document. 31 CFR 1010.380(e).
- **Includes Attorneys and Paralegals.**

Beneficial Ownership Information

- Specific Information to Be Reported on:
 - Reporting Company;
 - Beneficial Owners; and
 - Company Applicants.
- See 31 USC § 5336(b)(2); 31 CFR 1010.380(b).

Beneficial Ownership Information: Reporting Company

- 31 CFR 1010.380(b)(1)(ii) requires Reporting Companies to provide:
 - Entity name (including DBAs)
 - Business Street Address
 - Jurisdiction of formation (or, if a Foreign Reporting Company, jurisdiction of US registrations)
 - Unique identification number (e.g., FEIN or FinCEN identifier number)
 - Beneficial Owners
 - Company Applicants

Note: No instruction has been provided about the reporting requirements related to the assets or valuation of assets held by the Reporting Company.

Beneficial Ownership Information: Beneficial Owners and Company Applicants

- 31 CFR 1010.380(b)(1)(ii) requires the following information for each Beneficial Owner and Company Applicant be reported:
 - Full legal name
 - Date of birth
 - Current address – Beneficial Owners vs Company Applicants
 - Unique identification number from an acceptable identification document (e.g., Passport) and image of such document
 - Upon request, FinCEN will issue a unique FinCEN identifier that can be included on subsequent filings instead of providing the foregoing information each time
 - **Burden shifts from Reporting Company to the holder of the FinCEN identifier to keep his/her information up to date.**

Reporting

- Entities formed before January 1, 2024: All Reportable Information required to be submitted to FinCEN not later than January 1, 2025.
— But: no requirement to submit information re: Company Applicants.
- Entities formed on or after January 1, 2024: All Reportable Information required to be submitted to FinCEN within 30 calendar days of formation.
- Thereafter, updates to reportable information due within 30 calendar days (e.g., 30 days to report change of a Manager of an LLC or gift of 25% of the ownership of a Reporting Company).
- FinCEN has created a draft filing form, but no final form has been released yet.
— See 31 CFR 1010.380(a).
- Compliance is intended to be handled electronically through Beneficial Owner Secure System (“BOSS”).

Penalties

- An individual is considered to have failed to report complete or updated BOI if such person failed in their personal responsibility to report, directs or controls another person with respect to any failure to report, or is in substantial control of a Reporting Company when it fails to report.
- Standards for Penalties:
 - Willfully provide, or attempt to provide, false or fraudulent beneficial ownership information; or
 - Willfully fail to report complete or updated beneficial ownership information.
 - \$500 per day (max \$10,000); potential criminal liability (2 years jail time).
- The CTA places responsibility on Reporting Companies to submit and update accurate information.
- Liability extends to Senior Officers of the Reporting Company at the time of the failure to report.

Penalties: Safe Harbor

- A person shall not be subject to civil or criminal penalty if:
 - a) the person has reason to believe that any report submitted by such person contains inaccurate information, and
 - b) such person voluntarily and promptly, and in no case later than 90 days after the date on which the person submitted the report, submits a report containing corrected information.
- See 31 USC § 5336(h)(3)(C).
- The Safe Harbor is not available if an individual knowingly submitted false information in the original report, with the purpose of evading the reporting requirements. 31 USC § 5336(h)(3)(C)(i)(II)(bb).

Access

- **US Federal Agencies** engaged in national security, intelligence, or law enforcement activities where the beneficial ownership information would be used in connection with such activities. Such federal agency would then have access to search the FinCEN database (subject to audit by FinCEN).
- **State, local, and tribal law enforcement agencies**, provided that a court of competent jurisdiction rules that such agency should be allowed to access the beneficial ownership information. Such agency will then have access to search the database.
 - Such agency will have to upload a document from the court of competent jurisdiction for FinCEN review prior to being granted access.

Access, Cont'd

- **Foreign law enforcement** requesters may be granted limited access. Such foreign requester will need to submit their request to intermediary US Federal Agencies and must show that (1) the foreign law enforcement requester made a request under an international treaty, agreement, or convention, or (2) the request was otherwise made by law enforcement authorities in a “*trusted*” foreign country. Such foreign requester *would not* be granted access to search the FinCEN database; rather, they would receive the specific beneficial ownership information requested.
- **Financial institutions** that seek beneficial ownership information in order to meet customer due diligence requirements under applicable law, *provided* that such reporting company consents to the search.
 - Access limited to the applicable reporting company.
- **Treasury officers and employees** who require beneficial ownership information for their official duties or tax administration.

Access: Penalties and Safeguards

- Penalties:
 - Civil and Criminal Penalties for violating security and confidentiality requirements (\$500 per day [\$250k cap]; 5 years jail time)
 - Permanent ban or temporary suspension from accessing the database
- Safeguards
 - Secure, non-public database
 - Highest Federal Information Security Management Act level (FISMA High)

Specific Private Wealth Questions

- Ownership interests of a Reporting Company are gifted:
 - Assuming the transferee is deemed a Beneficial Owner, report such change within 30 calendar days.
- There is a change in fiduciaries of a trust that owns the entity interests (e.g., Trustee).
 - Report such changes within 30 calendar days.
- What about other powerholders that may not be fiduciaries (e.g., Trust Protectors; Distribution Advisors; persons able to remove and replace a Trustee)
 - Depends on the structure of the applicable Reporting Company.

Next Steps: Best Practices

- Only form Reporting Companies when Governing Documents are final and ownership is confirmed.
- Obtain (and maintain) FinCEN identifier for those who may be Beneficial Owners and/or Company Applicants.
- Confirm who will be responsible for filing BOI with FinCEN – as well as who will be responsible for amending documents as necessary.
- Add CTA disclosure obligations to new governing documents
- Maintain database of information submitted on behalf of Reporting Company clients.

Next Steps: Things to Consider

- Will modifications be necessary for current account documents [confirming who is responsible for filing, and who is responsible for updating information within the necessary timeframe], existing corporate documents, and existing trust documents?
 - Review new trusts for language that would be contrary to what is required by CTA?
- How to notify clients of the new reporting requirement?
 - Simply provide a firm statement, e.g., “In compliance with the [new reporting requirement] we are obligated to and will provide your information to the Reporting Company, so it can comply with its reporting obligations”?
 - What about client consent?

Next Steps: Things to Consider

- Who will be responsible for collecting and providing all required information to the Reporting Company?
 - Will there be a system for updating that information within the necessary time frames (e.g., if a party moves or changes their name upon marriage or divorce)?
 - Would the responsibility to file solely be on the Manager of the Reporting Company?
 - Should the filing responsibility be specified in any new corporate documents?
- What if the Manager and/or Reporting Company fails to act or fails to file accurately?
 - Would a Beneficial Owner have a separate obligation to file? Could penalties attach to Beneficial Owner ?
 - Practically, look at the corporate documents. Does someone within the Reporting Company or a have the right to remove and replace the Manager to fix this problem?
- What if a Beneficial Owner refuses to give their information or authorize the release of their information to the Reporting Company?
 - Nonjudicial to release and indemnify?
 - Petition for instructions?
 - Is it enough to lay out expectations and responsibilities at the start of a new client relationship?

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Practices

FOCUS: Private Wealth

Business Succession Planning

Charitable Planning, Philanthropy and
Nonprofit Organizations

Fiduciary and Private Client Litigation

International Private Wealth

Industries

Family Offices

Private Client Services

Education

JD, Loyola University Chicago School of Law,
cum laude

MBA, Loyola University Chicago Graduate
School of Business

MST, Pace University School of Education
BA, University of Michigan

Bar Admissions

Illinois

Michigan

Court Admissions

US District Court, Northern District of Illinois

US District Court, Central District of Illinois

US Tax Court

Community Involvements

American Bar Association, Real Property,
Trust and Estate Law Section

American Endowment Foundation, Council of
Advisors

Chicago Estate Planning Council

Adam Damerow assists ultra high-net-worth individuals in creating tax-efficient estate plans to preserve, protect and transfer wealth to future generations. He also guides fiduciaries and beneficiaries through disputes over estates and trusts, often helping them avoid the time, expense and burden of litigation.

Advising clients with both pragmatism and strategy

Adam focuses solely on private client matters. He knows that wealth creators don't just want to transfer their wealth in tax-efficient ways; they want to give their beneficiaries the flexibility to use and maintain that wealth for future generations. He works to understand his clients' values and goals with their tax planning, and then achieve those goals as efficiently and creatively as possible.

Toward that end, Adam undertakes varied strategies for his clients — from the formation and funding of family investment holding companies and family offices to the creation of dynasty trusts. The thoughtfulness of his planning stands the test of time; years after working with a first-generation wealth creator, for instance, the second generation of family members asked Adam to reinforce the planning that had positioned them so well.

Adam M. Damerow

Partner

Illinois State Bar Association, Trusts and Estates Section

Society of Trust and Estate Practitioners (STEP)

The Chicago Bar Association, Trust Law Committee and Co-Chair, Illinois Trust Code Sub-Committee

Wood Family Foundation, Board Member

"Very fine attorney and is one of the outstanding people at Katten."

*- Chambers High Net Worth 2022
(Illinois, Private Wealth Law) survey response*

Helping fiduciaries and beneficiaries resolve disputes

Adam also advises individual and corporate fiduciaries on the often-challenging task of administering trusts and estates. When he is not advising the fiduciary, Adam will represent estate and trust beneficiaries and zealously advocate for their rights under the governing documents of the estate plan. While he represents clients in contested court proceedings, he more often helps fiduciary clients find creative ways to resolve disputes before they evolve into litigation. In one matter involving a multibillion-dollar estate and litigious beneficiaries, he facilitated two different settlements among the beneficiaries and the tax authorities, avoiding further litigation.

Adam helps public charities, foundations and charitable trusts ensure their compliance with state and federal laws. He also represents clients before the Internal Revenue Service in controversies over estate and gift tax filings and audits.

Representative Experience

- Represented family members in contested, billion-dollar estate trust administration matters related to valuation, distribution and audits with the Internal Revenue Service.*
- Advised an ultra-high-net-worth individual on the purchase and sale of \$35 million of assets from a generation-skipping transfer tax-exempt trust created in the 1940s to a newly formed intentionally defective family dynasty trust created to efficiently transfer wealth to be held in perpetuity for the benefit of the client's descendants.*
- Represented corporate fiduciaries in contested trust matters.*
- Represented fiduciaries in preparation of non-judicial settlement and virtual representation agreement to settle issues arising in trust administration with beneficiaries.*

Adam M. Damerow

Partner

- Created series of grantor-retained annuity trusts for clients with (i) concentrated positions in publicly traded companies or (ii) privately held companies to transfer wealth to younger generations with minimal transfer tax cost.*
- Formed tax-exempt charities for professional athletes and advised on programming, fundraising and administration.*
- Advised nonresident, noncitizen families on the tax-efficient transfer and holding of wealth outside the United States into the United States for the benefit of US persons.*

*Experience prior to Katten

Recognitions

Recognized or listed in the following:

- American College of Trust and Estate Counsel
 - Fellow
- *Chambers High Net Worth*
 - Illinois: Private Wealth Law, 2018–2023

News

- Katten Team Advises MBX on its Acquisition by AHEAD, Boosting its Engineering Capabilities (June 9, 2023)
- Katten Attorneys Score High in *Chambers High Net Worth 2022* Guide (July 14, 2022)
- Katten Attorneys Selected for *Chambers High Net Worth 2021* Guide (July 22, 2021)
- A Dozen Katten Partners Recognized in *Chambers High Net Worth* Guide (July 9, 2020)

Adam M. Damerow

Partner

- Adam Damerow and Tye Klooster help draft Illinois' new trust code (August 26, 2019)
- *Chambers High Net Worth* Guide Recognizes Katten's Private Wealth Practice (July 12, 2019)
- Katten Lands New Private Wealth Partner in Chicago (September 18, 2018)

Publications

- Keep It in the Family: Three Tips for Preserving Family Business Interests (July 12, 2023)
- 2022 Year-End Estate Planning Advisory (November 17, 2022)
- 5 Questions You Should Be Asking About Succession Planning for Your Family Office (June 30, 2022)
- 2021 Year-End Estate Planning Advisory (November 22, 2021)
- Proposed Tax Legislation Would Dramatically Impact Private Wealth Planning (September 24, 2021)
- 2021 Biden Plan Estate Planning Advisory (January 15, 2021)
- 2020 Year-End Estate Planning Advisory (November 24, 2020)
- Looking Beyond the COVID-19 Crisis (March 23, 2020)
- Review of Illinois Revocable Trusts Recommended in Light of New Illinois Trust Code (December 30, 2019)
- 2019 Year-End Private Wealth Advisory (November 25, 2019)
- Home Repair: A Handy Lawyer's Guide to Fixing a Damaged QPRT (January 2019)
- Katten Team Publishes 2018 Year-End Estate Planning Series (December 4–7, 2018)
- 2018 Year-End Estate Planning Advisory (November 19, 2018)

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- Tax Reduction Opportunities for Non-U.S. Families, Family Offices and Trusts after Tax Reform, *Steve Leimberg's International Tax Planning Newsletter #23* (January 31, 2018) | *Co-author*
- Fiduciary Litigation Update: Trustee Duties and the Probate Exception – Three Cases, *ABA Trust Letter* (December 2014) | *Co-author*
- Cases of Interest to Fiduciaries, *LISI Estate Planning Newsletter #2011* (October 3, 2012) | *Co-author*
- Cases of Interest to Fiduciaries, *LISI Estate Planning Newsletter #1980* (June 25, 2012) | *Co-author*
- Cases of Interest to Fiduciaries, *LISI Estate Planning Newsletter #1957* (May 2, 2012) | *Co-author*
- Cases of Interest to Fiduciaries, *LISI Estate Planning Newsletter #1942* (March 28, 2012) | *Co-author*
- Making Sense of the 2010 Estate Tax Legislation, *CCH* (June 2011) | *Co-author*

Presentations and Events

- Tax Residency Planning - Do's, Don'ts and Everything in Between (March 23, 2023) | *Panelist*
- Annual Katten Private Wealth and Fiduciary Seminar (September 22, 2022)
- Estate Tax Returns (November 24, 2021) | *Presenter* | *Estate Tax Returns*
- Recent (and Very Recent) Developments in Illinois Trust Law and Estate Planning (November 18, 2021) | *Presenter* | *Recent (and Very Recent) Developments in Illinois Trust Law and Estate Planning*
- Drafting and Administering Trusts Under the Illinois Trust Code – Part 2 (September 24, 2021) | *Speaker* | *Trust Modifications* | *Revocable Trust Drafting & Administration* | *Notices and Approvals*

Adam M. Damerow

Partner

- Am I Doing this Right? A One-Year Checkup on the Illinois Trust Code (June 22, 2021) | *Panelist*
- Generation Skipping Transfer (GST) Presentation to BMO Financial Group (May 20, 2021) | *Presenter*
- The Illinois Trust Code: Highlights for Fiduciaries — Notices and Accounts (April 6, 2021) | *Speaker*
- The Illinois Trust Code: Highlights for Fiduciaries — Trust Modification, In Brief (April 6, 2021) | *Speaker*
- Katten Virtual Private Wealth Seminar (October 14, 2020) | *Speaker* | *Advising UHNW Families During a Period of Seismic Changes*
- Katten Private Wealth Fiduciary Seminar (October 15, 2019) | *Speaker*
- Trust Issues Impacting Commercial Bankers (July 15, 2019) | *Speaker*
- Trusts and Estates Practice Group of BMO Financial Group (March 18, 2019) | *Speaker* | *Heckerling 2019 Roundup*
- ABA Real Property Trusts & Estates Section Spring Symposium (May 11, 2018) | *Speaker* | *Cabins and Compounds, Boats and Biplanes – Planning for Vacation and Recreation Assets*
- Indiana Bankers Association Megaconference (May 2, 2018) | *Speaker* | *Fiduciary Litigation Update: Observing Pitfalls and Leaping Over Them*
- Annual Charlotte Estate Planning Seminar (April 24, 2018) | *Speaker* | *Impacts of Tax Reform on Estate Planning*
- Essential Insight on Sweeping Tax Reforms (January 18, 2018) | *Speaker* | *Tax Reform and the Impact on You and Your Estate*
- 12th Annual Fiduciary Advisory Services Seminar: Issues Confronting Institutional Fiduciaries (October 4, 2017) | *Speaker* | *Trust Modifications in Light of Unforeseen Circumstances and Mistakes*
Speaker | *Cross-Border Estate Planning*
- BMO Private Bank Estate Settlement Services Group (June 8, 2017) | *Speaker* | *Digital Assets: The Latest Frontier in Estate and Trust Administration*

Adam M. Damerow

Partner

- Estate Planning – Beyond the Basics, Pennsylvania Bar Institute CLE (April 2017) | *Presenter* | *Cross Border Estate and Income Tax Planning*
- New Developments in Tax and Wealth Planning Seminar (April 2017) | *Speaker* | *Cross Border Estate and Tax Planning*
- 11th Annual Fiduciary Advisory Services Seminar (October 2016) | *Speaker* | *Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)*
- Conference of State Bank Supervisors' Trust Forum (August 2016) | *Speaker* | *Cybersecurity and Digital Assets: Threats and Duties*
- AccuTech Executive Conference (April 2016) | *Speaker* | *Cybersecurity and Digital Assets: The Latest Frontiers in Administration*
- Be a Road Warrior, Not Road Kill: Issues Confronting Fiduciaries (October 2015) | *Speaker* | *Cyber Security Threats and Duties*
- U.S. Bank Fiduciary Leadership Team (April 22, 2015) | *Speaker* | *Fiduciary Litigation Update*
- Surmounting the Current Challenges: Issues Confronting Professional Fiduciaries (October 2013) | *Speaker* | *Charitable Trusts: Tax Classification Under the 2012 Type III Supporting Organization Final and Temporary Regulations*
- Chicago Bar Association YLS Estate Planning Committee (November 2012) | *Speaker* | *Creative Trust Planning – Decanting and Directed Trusts*
- Who's on First? Issues Confronting Professional Fiduciaries, The Fiduciary Advisory Services Seminar, co-presented by the Fiduciary Education Center (October 2012) | *Speaker* | *Creative Trust Planning – Decanting, Directed Trustees, Reformation and More*

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Practices

FOCUS: Private Wealth

Charitable Planning, Philanthropy and Nonprofit Organizations

Fiduciary and Private Client Litigation

International Private Wealth

Education

JD, Loyola University Chicago School of Law

BS, Michigan State University

Bar Admissions

Illinois

Community Involvements

The Chicago Bar Association

Women's Bar Association of Illinois

As an associate in the Private Wealth group, Caitlin Kelly focuses her practice on estate planning, asset protection, trust and estate administration, and wealth preservation. Caitlin performs a wide variety of services for clients, including the preparation of wills, revocable living trusts, dynasty trusts, virtual representation and settlement agreements and other estate planning documents necessary for each individual client and plan.

Any successful endeavor starts with a good plan

From core estate planning documents to more complex and sophisticated gifting and tax planning strategies, Caitlin provides comprehensive and appropriate estate plans, which fit the specific wants and needs of each particular client. Caitlin also has experience representing individuals and fiduciaries alike in contested estate and trust matters. She takes her role as a counselor very seriously and enjoys assisting clients during what can be the emotional and complicated process of getting their affairs in order.

With her prior experience at a boutique estate planning firm, Caitlin has a keen eye for detail and ample experience assisting families and business owners in planning their estates, protecting assets, transferring wealth and minimizing taxation.

Publications

- 2022 Year-End Estate Planning Advisory (November 17, 2022)
- 2021 Year-End Estate Planning Advisory (November 22, 2021)
- Proposed Tax Legislation Would Dramatically Impact Private Wealth Planning (September 24, 2021)
- 2021 Biden Plan Estate Planning Advisory (January 15, 2021)

Caitlin A. Kelly

Associate

- 2020 Year-End Estate Planning Advisory (November 24, 2020)

Presentations and Events

- Understanding the Corporate Transparency Act | Chicago Bar Association Young Lawyers Section Estate Planning Committee (April 3, 2023) | *Presenter*
- Updates on Proposed SECURE Act Regulations | The Chicago Bar Association Trust Law Committee | Co-Presenter (November 14, 2022)

**MAINTAINING
CONFIDENTIALITY IN
FIDUCIARY
RELATIONSHIPS**

Confidentiality vs. Duty to Inform: What's a Trustee/Shareholder to Do?

September 19, 2023
Rebecca Wallenfelsz





Overview

- ▶ Duty to Account and Inform
- ▶ Duty of Confidentiality of Shareholder/Member/Partner
- ▶ Shareholder/Member/Partner right to company information
 - ▷ Trustee duty to request
 - ▷ Trustee duty to share
- ▶ Attorney-Client Privilege and the Fiduciary Exception
 - ▷ Between trustee/beneficiary
 - ▷ Between entity and shareholder/member/partner

Duty to Account/Inform

Duty to Account

- Inventory assets of trust
- Identify current value
- Identify all receipts/ disbursements (principal and income)

Duty to Inform

- Provide information necessary (or all material information) so that beneficiary can protect interest in trust

Restatement (Third) of Trusts §82

- (1) Except as provided in § 74 (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty to keep fairly representative beneficiaries reasonably informed ... about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.
- (2) Except as provided in § 74 or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.

Duty of Confidentiality of Shareholders/Members/Limited Partners

- ▶ No common law or statutory duty (unless also Director/Manager)*
- ▶ Often contractual obligation of confidentiality
 - ▷ Operating agreement/joinder agreement
 - ▷ NDA
 - ▷ Release of financial or other entity information may be conditioned on maintaining confidentiality

IS THE CONTRACTUAL DUTY OF CONFIDENTIALITY, SIGNED OR AGREED TO BY THE TRUSTEE OF A TRUST, BINDING ON TRUST BENEFICIARIES?

*Majority-owning shareholder/member/partner may have duties similar to directors/manager

When Are Beneficiaries Bound by Trustee's Contract?



Binding

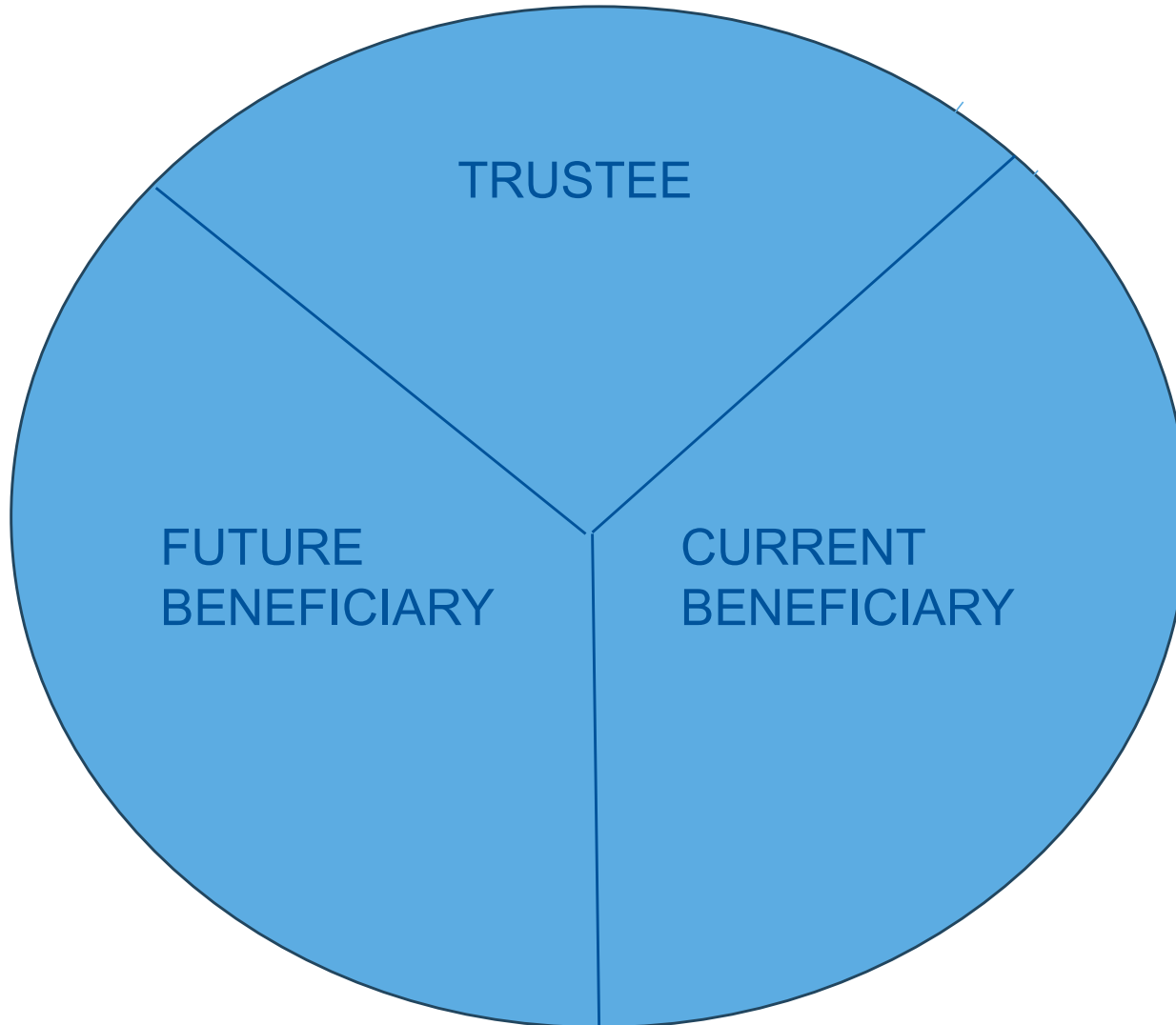
- Obligation/burden on trust property (e.g., sale/leases/pledge)
 - Services to trust/trust property
 - Arbitration clauses in investment management agreement (*Harvey ex rel Gladden v. Cumberland Trust and Investment Company*, 532 S.W.3d 243 (TN 2017))



Not Binding

- Trustee violated fiduciary duty
 - Arbitration Clause in investment/insurance agreement (*Morgan Stanley DW Inc. v. Halliday*, 873 So.2d 400 (Fl. App. Ct. 2004); *Clark v. Clark*, 57 P.3d 95 (Ok 2017))

When are Beneficiaries Bound by Trustee's Contract (cont.)



Duty to Account/Inform*

What Should be Disclosed?

- Any extraordinary event

What Should be Disclosed Upon Beneficiary Request?

- Financial statements/reports (under NDA if needed)

What *May Be* Should be Disclosed?

- Shareholder/member/partner votes
- Board/Manager Resolutions/Minutes

*Subject to terms of trust agreement regarding duty to account/inform

Trustee's Duty to Request Entity Information

ABILITY TO REQUEST INFORMATION

Wide range of information entities provide their shareholder/members/ partners

Amount of information provided/obtainable will depend on operating agreement and state law



CONSIDERATIONS IN GETTING INFORMATION

Duty of prudent investor = monitor (periodically review)

Consider costs

Corollary between amount of control/input trustee has as shareholder/member/partner and/or value of the business to the trust and how "involved" trustee should be (i.e., being an *activist* shareholder/member/partner)

Trustee's Duty to Share Confidential Information with Beneficiary

Does scope of confidentiality permit sharing with beneficiary?

Would beneficiary be subject to confidentiality agreement?

Can/would business/entity consent to disclosure?

Can trustee condition disclosure on beneficiary signing confidentiality agreement?

Attorney-Client Privilege

- **Evidentiary Rule *applicable to judicial proceedings***
 - Protects communication between attorney and client from disclosure
 - Communication must be advice
- **Fiduciary Exception**
 - Communication from attorney to client who is in a fiduciary role is **NOT** privileged from disclosure to the beneficiary
 - May also apply to legal advice given to company/directors/general partners/managers subject to disclosure to shareholders/members/ partners (*Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-1104 (5th Cir. 1970))





Questions?

Rebecca Wallenfelsz

Partner

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Rebecca Wallenfelsz is a partner in the firm's Trusts and Estates Department, and has been practicing law since 1997. Rebecca has extensive experience representing individuals and institutions in estate planning and trust and estate matters.

Rebecca's experience in estate planning matters includes drafting a variety of wills, trusts and premarital agreements, and in planning for and minimizing estate, gift and generation skipping transfer taxes and related income taxes, including taxes related to retirement plan assets. Her practice includes more sophisticated estate planning devices, such as family limited partnerships, grantor-retained annuity trusts, sales to defective grantor trusts and split-dollar agreements. For the charitably inclined client, Rebecca has planned for, or assisted in creating, directed funds, charitable remainder trusts and private foundations. In addition, she reviews and prepares fiduciary tax returns, private foundation information returns and estate, gift and generation-skipping transfer tax returns.

Rebecca also represents a variety of fiduciaries and beneficiaries in the administration of estates and trusts, including addressing fiduciary risk issues, tax issues and litigation matters, such as will and trust construction, breach of fiduciary duty and contested probate matters. She advises institutions on the creation and administration of Individual Retirement Trust products and on transactions involving trusts or estates.

In 2011, Rebecca was named to the Law Bulletin Publishing Company's "40 Illinois Attorneys Under Forty to Watch" list of outstanding lawyers. In 2012, she was elected to the American College of Trust and Estate Counsel, a prestigious professional organization for skilled and experienced lawyers in the trusts and estates practice. Rebecca serves as the firm's Co-Pro Bono Partner and manages the volunteer efforts of Chapman attorneys.

Education

Loyola University Chicago
School of Law, J.D., *cum laude*, 1997

University of Notre Dame,
B.A., Program of Liberal
Studies, *cum laude*, 1994

Admitted

Illinois

Wisconsin

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**TRUST ME, IT'S
COMPLICATED: THE
MULTIFACETED ROLE OF
DIRECTORS IN TRUST-
OWNED BUSINESSES**



Trust Me, It's Complicated: The Multifaceted Role of Directors in Trust-Owned Businesses

Presented by

Jessica Birnbaum

Matthew Prewitt

Lynn Watkins

Agenda

1. Roles and Responsibilities of Board Members
2. Duty of Care
3. Duty of Loyalty
4. Role of Directors and Officers Liability Insurance
5. Trust Overlay
6. Conflicts
7. Privilege and the Fiduciary Exception
8. Selected Examples

Role and Duties of the Board of Directors; Duty of Care

1. Management of the Business Affairs of the Company
 - Role of Entity
 - Business Judgment Rule presumption
 - Encourages risk taking, innovation and other creative entrepreneurial activities that may not be vindicated by subsequent success.
 - Focus is on the decision-making process, not necessarily the decision itself.
2. Duty of Care
 - Exercise judgment by acting in an informed and deliberate manner without a conflict of interest.
 - Rebutted where there is evidence that the director acted fraudulently, illegally, or without becoming significantly informed to make an independent business decision.
 - Factors involved in meeting duty

Duty of Care

- Regarding the Board's need to be informed, Board Members must have:
 - Accurate information;
 - Full disclosure of material facts;
 - Appropriate time for informed study to consider the matter; and
 - Candid discussion.

- If a Board Member believes the Board has repeatedly not been provided with the appropriate information to enable the director to vote or act in an informed manner, and is unsuccessful in efforts to remedy the situation, the director should urge the board to consider changing management or, failing such change, should consider resigning.

Duty of Loyalty

3. Duty of Loyalty

- Conflicts of interest
 - Types of Conflicts of Interest.
 - Conflict transactions negate the business judgment rule presumption.
 - Burden on party who would maintain transaction to show there was entire fairness in the transaction unless:
 - (1) the material facts of the transaction and a Board Member's interest or relationship were disclosed or known to the other Board Members and a special disinterested committee of the Board approved the transaction or the Board authorized, approved or ratified the transaction by the affirmative votes of a majority of disinterested board members, even though the disinterested board members are less than a quorum; or
 - (2) the material facts of the transaction and the board member's interest or relationship were disclosed or known to the shareholders entitled to vote and they authorized, approved or ratified the transaction without counting the vote of any shareholder who is an interested director. See, for example BCA Section 8.60
 - Failure otherwise to sustain fairness may result in transaction being set aside and damages recovered on the part of the Company.

Other Duties Attendant to Duty of Loyalty

- Disclosure of corporate opportunities
 - The Company must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations.
 - If Directors fail to make such a disclosure and to tender the opportunity, the rule imposing a fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf.
 - Waivable under charter in corporate context and by contract in other entity structures.
- Competing with the Company
 - Involves the fiduciary forming a third party or joining with a third party to compete with the Company.

Role of Directors and Officers Liability Insurance

4. Role of Directors and Officers Liability Insurance:
 - Coverage intended to protect individuals or company from losses resulting from actions or omissions of directors and officers of the company as a result of legal action brought against them.
 - Coverage is not mandatory
 - Standard Exclusions

Trust Overlay

- Trustee has a duty to act in beneficiaries' best interests
 - Cannot take off trustee hat when acting as director
 - Often interests align as a result of Trust's ownership in entity
- Obligations to keep beneficiaries informed
 - Trustee has obligation to communicate all relevant material information
 - Consider whether confidentiality obligations of director will conflict with communication
 - Beneficiaries should be notified if trustee or employee of trustee is serving as director
- If an individual employee of trustee is acting as director on the trustee's behalf, the actions and knowledge of the employee director are imputed to trustee

Conflicts

- If the fiduciary duties that a director owes to shareholders conflicts with duty as trustee, the trustee may have to recuse himself/herself or cease acting as a director
- Exception: Waiver of this conflict in the trust document
- **Sample language:** I anticipate that a trustee may exercise powers hereunder with respect to property held by the trustee from time to time in which that trustee may have an individual interest as director, stockholder, officer, employee, creditor, partner, joint venturer, trustee, agent, custodian, seller, buyer, broker, or otherwise, and that trustee may as a result directly or indirectly benefit therefrom. I further anticipate that it may be desirable for the trustee to make decisions, or refrain from making decisions, which are adverse in some respects to the best interests of some of the beneficiaries of the trust but which may be desirable from a long-term point of view for the best interests of all beneficiaries of the trust. Accordingly, I fully authorize a trustee to act with respect to matters in which that trustee may have an individual interest or the resolution of which may in some respects be adverse to the best interests of some of the beneficiaries of the trust, and the actions taken in these respects shall, absent proof of bad faith, be as binding and conclusive as though no such relationship or conflict of interest existed. In addition, a trustee shall not be required to account for any direct or indirect personal benefit that such trustee receives and shall not be liable for any loss that results, in either case unless proof of bad faith exists.
- If trust does not have waiver, consider whether trust can be modified to include it
- Even with waiver, be cautious

Privilege and the Fiduciary Exception

- Attorney-Client Privilege defined
 - Evidentiary rule that protects information from being disclosed in discovery or at trial
 - In general, the privilege applies to communications made and kept in confidence between an attorney and client for the purpose of seeking or providing legal advice
- How privilege can be waived
 - Disclosure to a third party
 - Can be waived by agents, including attorneys

Fiduciary Exception

- Fiduciary exception
 - The beneficiary of a trust is entitled to access the trustee's communications with its lawyer notwithstanding that those communications would be privileged with respect to anyone else
 - Varies state by state; minority rule and many states have not ruled on whether it will be applied
 - Similar concept may be applied to shareholders seeking information that would otherwise be privileged between the company and its attorneys
 - When concept is applied it discouraged open communication between fiduciary clients and their attorneys

Cybersecurity

– Case Study: Attack by Criminal Hacking Syndicate

Trade Secrets

- Case Study: Stealer of company secrets caught red-handed

Environmental

- Case Study: The paradox of preemptive due diligence



Questions?

Jessica J. Birnbaum

PARTNER

Jessica helps clients articulate their wealth transfer objectives and implement estate plans that meet their financial, familial, and business goals in a tax-efficient manner.



Practices

Private Clients, Trusts & Estates
Estate Planning
Trust & Estate Disputes
Wealth Transfer Strategies

Bar & Court Admissions

Illinois

Education

University of Pennsylvania Law School, JD, 2011 (magna cum laude, Journal of Constitutional Law, Senior Editor)
Northwestern University, BA, 2005 (History and Political Science)

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She advises clients on all aspects of estate planning, including the preparation of wills, trusts and premarital agreements; the analysis and execution of estate, gift and generation skipping tax planning strategies; and the administration of estates and trusts.

Jessica has extensive experience advising family offices and multi-generational families. The ongoing relationships that she builds with these families is essential in developing strategies that both accomplish shared family goals and account for individual needs and circumstances. Jessica also regularly assists clients with trust administration, including effectuating modifications such as trust decantings and nonjudicial settlement agreements when needed.

Jessica also represents corporate fiduciaries in trust administration matters. These matters include trust interpretation questions, fiduciary duty issues, and beneficiary disputes. In contested matters, she partners with the firm's trust litigation team to settle disputes, and when necessary, to seek court resolution. As a result of Jessica's work with corporate fiduciaries, she has the ability to anticipate issues that may arise in trust administration and address these issues before a trust is created through careful planning and drafting.

Jessica formerly advised companies on corporate governance and acquisition matters, which gives her insight into the issues facing clients whose assets include business interests.

Lynn J. Watkins

PARTNER

Lynn J. Watkins concentrates his practice in corporate and securities law, where he has extensive experience in representing his clients in a range of complex financial transactions.



Industries

Private Companies
Transportation & Mobility
– Automotive

Practices

Corporate & Securities
– Institutional Investors
– Mergers & Acquisitions
– Private Equity

Bar & Court Admissions

Illinois

Education

University of Illinois, College of Law, JD, 2005
University of Michigan Ford School of Public Policy, MPP, 2002
Oberlin College, AB, 1999

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Lynn has successfully represented both private and public companies in their acquisitions and divestitures. He has counseled institutional clients in connection with their investments in alternative investment vehicles. Lynn has also guided private equity funds in their formation and helped ensure their compliance with securities laws. He has significant experience in working with start-ups on a range of critical and sophisticated financial transactions.

Lynn also represents financial institutions and borrowers in a variety of financing matters, including secured and unsecured term note placements and mezzanine financings.

Client Work

- Acting as investment counsel to public pension plans, state treasuries and institutional endowments in connection with their private equity, private credit, venture capital, mezzanine, infrastructure and hedge fund investments as well as related co-investments and secondary sales.
- Acting as Fund counsel for fund-of-funds, separate accounts, mezzanine and real estate funds.
- Acting as outside M&A counsel for leading global food manufacturers in connection with the acquisition and sale of global and U.S. brands.
- Acting as outside M&A counsel for asset management firms in connection with their strategic acquisition of asset management firms, trust companies and

insurance brokerages.

-Acting as outside M&A and corporate counsel for a global automotive supplier and a global automotive manufacturer in connection with their strategic acquisitions and strategic investments.

-Acting as outside corporate counsel to mezzanine private equity funds in connection with their equity investments in middle market companies.

- Acting as outside general counsel to a start-up Medicaid health plan, including counseling with respect to formation, equity securities offerings, credit facilities, employment agreements, employee incentive plans, commercial contracts and intellectual property protection.

-Acting as outside corporate counsel for an education solutions provider of school turn-around services, online education, school design services, and school management services in connection with management agreements, services agreement, licensing agreements, and national and international joint ventures.

Boards, Memberships & Certifications

- American Bar Association, Institutional Investors Committee
- National Bar Association
- Cook County Bar Association, Director (2019-2023)
- Leadership Council on Legal Diversity, Fellows Program class of 2017
- National Association of Securities Professionals

Publications, Presentations & Recognitions

Presentations

- "Getting off to a Great Start: Commonly Negotiated PE Fund Terms," Chicago Private Equity Forum, Chicago, IL (May 4, 2016)
- "Institutional Limited Partners Association Private Equity Principles: A Guide For Improving GP/LP Relations," (co-presenter) Muller & Monroe Asset Management's Back Office Exchange, Chicago, Ill. (Oct. 14, 2011)
- "Dodd-Frank's Impact on Private Equity Funds and Other Recent Legal Developments," Muller & Monroe Asset Management's Back Office Exchange, Chicago, Ill. (Nov. 2, 2010)

Recognitions

- The Best Lawyers in America, *Best Lawyers* (2023)
- Most Influential Black Lawyers, *Savoy Magazine* (2022)

- Illinois Leading Lawyer, Law Bulletin's *Illinois Leading Lawyers Network* (2021)
- Emerging Lawyer, Law Bulletin Publishing Company's Leading Lawyers (2016-2020)



Matthew F. Prewitt

PARTNER

Matthew F. Prewitt is a trial lawyer with a national practice focused on the law governing confidential business and personal information and the IT systems used to store, analyze, and transmit that data. Matt is Co-Leader of the Trade Secrets, Non-Competes & Employee Mobility group.



Industries

[Private Companies](#)

Practices

[Complex Litigation](#)

[Labor & Employment](#)

[Patent](#)

[Privacy, Data Protection & Data Security](#)

[Trade Secrets, Non-Competes & Employee Mobility](#)

Education

University of Chicago Law School, JD, with honors;
Phi Kappa Phi graduate fellowship; Harvard Journal
of Law and Public Policy Studies, Symposium Editor,
1996

Delta State University, BA, 1993

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Clients engage Matt for his ability to translate complex business and technology disputes into compelling courtroom advocacy.

A substantial part of Matt's practice is devoted to insider threat investigation and response, including protection of trade secrets and enforcement of nondisclosure agreements, noncompete agreements, and other restrictive covenants in commercial and employment relationships. Because of his experience litigating information technology-focused disputes, clients also choose Matt as their trial counsel for business disputes relating to software development and implementation, data security breaches, and IT outsourcing. Matt advises clients on protection of sensitive competitive and personal information, information governance, litigation preparedness and avoidance, and the intersection of trade secrets, noncompetes, data security, and data privacy.

As lead trial counsel in numerous high stakes trade secrets and noncompete cases, Matt has won emergency injunctive relief in expedited proceedings in more than 30 different U.S. jurisdictions. Matt has significant experience in enforcement proceedings to compel compliance with injunctions and to win remedies for violations of court orders. He has won case-terminating sanction awards for litigation misconduct and violation of injunctions in numerous suits.

As a trial lawyer regularly leading the prosecution and defense of complex, fast track TRO and preliminary injunction motions, Matt triages the potential factual and legal issues to develop a focused strategy. Matt applies these skills in "rescue" engagements where he is called upon to augment or replace prior trial counsel at advanced stages of litigation. These engagements have provided Matt substantive experience in a broad range of business, environmental, and mass tort disputes in both the trial courts and in bankruptcy proceedings.

Matt knows how to pivot from doing battle in the courtroom to using settlement discussions to build and strengthen business relationships. Matt's trade secrets and IT services disputes often arise in ongoing commercial relationships that require adept use of mediation, arbitration, and other methods of ADR to vindicate the client's rights while preserving the long-term commercial relationship. When writing or accepting a settlement check is not a viable option, Matt skillfully negotiates to resolve disputes through business terms that create value for both sides.

Matt is a Certified Information Privacy Professional (CIPP-US). He is an active participant in The Sedona Conference Working Group 1 (Electronic Document Production and Retention) and Working Group 12 (Trade Secrets). He is a member of the International Association of Privacy Professionals.

Client Work

Trade Secrets, Restrictive Covenants, and Breach of Loyalty

- *Cook County, Illinois, Circuit Court.* In a complex trade secrets dispute between competitors involving extensive cross-border discovery, Matt won summary judgment for our client on all claims and an award of attorney fees as a sanction against plaintiff for commencing the suit in bad faith and submitting materially false affidavits to the court. The victory was profiled in a "How They Won It" feature in *Law360* and reported widely in the legal press as the first time an Illinois court had awarded a trade secrets defendant its entire fees for a complex, multi-year litigation.
- *Travis County, Texas, District Court.* In a suit arising from the resignation of our client's former general manager and his attempt to form a competing business with our client's long-term exclusive supplier, Matt won a TRO and a criminal contempt finding against the supplier, which was sustained on expedited appeal to the Texas Supreme Court on the eve of a jury trial. Before the jury, Matt won a substantial verdict of both actual and punitive damages.
- *Maricopa County, Arizona, Superior Court.* Matt was engaged as "rescue" trial counsel for defendants in a suit arising from alleged employee raiding of a competitor to form a new business. Matt was engaged only one month before the two-week jury trial and won a unanimous defense verdict on all claims.
- *Delaware Court of Chancery.* Matt represented a private equity investor in a suit against a selling co-founder and selling shareholder of an acquired business, who secretly formed a competing business with other former employees post-closing. After obtaining the employees' videotaped confessions admitting the scheme, Matt won a favorable settlement.
- *Southern District of Texas US District Court, Northern District of California US District Court, and Eastern District of California Bankruptcy Court.* In a multi-forum litigation, Matt first won a TRO against a departing executive and then, when the defendant attempted to frustrate enforcement by filing a bankruptcy petition and feigning mental illness, won a bad faith dismissal of the bankruptcy case, followed by civil contempt awards against the defendant and two co-conspirators who assisted him to violate the TRO and hide assets, followed by RICO and business tort claims against the contemnors and other associates. The matter was resolved by a confidential global settlement.
- *Kings County, New York Supreme Court for Kings County and US District Court, Eastern District of New York.* In a confidential arbitration of complex environmental claims, our clients' retained expert secretly changed sides and authored a report for the opposing parties. Matt commenced litigation that raised novel issues of the interplay between arbitration and litigation in a court of record. The matter was resolved by a confidential settlement.
- *Cook County, Illinois, Circuit Court.* Matt won a TRO on New Year's Eve, shutting down a competing business secretly formed by three of plaintiff's executives while still employed with plaintiff. Following entry of the TRO, the parties reached a confidential settlement.*

Software Development and Implementation and IT Outsourcing

- *Northern District of Illinois US District Court.* As lead counsel in a high profile litigation arising from a partially completed ERP software implementation, Matt represented the defendant, a prominent global IT services firm. Matt developed and successfully executed a strategy for early resolution by pursuing extensive discovery of the technical basis for plaintiff's claim of software defects. The parties reached a settlement shortly after the court allowed our client's experts access to inspect on premises the opposing party's live production environment and after a single fact witness deposition, where Matt examined the plaintiff's project sponsor.
- *Confidential Mediation, Houston, Texas.* Matt was lead counsel for a global IT services and consulting firm in a dispute with a major retail provider of gas and electricity over our client's development, implementation, and staffing of the billing and accounting platforms. We obtained a favorable resolution for our client at a confidential mediation by presenting a granular root cause analysis of the alleged defects and errors.
- *Confidential Mediation, Wilmington, Delaware.* Our client was hired to develop, implement, and staff an outsourced billing and revenue cycle management function for a major regional hospital network as part of a post-merger integration. After go live, aged A/R skyrocketed, and the customer blamed our client. For unrelated business reasons, our client wanted to resolve the dispute quickly without litigation. In preparation for a confidential mediation, Matt led a team that included our client's technical project leads and retained experts and developed a root cause analysis, created a full expert report with hundreds of pages of supporting exhibits, and made a detailed presentation to rebut the hospitals' claims in just 30 days, resulting in a favorable settlement for our client.
-

Hennepin County, Minnesota, District Court. Our client was engaged to develop and implement timekeeping, billing, and docketing applications for a law firm. Our client was fired prior to completion of the project for alleged cost overruns, which plaintiff attempted to embellish in the litigation with allegations of fraud. Matt successfully guided the case to early resolution in mediation in the early stages of document discovery and without depositions.

Spoliation and Concealment of Electronic Evidence

- *Kane County, Illinois, Circuit Court.* Matt won a contempt motion by proving in a multi-day bench trial through circumstantial evidence that defendant had copied and hidden sensitive competitive data in violation of a TRO. The parties reached a settlement following the court's decision holding defendant in contempt.
- *Middle District of Florida US District Court.* Matt brought a motion for case-dispositive sanctions, presenting evidence of destruction and concealment of electronic evidence and false testimony by defendants in an attempt to conceal their copying, retention, and use of our client's electronic data. Following a week-long bench trial on our client's sanctions motion for default judgment, conducted via Zoom during the COVID pandemic, the parties reached a settlement.
- *Northern District of California US District Court.* Matt brought a motion for case-dispositive sanctions, presenting evidence that co-defendants had used an encrypted chat application to communicate and then withheld from discovery and attempted to destroy the chats. Following a hearing, the parties reached a settlement of the litigation.
- *Northern District of Illinois US District Court.* Matt won a default judgment as a sanction by proving at a bench trial the opposing party's intentional alteration and destruction of file access history metadata. The decision is widely cited as a landmark early decision pre-dating the eDiscovery amendments to the Federal Rules. *Krumwiede v. Brighton Associates, L.L.C., 2006 WL 1308629 (N.D. Ill. 2006)* *

*Handled prior to joining ArentFox Schiff.

Boards, Memberships & Certifications

- American Bar Association, Section of Litigation, Expert Witnesses Committee, Co-Chair (2015), Vice Chair (2012–2015)
- International Association of Privacy Professionals
- The Sedona Conference, Working Group 1 on Electronic Document Production and Retention, Drafting Team for Commentary on Bring Your Own Device (BYOD) Security, Privacy, and Discovery, Working Group 11 on Data Security and Privacy Liability, Drafting Team for Data Privacy Law Primer, and Working Group 12 (Trade Secrets).
- Certified Information Privacy Professional (CIPP-US)
- University of Chicago Law School, Alumni Admissions Committee (2007-2011)
- Global Citizenship Experience School, Board of Directors (2013-Present)
- Lincoln Park Conservancy, Board of Directors (2021-Present)

Professional Activities

- Chicago-Kent College of Law, Complex Civil Litigation, Data Privacy Law, Adjunct Professor (2008–present)
- Matt oversees our firm's work as legal counsel for Global Citizenship Experience, a lab school developing curriculum modules and providing teacher training focused on Chicago's at-risk urban schools and a scholarship fund for disadvantaged high school students.
- Matt represented a playwright as plaintiff in a Lanham Act suit arising from false attribution of a play about civil rights martyr Emmett Till. He also represented an indigent plaintiff in a civil rights suit for false arrest and use of excessive force.

Previous Work

- Honorable John E. Sprizzo, U.S. District Court, Southern District of New York (1997 – 1999)

Publications, Presentations & Recognitions

Publications

Recent Articles on Cybersecurity and Data Privacy

- “Consumer Data Encryption and the Autonomous Digital Self,” *The Circuit Rider* (Apr. 2016)
- “The Cybersecurity Aspects of Responding to Government Agency Demands for Trade Secrets Information,” (co-author) *TerraLex Connections* (Feb. 5, 2016)
- “Cybersecurity ‘Elevator Speech,’” (interviewee) *Security Magazine* (Apr. 2015)
- “Managing Cybersecurity Risk for Experts and Consultants,” *American Bar Association Section of Litigation* (Mar. 23, 2015)
- “No One Is Too Small To Hack,” *Computerworld* (Feb. 17, 2015)
- “Does Your Company Need a CISO?” *Law Technology News* (Sep. 21, 2014)

Recent Articles on Trade Secrets

- “Jurisdiction in the Information Age,” (co-author) Chapter 16 in *Intellectual Property Law*, IICLE (2017)
- “Protecting Trade Secrets in the Era of Cyberbreach,” *Law Technology News* (Feb. 20, 2015)
- “Regulatory: Think Twice Before Asserting a Trade Secrets Claim,” *Inside Counsel* (Aug. 28, 2013)

Recent Articles on E-Discovery, Electronic Data Forensics, and IT Expert Testimony

- “Oh, Yeah – Don’t Forget About the Trial Counsel,” *The National Law Journal* (Jan. 28, 2013)

Presentations

- How to Bring Illinois Employee Handbooks Into Compliance, The National Business Institute, speaker (Mar. 21, 2023)
- “Trade Secrets Protection, Enforcement, and Litigation,” Sandpiper Partners LLC, Conference (Oct. 27, 2022)
- “Ethics Issues in Trade Secret Disputes,” The Sedona Conference WG12 Annual Meeting 2022, Reston, VA (Sep. 7, 2022)
- “Take Charge: Protecting Your Company Against Cyber Crime,” General Counsel Conference Midwest, Chicago, IL (Jun. 14, 2022)
- “COVID-19 Legal Issues Spotting for In-House Counsel,” Webinar (Apr. 1, 2020)
- “The 13th Annual Institute Program on eDiscovery: Protecting Privacy, Confidentiality, and Privilege in Civil Litigation,” The Sedona Conference, Charlotte, NC (Mar. 7, 2019)
- “HR Cybersecurity Case Study Featuring a panel from Amalgamated Sugar,” (moderator) 2017 NCFRC Human Resources Conference, Rosemont, IL (Oct. 27, 2017)
- “Privacy, Innovation, and Growing a Business Domestically and Internationally,” (panelist) Northwestern Journal of International Law and Business and the Donald Pritzker Entrepreneurship Law Center Symposium, Chicago, IL (Apr. 14, 2017)
- “Is Your Data Safe? Cybersecurity and Protection of Trade Secrets under the Defend Trade Secrets Act,” (panelist) FCBA/IPLAC IP Law Symposium, Chicago, IL (Mar. 15, 2017)
-

- “Protection of Employers' Confidential Information,” (speaker) Schiff Hardin Labor and Employment Webinar Series (Oct. 19, 2016)
- “Data Breach Case Law Update and Data Privacy Primer,” The Sedona Conference Working Group 11 on Data Security and Privacy Liability Annual Meeting (Dec. 1, 2015)
 - “Discovery of ESI Involving ‘Bring Your Own Devices’,” Sedona Conference Working Group 1: Electronic Documents Retention and Production Annual Meeting (Oct. 29, 2015)
 - “Class-Action Review,” Cybersecurity Law Conference (Oct. 15, 2015)
 - “Trade Secrets and Cybersecurity: Protecting Intellectual Property, Mitigating Loss and Navigating Legal Responses,” Webinar (Sep. 24, 2015)
 - “How To Develop A Trade Secrets Protection Plan For A Global Business,” 4th Annual Global IPR Conclave (Sep. 10, 2015)
 - “BYOD: Preservation and Discovery from Mobile Devices,” The Sedona Conference Sedona Conference Working Group 1 Midyear Meeting (Apr. 29, 2015)
 - “A Crisis in Confidence – Replacing Your Company’s Trial Counsel in HighStakes Litigation,” (panelist) Association of Corporate Counsel, Chicago, IL (Jun. 24, 2014)
 - “Controlling Risk While Preparing for Trade Secret Litigation,” Network of Trial Law Firms, New York, NY (Aug. 9, 2013)
 - “Managing Trade Secret Litigation,” (moderator) Network of Trial Law Firms, San Diego, CA (Nov. 10, 2012)
 - “Case Study: Spoliation,” National Conference on Managing Electronic Records, Chicago, IL (May 8, 2012)

Recognitions

- Crain's Chicago Business, Notable Gen X Leaders in Law 2022
- The Best Lawyers in America, *Best Lawyers* (2023)
- Client Service All-Star, BTI Consulting Group (2022)
- *The Legal 500 United States* – Intellectual Property: Trade Secrets (2016-Present)

Bar Admissions

[Illinois](#)

[New York](#)

Court Admissions

[US Court of Appeals, 5th Circuit](#)

[US Court of Appeals, 7th Circuit](#)

[US Court of Appeals, 10th Circuit](#)

[US District Court, Northern District of California](#)

[US District Court, Central District of Illinois](#)

[US District Court, Northern District of Illinois \(Trial Bar\)](#)

[US District Court, District of Nebraska](#)

[US District Court, Eastern District of New York](#)

[US District Court, Northern District of New York](#)

[US District Court, Southern District of New York](#)

[US District Court, Eastern District of Wisconsin](#)

VALUATION ROUNDTABLE

NOTES:

COMMERCIAL REAL ESTATE MARKET

COMMERCIAL REAL ESTATE MARKET

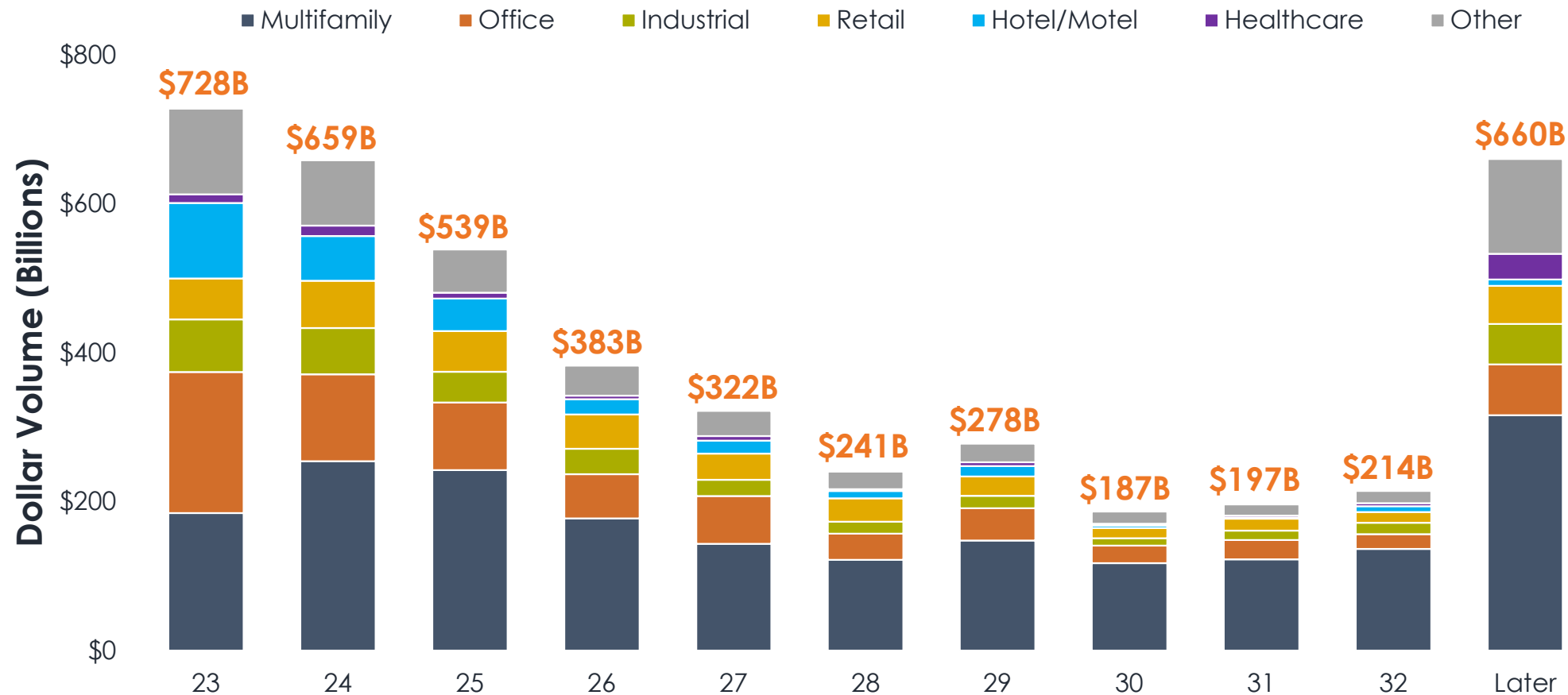
For a copy of slides text your name and e-mail address to:
630-740-4465

Jordan Callaway – First Vice President Investments
Eric Bell – Executive Managing Director Investments

630-740-4465
708-721-0700

Marcus & Millichap

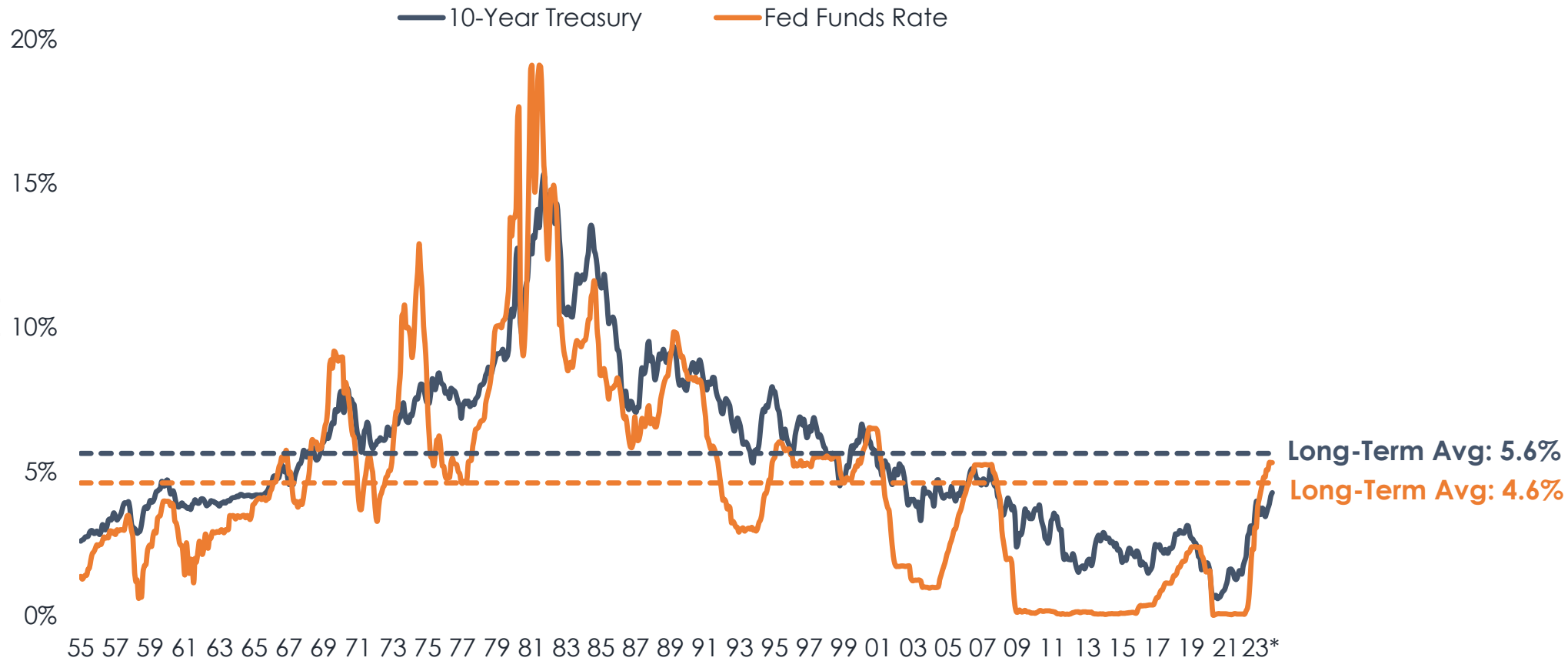
ANNUAL COMMERCIAL REAL ESTATE LOAN MATURITIES RISK VARIES BY PROPERTY TYPE



For loans outstanding as of 2022
Sources: Marcus & Millichap Research Services, Mortgage Bankers Association

Marcus & Millichap
Jordan Callaway | Eric Bell

INTEREST RATES HAVE MOVED BACK TO THEIR HISTORICAL NORM; FED UNLIKELY TO REDUCE RATES UNLESS THERE IS A RECESSION



Long-Term Avg: 5.6%

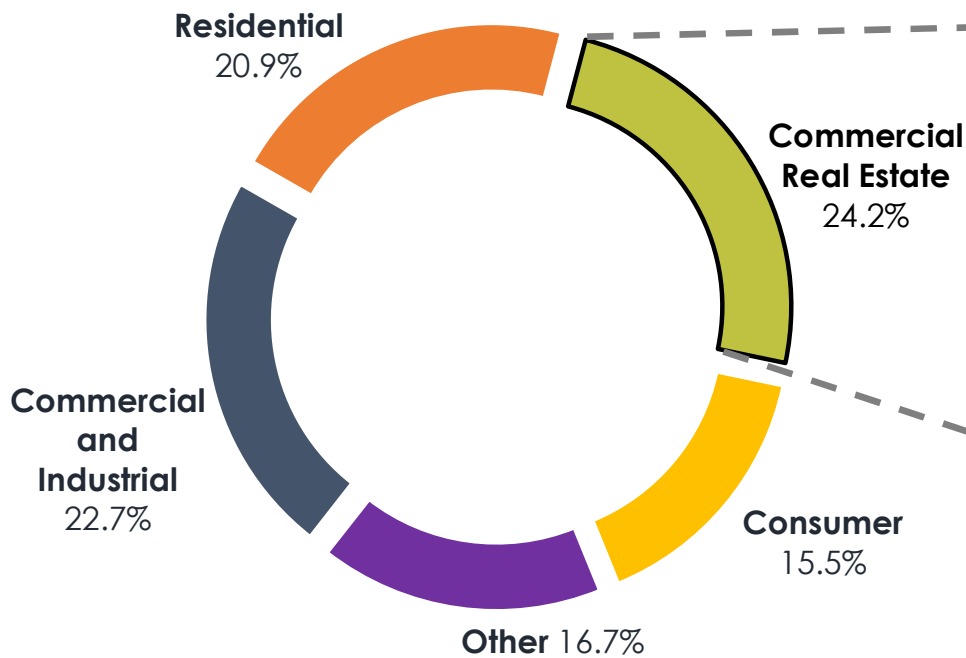
Long-Term Avg: 4.6%

* Through September 11
Sources: Marcus & Millichap Research Services, Federal Reserve

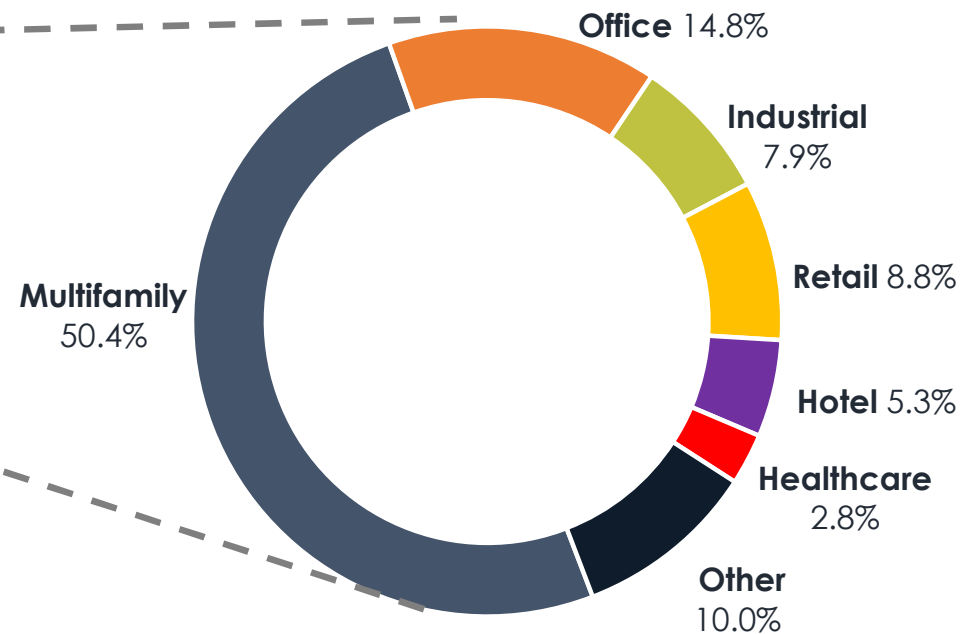
Marcus & Millichap
Jordan Callaway | Eric Bell

BANKING SECTOR RISK FROM COMMERCIAL REAL ESTATE OVERSTATED; OFFICE CRE LOANS JUST 3.6% OF TOTAL BANK LENDING

Bank Debt by Type



CRE Debt by Property Type Estimate



As of 2022

Sources: Marcus & Millichap Research Services, Mortgage Bankers Association, Federal Reserve

Marcus & Millichap
Jordan Callaway | Eric Bell

CRE PERFORMANCE TRENDS

PROPERTY TYPE SNAPSHOTS

Jordan Callaway – First Vice President Investments
Eric Bell – Executive Managing Director Investments

630-740-4465
708-721-0700

APARTMENT SECTOR FACES SHORT-TERM HEADWINDS; HOUSING SHORTAGE REMAINS A POSITIVE LONG-TERM FORCE



1H 2023 Overview

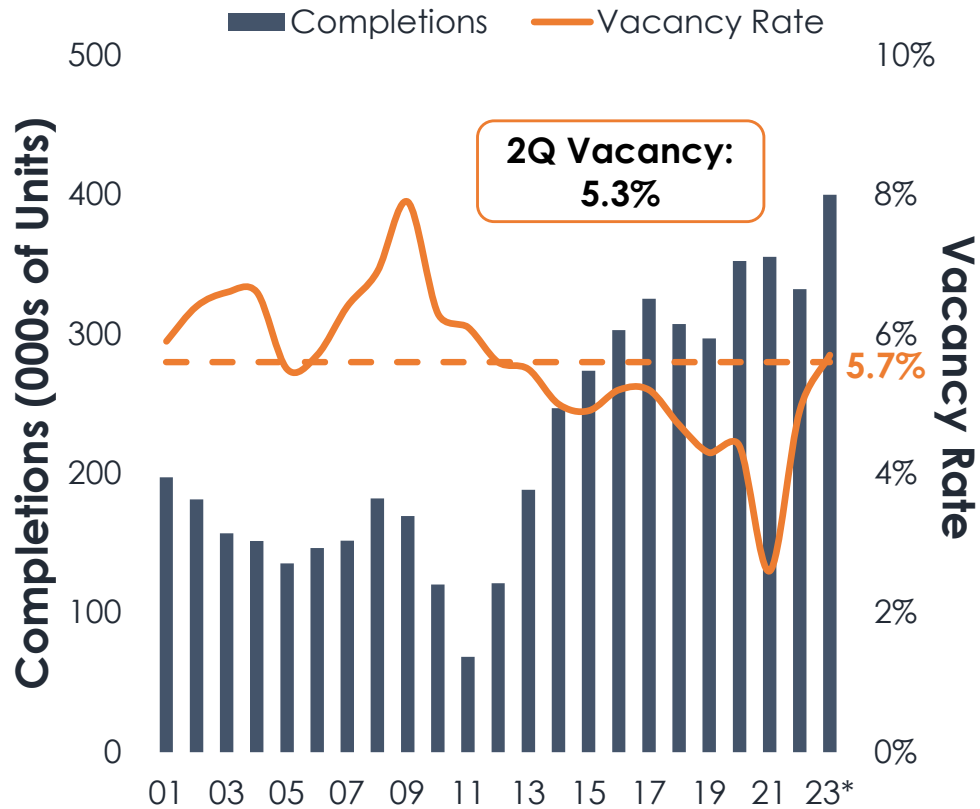
- ❖ Y-O-Y Comp. as % of Inv.: 2.0%
- ❖ Vacancy: 5.3% (+210 bps)
- ❖ Avg. Rent: \$1,809 (+4.0%)
- ❖ Avg. \$/Unit: \$195,700 (-12.8%)
- ❖ 5-Year Price Growth: +28.1%
- ❖ Average Cap Rate: 5.4%

Through 2Q
Five-year period: 3Q 2018 to 2Q 2023
Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023
Sources: Marcus & Millichap Research Services, RealPage, Inc., CoStar Group Inc., Real Capital Analytics

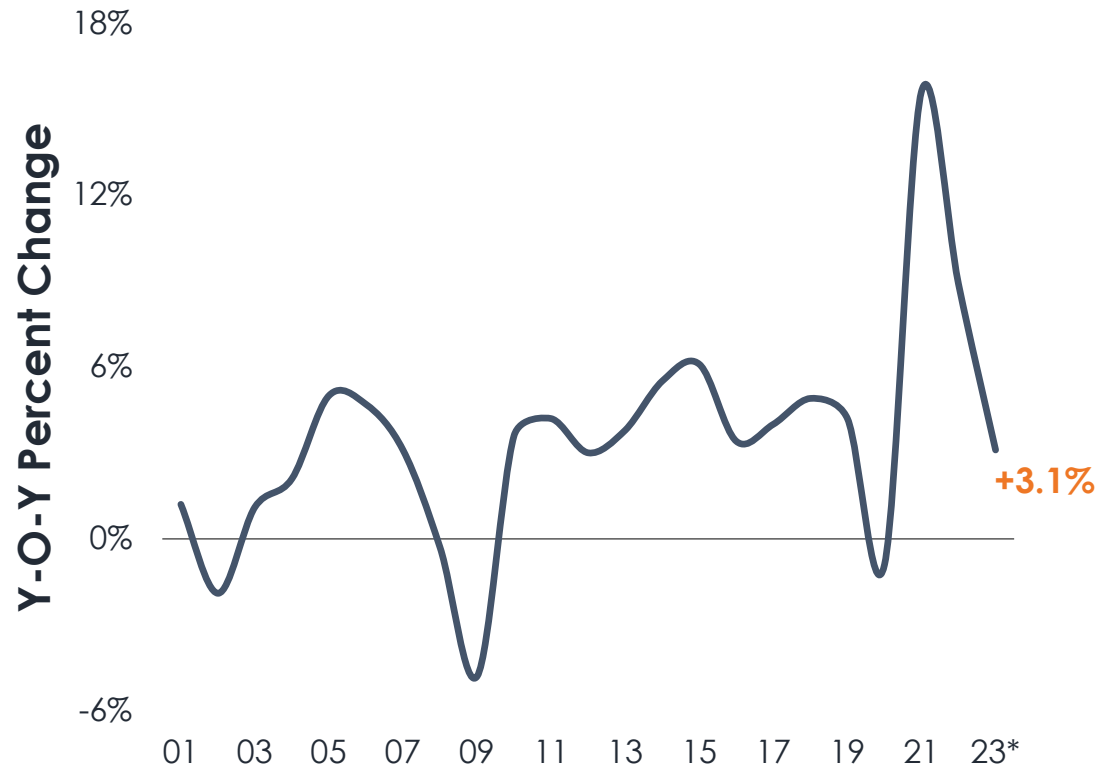
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RECORD CONSTRUCTION DRIVING APARTMENT VACANCY RATES UP, BUT ABSORPTION BACK ON THE RISE

Vacancy and Construction



Average Rent Trends

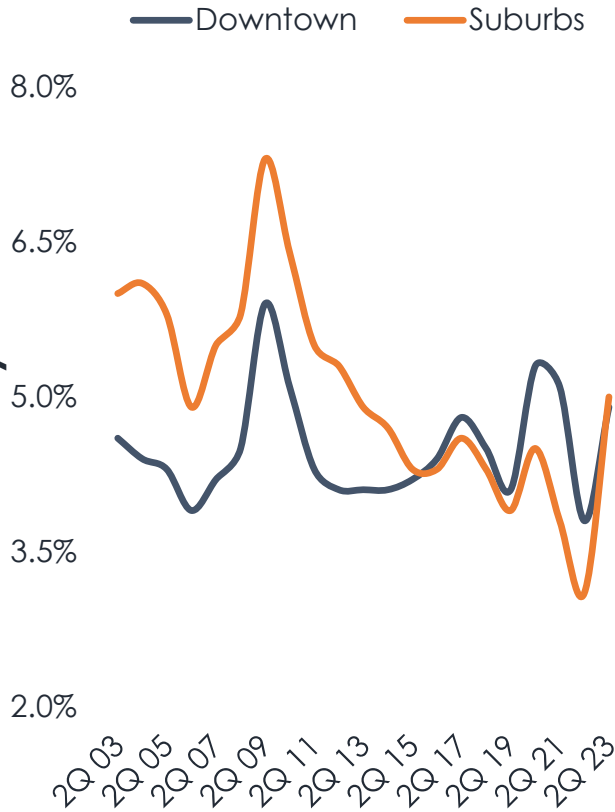


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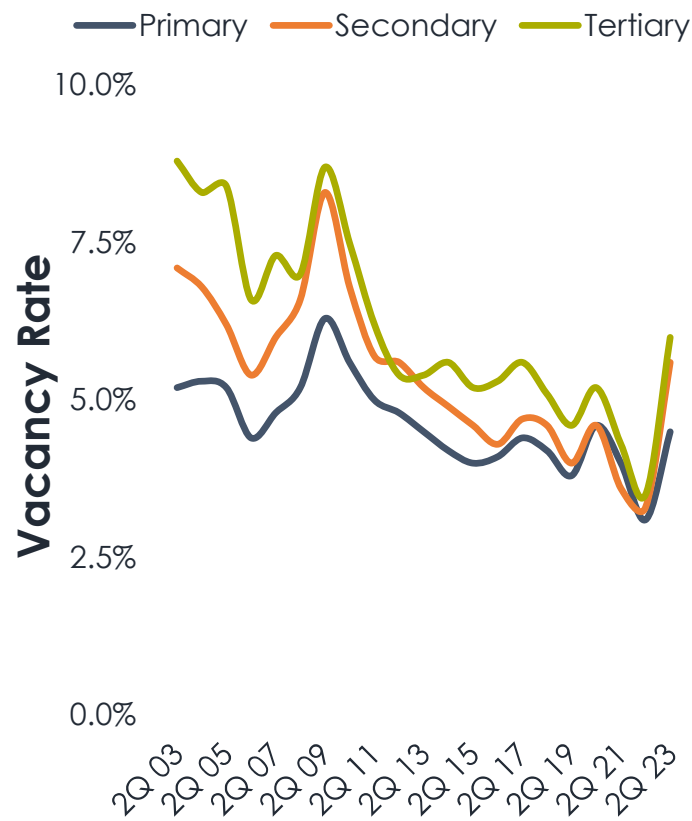
* Forecast
Sources: Marcus & Millichap Research Services, RealPage, Inc.

APARTMENT VACANCY RATES ARE RISING ACROSS ALL CLASS AND GEOGRAPHY TYPES, BUT MAGNITUDE OF IMPACT VARIES

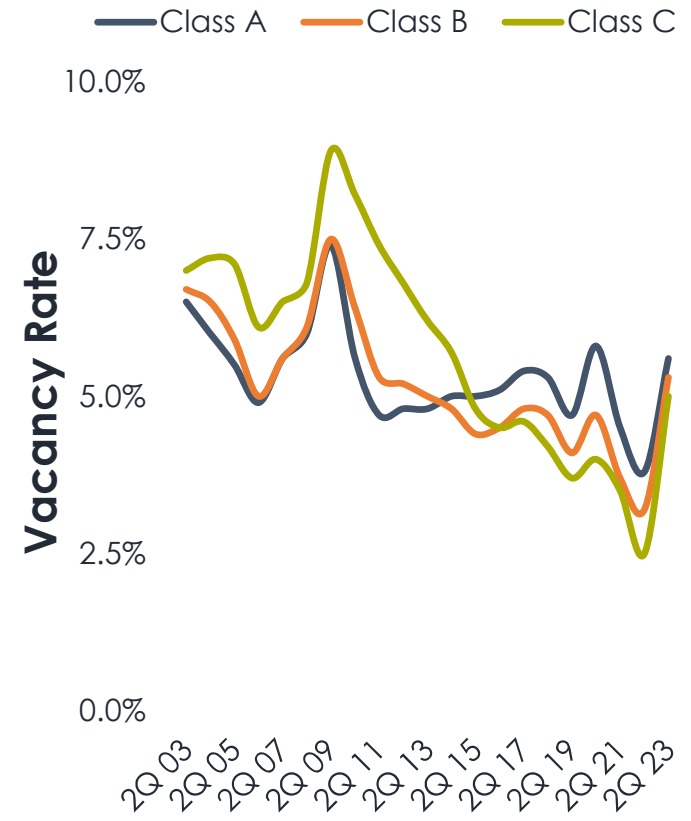
Downtown vs. Suburbs



Market Type



Class Type

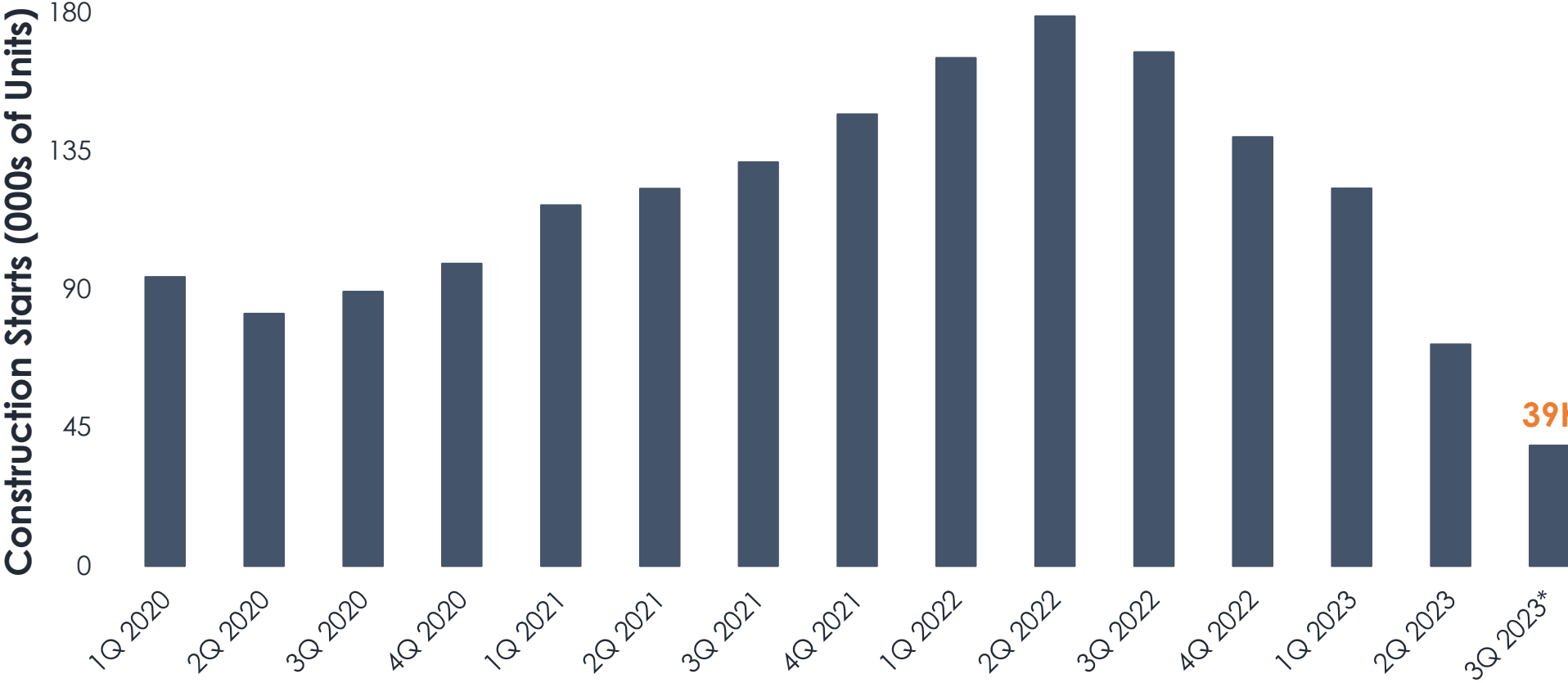


Marcus & Millichap

Jordan Callaway | Eric Bell

Includes downtown and suburban submarkets for 48 major metros
Sources: Marcus & Millichap Research Services, RealPage, Inc., CoStar Group, Inc.

U.S. APARTMENT CONSTRUCTION STARTS (FINALLY) ON THE DOWNTURN



* Trailing 3-months through July
Sources: Marcus & Millichap Research Services, RealPage, Inc.

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Jordan Callaway | Eric Bell

MULTI-TENANT RETAIL HAS OUTPERFORMED EXPECTATIONS LIMITED CONSTRUCTION WILL SUPPORT SUSTAINED MOMENTUM



1H 2023 Overview

- ❖ Y-O-Y Comp. as % of Inv.: 0.5%
- ❖ Vacancy: 5.4% (-20 bps)
- ❖ Avg. Rent: \$20.81 (+3.4%)
- ❖ Avg. \$/SF: \$183 (-10.4%)
- ❖ 5-Year Price Growth: -0.4%
- ❖ Average Cap Rate: 7.1%

Through 2Q
Five-year period: 3Q 2018 to 2Q 2023
Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023
Sources: Marcus & Millichap Research Services, CoStar Group Inc., Real Capital Analytics

Marcus & Millichap
Jordan Callaway | Eric Bell

SINGLE-TENANT RETAIL OFFERS STEADY CASH FLOW AND SIMPLIFIED MANAGEMENT; A FAVORED 1031 EXCHANGE OPTION



1H 2023 Overview

- ❖ Y-O-Y Comp. as % of Inv.: 0.4%
- ❖ Vacancy: 4.4% (-10 bps)
- ❖ Avg. Rent: \$22.27 (+2.9%)
- ❖ Avg. \$/SF: \$333 (-12.8% YOY)
- ❖ 5-Year Price Growth: -2.5%
- ❖ Average Cap Rate: 6.4%

Through 2Q
Five-year period: 3Q 2018 to 2Q 2023
Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023
Sources: Marcus & Millichap Research Services, CoStar Group Inc., Real Capital Analytics

Marcus & Millichap
Jordan Callaway | Eric Bell

STORE OPENINGS OUTPACING CLOSINGS; FAVORS OPEN AIR CENTERS MAJOR CHALLENGE FOR RETAILERS IS FINDING AVAILABLE SPACE

2017 – 2024 Store Major Closures & Openings

53,000+
Store Closures

**BED BATH &
BEYOND**

THE CHILDREN'S
PLACE

H&M ♥ **CVS**

Walgreens

88,000+
Store Openings

**five
BELW**

ROSS

TJX
THE TJX COMPANIES, INC.

**BARNES
& NOBLE**



ATHLETA

WARBY
PARKER

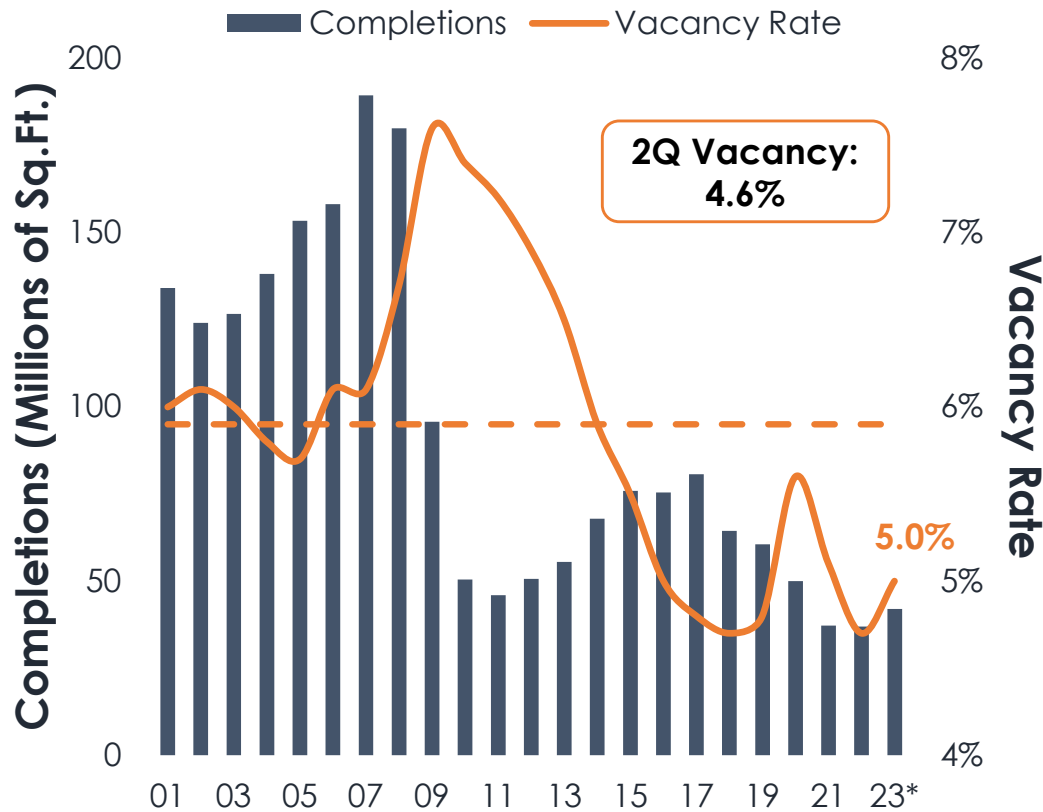
O'Reilly AUTO
PARTS

Raising
Cane's
CHICKEN FINGERS

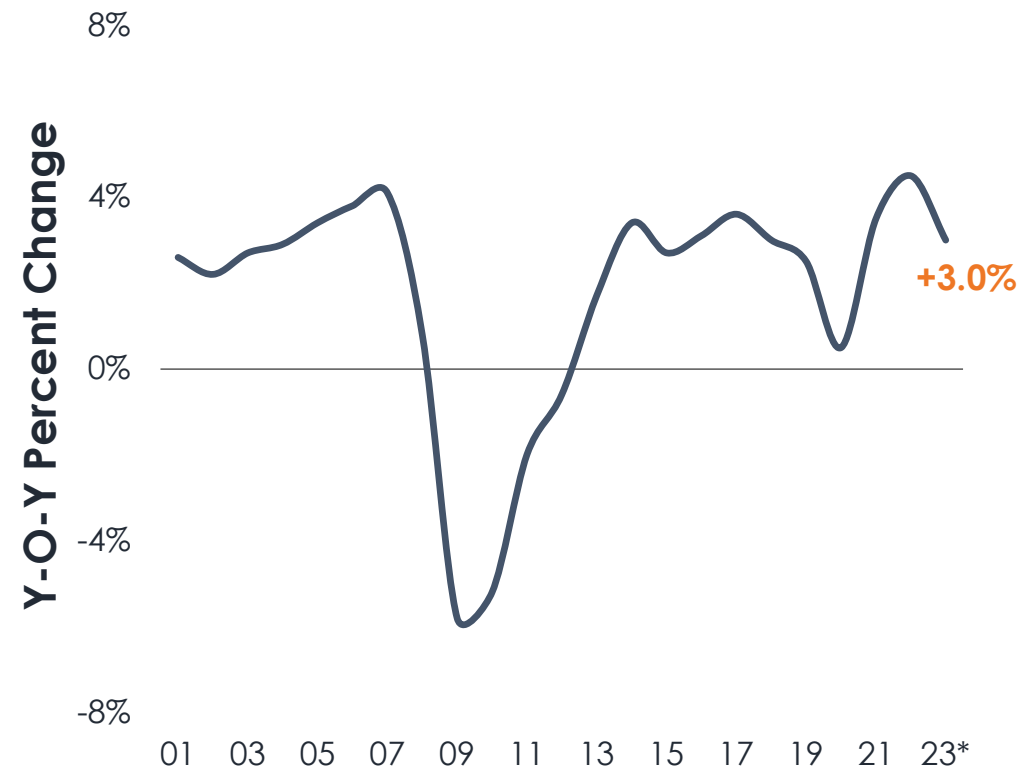
Marcus & Millichap
Jordan Callaway | Eric Bell

NATIONAL (BLENDED) RETAIL VACANCY BACK TO PRE-PANDEMIC; FLATTENED RETAIL SALES COULD RESTRAIN MOMENTUM

Vacancy and Construction



Average Rent Trends



Marcus & Millichap
Jordan Callaway | Eric Bell

* Forecast
Sources: Marcus & Millichap Research Services, CoStar Group, Inc.

OFFICE PROPERTIES STILL FACE WORK-FROM-HOME QUESTION; URBAN OFFICE HEADWINDS; SIGNIFICANT REGIONAL VARIANCE



1H 2023 Overview

- ❖ Y-O-Y Comp. as % of Inv.: 0.8%
- ❖ Vacancy: 17.0% (+120 bps)
- ❖ Avg. Rent: \$29.19 (+0.6%)
- ❖ Avg. \$/SF: \$202 (-15.4%)*
- ❖ 5-Year Price Growth: -8.7%
- ❖ Average Cap Rate: 7.4%*

* Caution: Current Cap rate reflects traded deals, but the market has not stabilized and values have been falling Through 2Q

As of 2022; Five-year period: 3Q 2018 to 2Q 2023

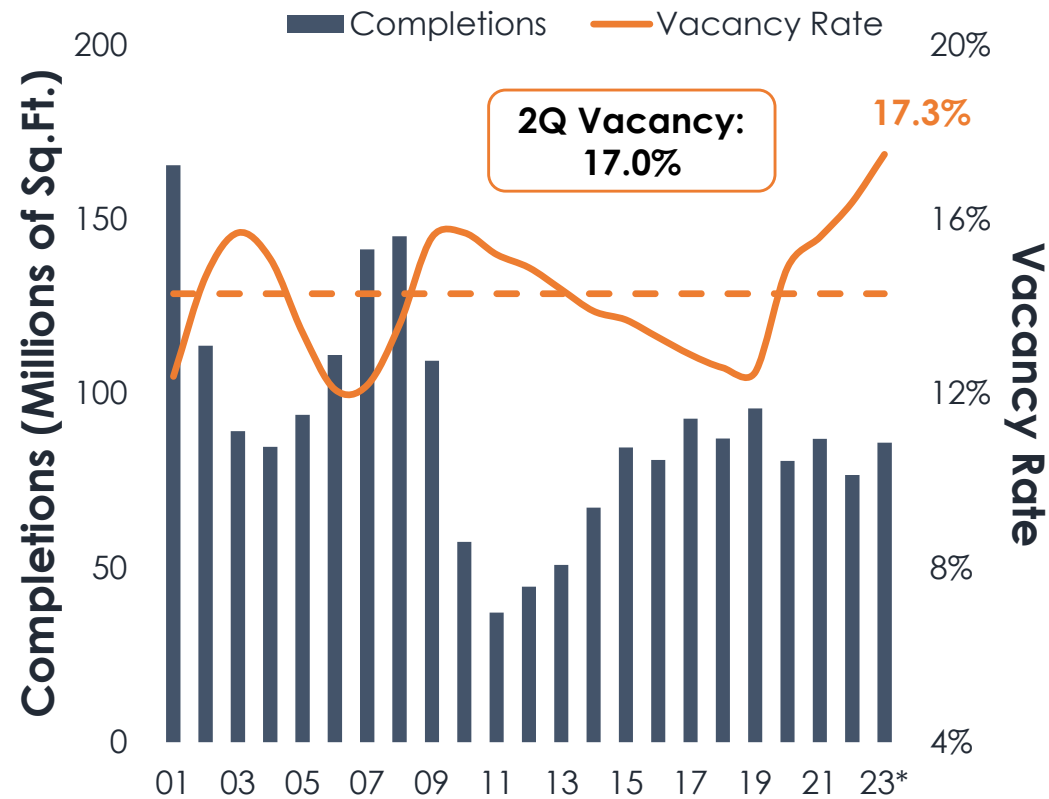
Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023

Sources: Marcus & Millichap Research Services, CoStar Group Inc., Real Capital Analytics

Marcus & Millichap
Jordan Callaway | Eric Bell

NATIONAL OFFICE VACANCY AT RECORD HIGH; SIGNIFICANT VARIANCE BY MARKET AND PROPERTY SUBTYPE

Vacancy and Construction



Average Rent Trends

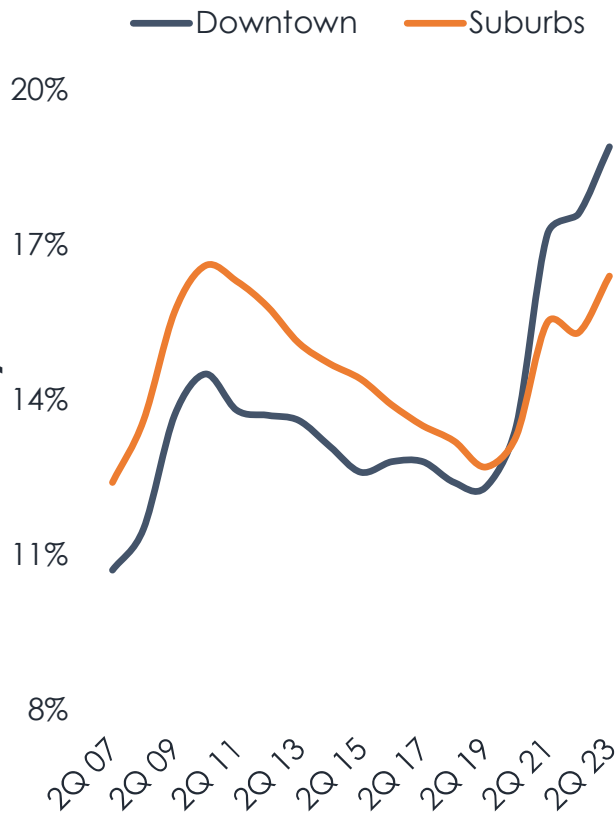


Marcus & Millichap
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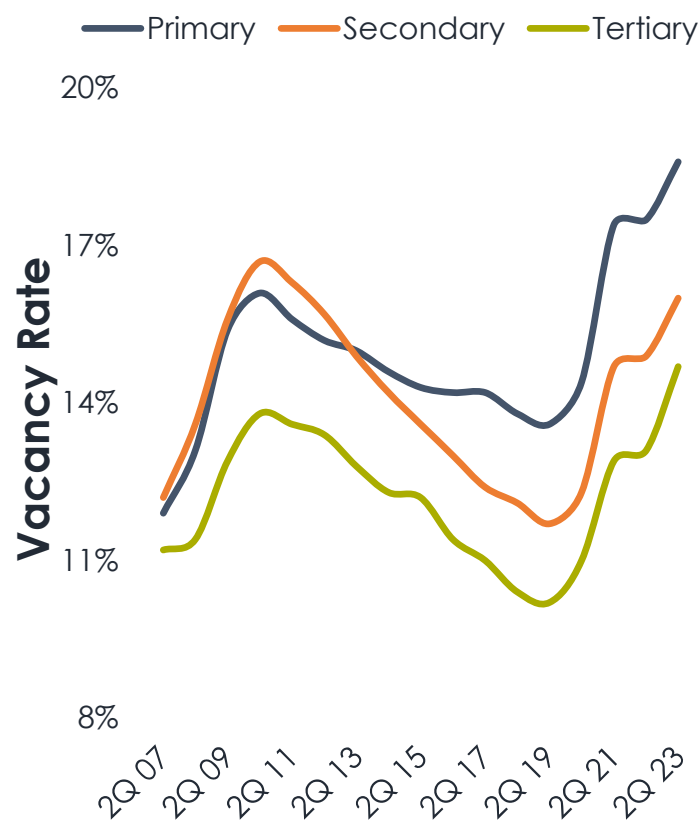
* Forecast
Sources: Marcus & Millichap Research Services, CoStar Group, Inc.

OFFICE VACANCY UP ACROSS THE BOARD; 80'S VINTAGE URBAN OFFICE IN PRIMARY MARKETS IMPACTED HARDEST

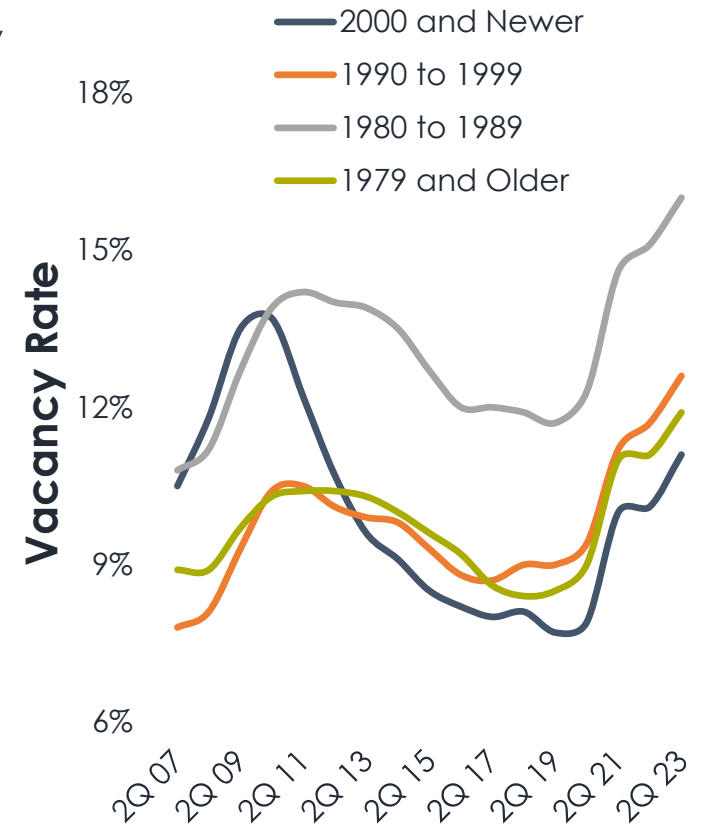
Downtown vs. Suburbs



Market Type



Vintage



Marcus & Millichap

Jordan Callaway | Eric Bell

Includes downtown and suburban submarkets for 48 major metros
Sources: Marcus & Millichap Research Services, CoStar Group, Inc.

MEDICAL OFFICE PROPERTIES SUSTAIN COMPARATIVELY STRONG RESULTS AND OUTLOOK



1H 2023 Overview

- ❖ **Y-O-Y Comp. as % of Inv.: 0.9%**
- ❖ **Vacancy: 9.2% (-20 bps)**
- ❖ **Avg. Rent: \$22.92 (+2.8%)**
- ❖ **Avg. \$/SF: \$324 (-7.0% YOY)**
- ❖ **5-Year Price Growth: +14.3%**
- ❖ **Average Cap Rate: 7.3%**

Through 1Q
As of 2022; Five-year period: 3Q 2018 to 2Q 2023
Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023
Sources: Marcus & Millichap Research Services, CoStar Group Inc., Real Capital Analytics

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INDUSTRIAL FACES WAVE OF DEVELOPMENT AND SLOWING IMPORTS; LONG-TERM TAILWINDS SUSTAIN SECTOR AS A FAVORED ASSET CLASS



1H 2023 Overview

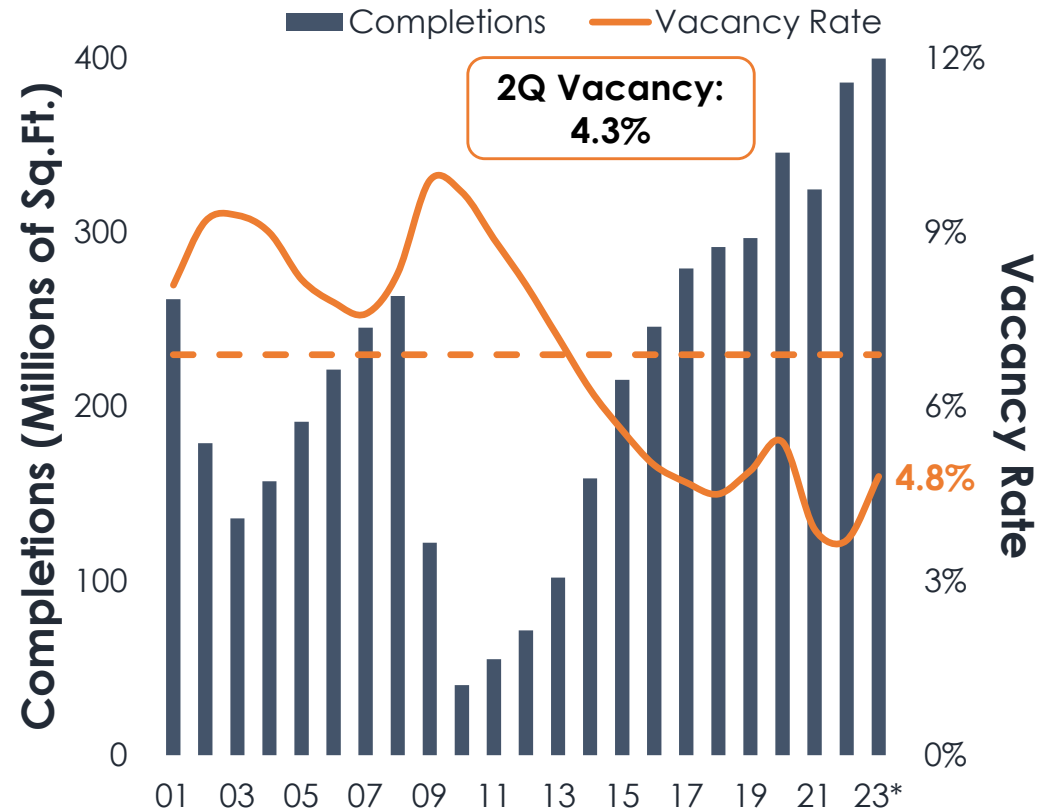
- ❖ **Y-O-Y Comp. as % of Inv.: 2.3%**
- ❖ **Vacancy: 4.3% (+70 bps)**
- ❖ **Avg. Rent: \$10.44 (+14.2%)**
- ❖ **Avg. \$/SF: \$147 (-5.1%)**
- ❖ **5-Year Price Growth: +40.6%**
- ❖ **Average Cap Rate: 6.7%**

Through 2Q
As of 2022; Five-year period: 3Q 2018 to 2Q 2023
Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023
Sources: Marcus & Millichap Research Services, CoStar Group Inc., Real Capital Analytics

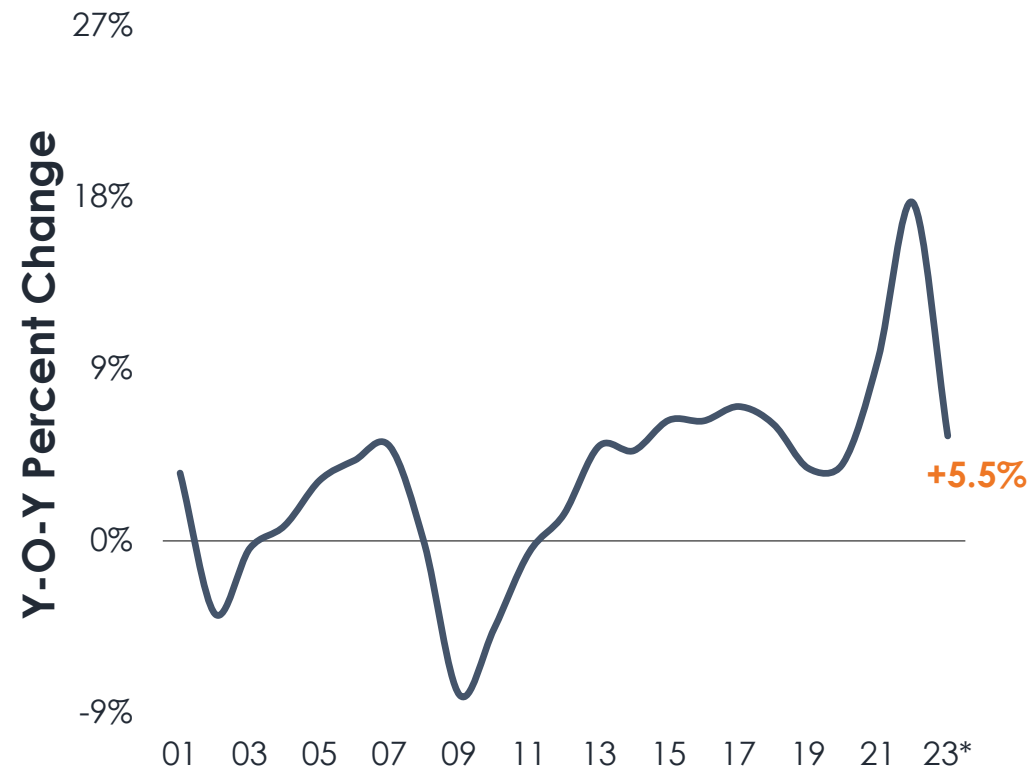
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Jordan Callaway | Eric Bell

RECORD INDUSTRIAL COMPLETIONS DRIVE NATIONAL INDUSTRIAL VACANCY UP; SIGNIFICANT VARIANCE BY LOCATION & SUBTYPE

Vacancy and Construction



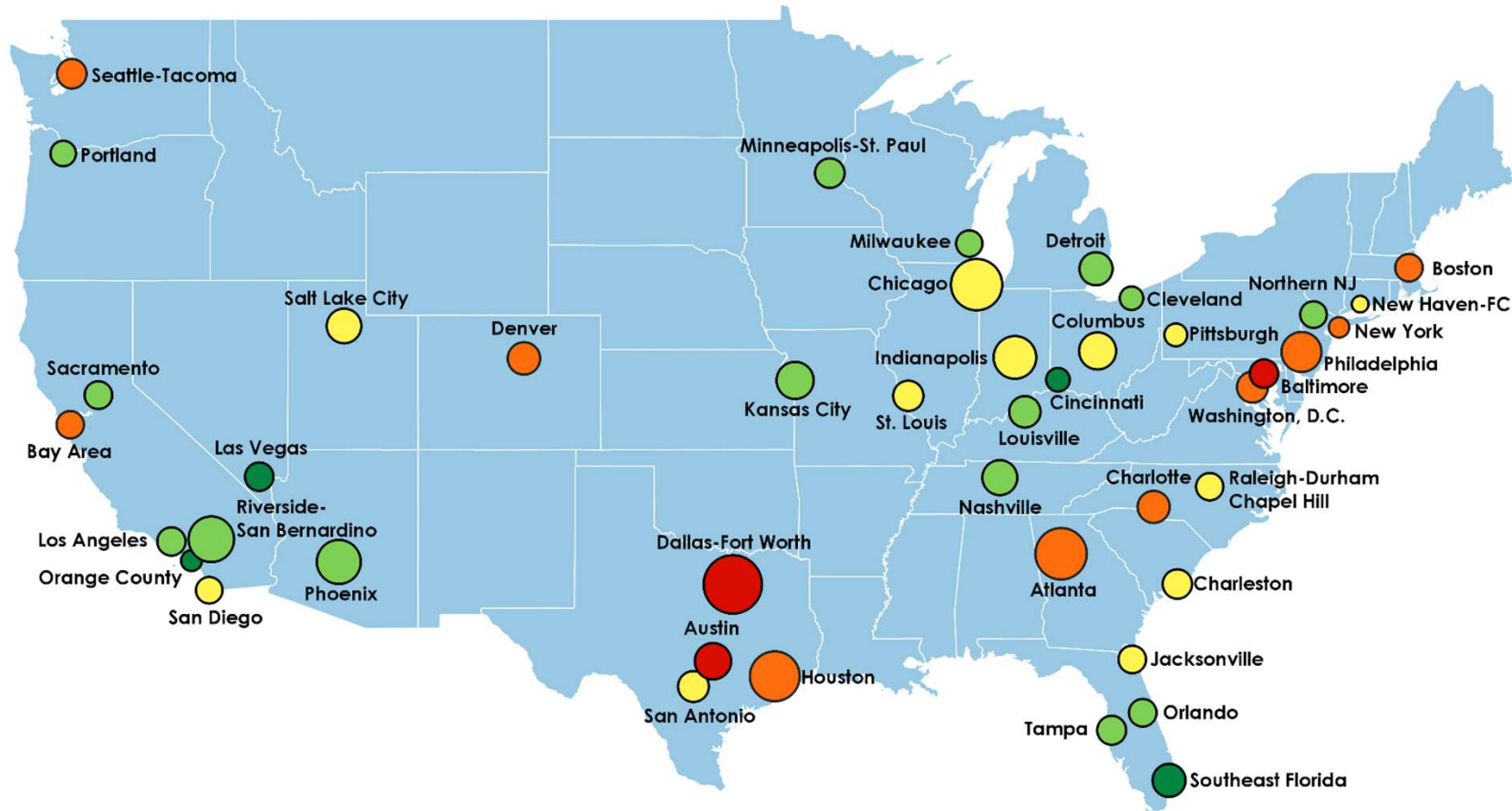
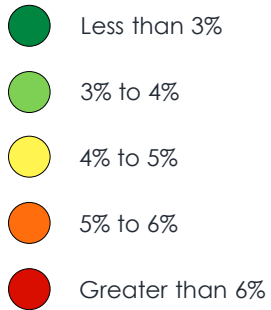
Average Rent Trends



* Forecast
Sources: Marcus & Millichap Research Services, CoStar, Inc.

INDUSTRIAL VACANCY RATE AND 3 YEAR CONSTRUCTION MAP

2Q 2023 Industrial Vacancy Rate



Bubble size correlates to total square feet of industrial construction from 3Q 2021 to 2Q 2023
 Sources: Marcus & Millichap Research Services, CoStar Group, Inc.

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 Jordan Callaway | Eric Bell

SELF-STORAGE HAS DEMONSTRATED RECESSION RESISTANCE; MARKET IS SOFTENING AS DEVELOPMENT RISES



1H 2023 Overview

- ❖ **Y-O-Y Comp. as % of Inv.: 2.8%**
- ❖ **Vacancy: 8.4% (+180 bps)**
- ❖ **Avg. Rent: \$1.28 (-3.8%)**
- ❖ **Avg. \$/SF: \$154 (-9.1%)**
- ❖ **5-Year Price Growth: +43.6%**
- ❖ **Average Cap Rate: 5.9%**

Through 2Q

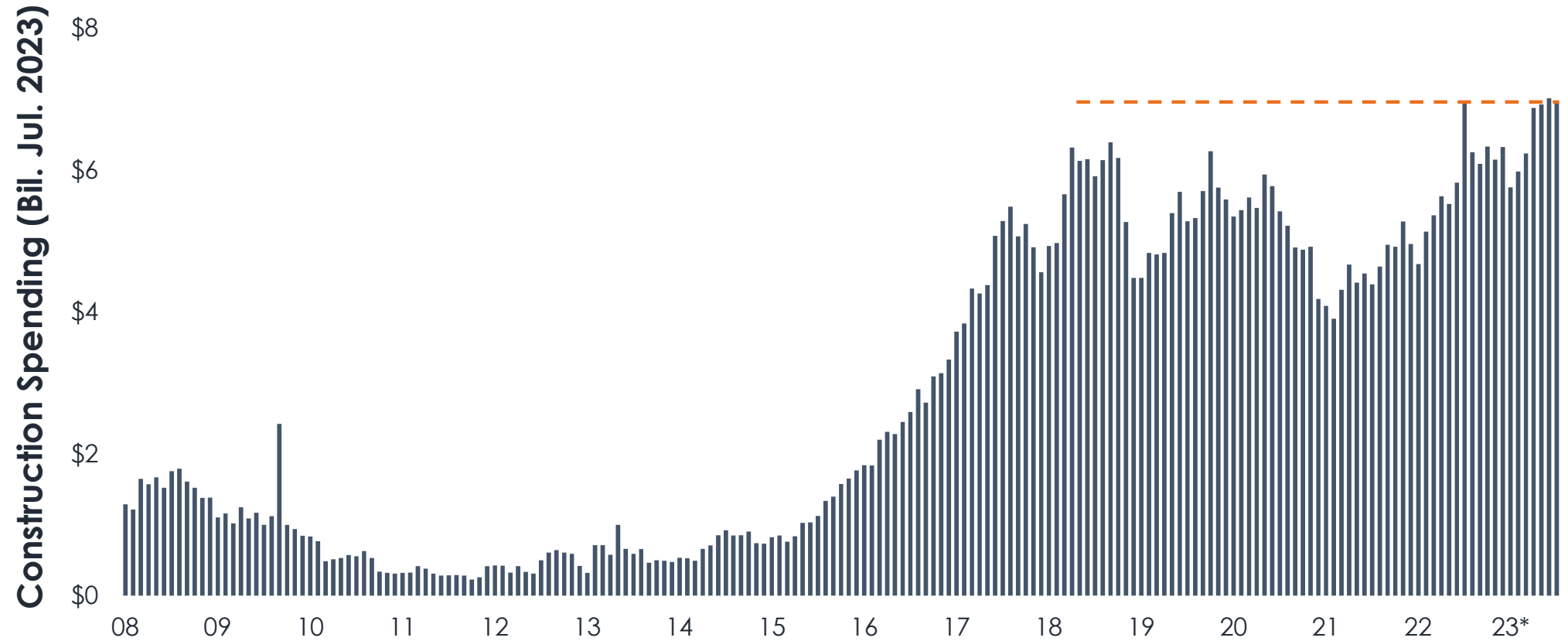
As of 2022; Five-year period: 3Q 2018 to 2Q 2023

Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023

Sources: Marcus & Millichap Research Services, Yardi Matrix, Radius+, CoStar Group Inc., Real Capital Analytics

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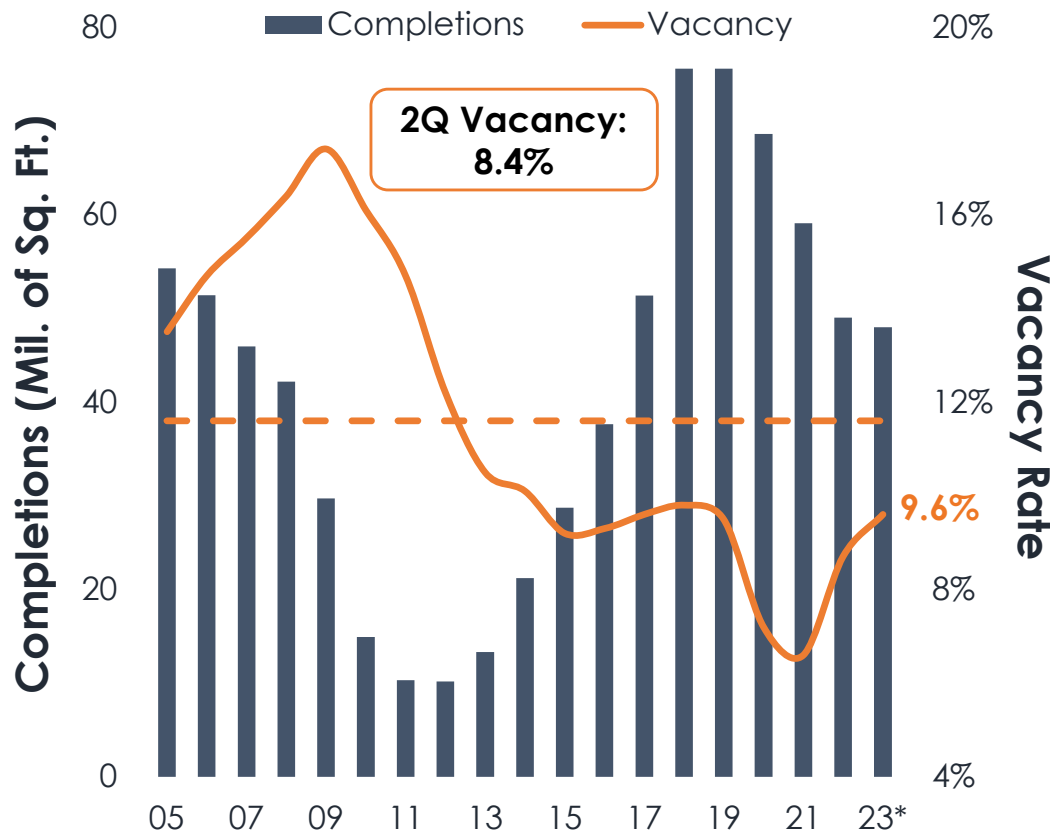
INFLATION-ADJUSTED SPENDING ON U.S. SELF-STORAGE ELEVATED, OVERDEVELOPMENT RISKS MAY REEMERGE



* Through July
Adjusted for inflation using core PCE
Sources: Marcus & Millichap Research Services, U.S. Census Bureau, BEA

SELF-STORAGE IN POST-PANDEMIC TRANSITION; NEW SUPPLY RISKS COULD WEIGH ON MARKET IN 2024-2025

Vacancy and Construction



Average Effective Rent Trends



Marcus & Millichap
Jordan Callaway | Eric Bell

* Forecast
Sources: Marcus & Millichap Research Services, Radius+, Yardi Matrix

HOSPITALITY FUNDAMENTALS CLIMBING WELL ABOVE PRE-PANDEMIC NORMS AS LEISURE TRAVEL REBOUNDS



1H 2023 Overview

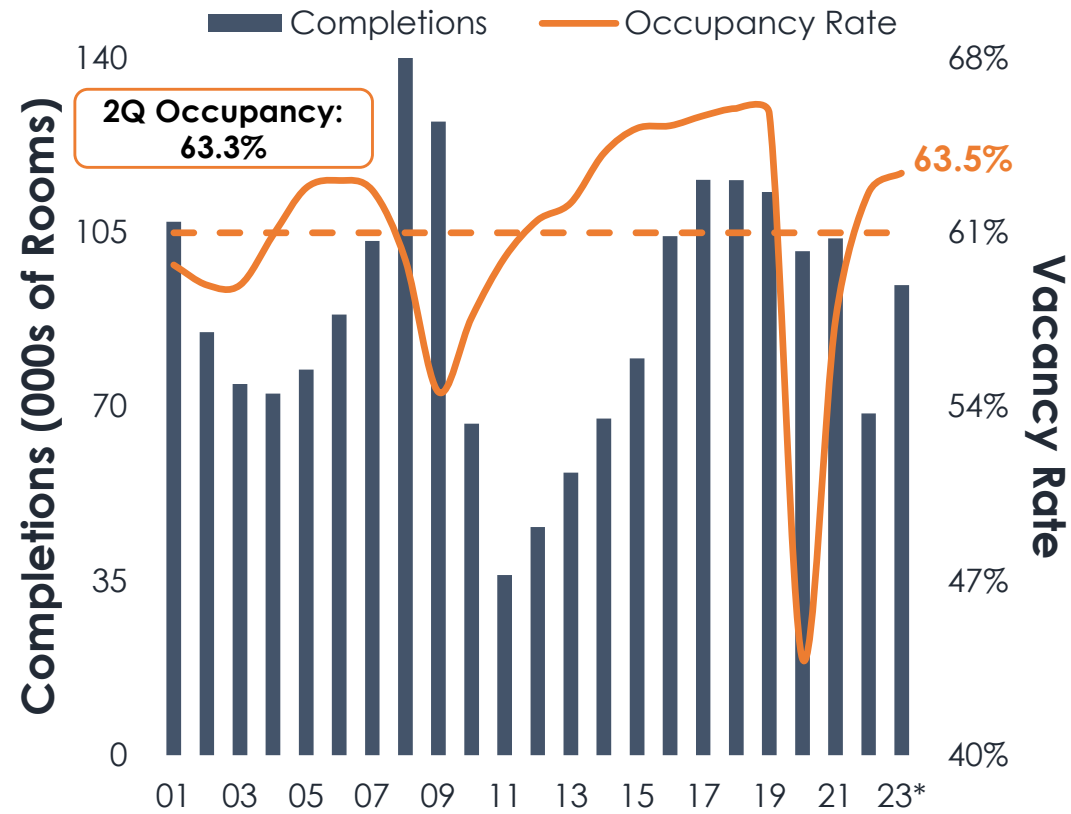
- ❖ Y-O-Y Comp. as % of Inv.: 0.5%
- ❖ Occupancy: 63.3% (+200 bps)
- ❖ ADR: \$154 (+9.3%)
- ❖ Avg. \$/Room: \$112 (+4.0%)
- ❖ 5-Year Price Growth: +18.7%
- ❖ Average Cap Rate: 8.0%

Trailing 12-month average through 2Q
As of 2022; Five-year period: 3Q 2018 to 2Q 2023
Estimated cap rate includes sales \$2.5 million and greater through 2Q 2023
Sources: Marcus & Millichap Research Services, CoStar Group Inc., Real Capital Analytics

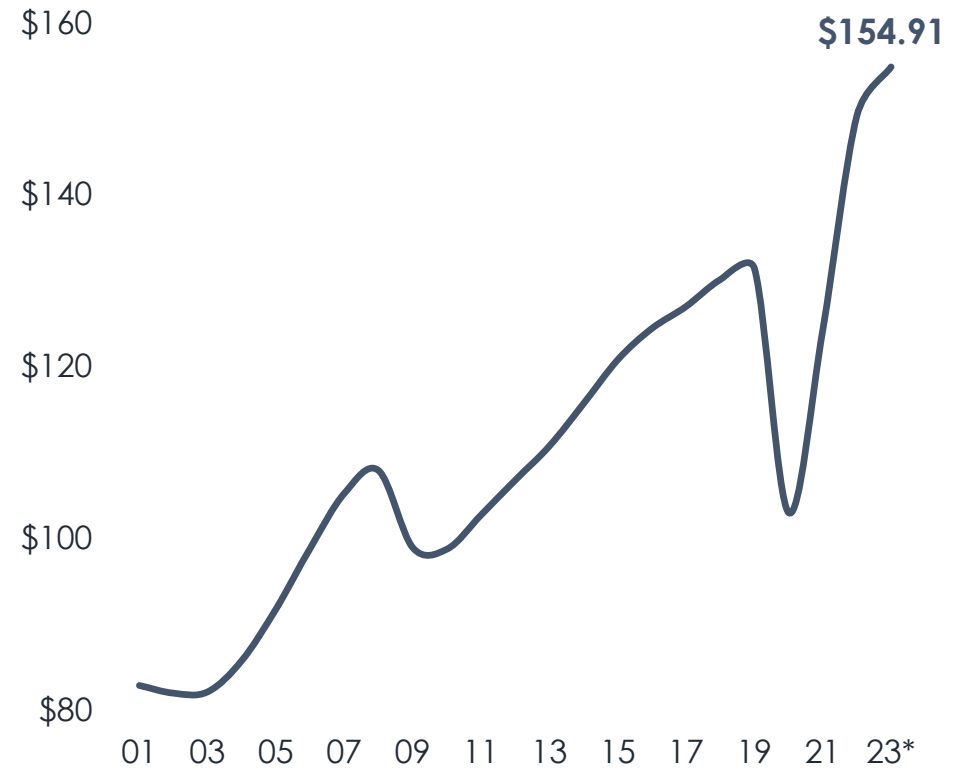
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LABOR SHORTAGE RESTRAINING NATIONAL HOTEL OCCUPANCY, BUT ADR MORE THAN OFFSETTING THE REDUCED ROOM USAGE

Occupancy and Construction



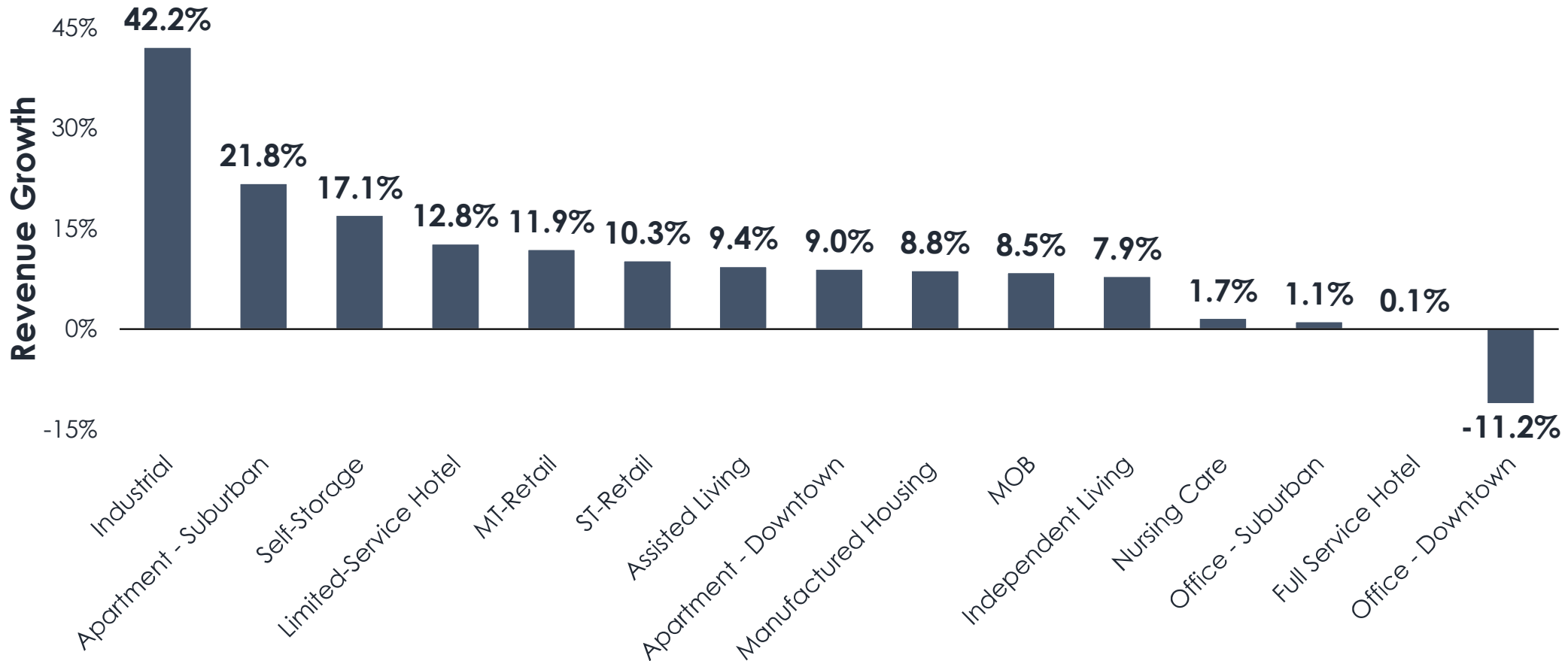
Average Daily Rate Trends



Marcus & Millichap
Jordan Callaway | Eric Bell

* Forecast
Sources: Marcus & Millichap Research Services, CoStar, Inc.

COMMERCIAL REAL ESTATE REVENUE GROWTH SINCE 2019 BY PROPERTY TYPE/SEGMENT



Change from 4Q 2019 to 2Q 2023; Change from 4Q 2019 to 1Q 2023 for MOB, Seniors Housing and Manufactured Housing
Trailing 12-month RevPAR for Hotel
Sources: Marcus & Millichap Research Services, Federal Reserve, CoStar Group, Inc., RealPage, Inc., Yardi Matrix, NICMap

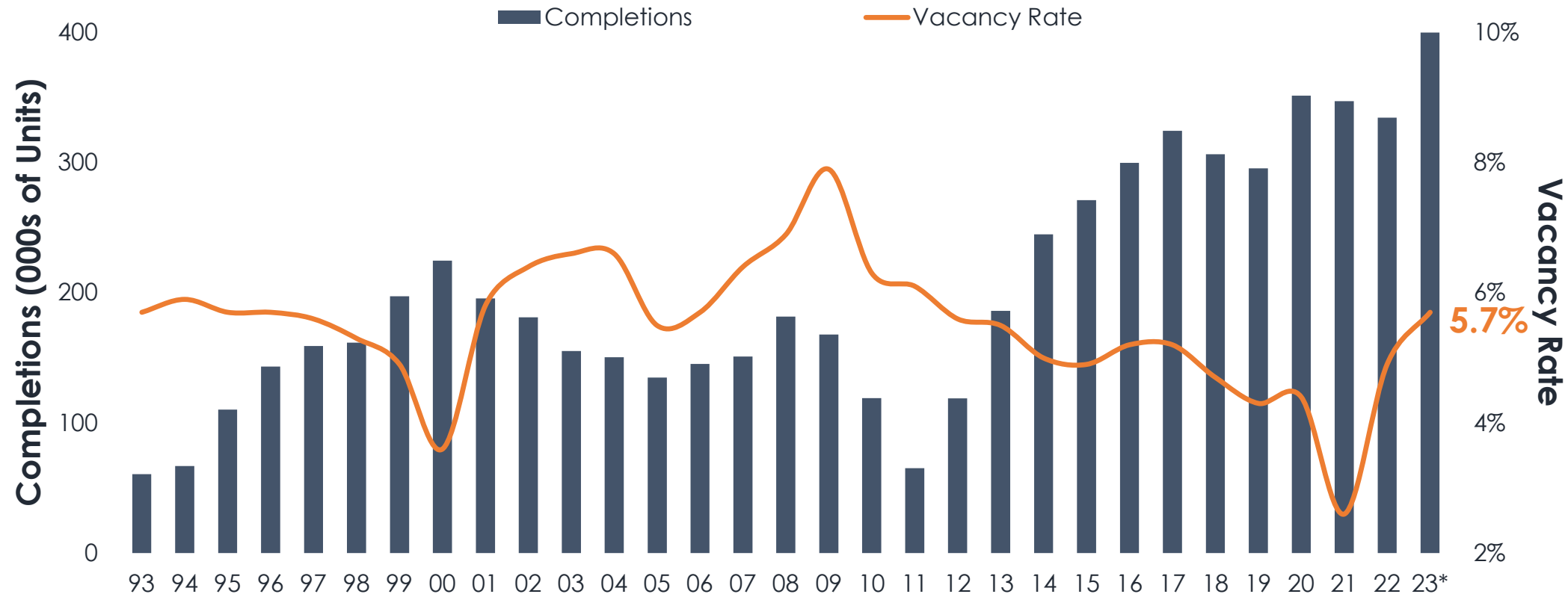
Marcus & Millichap
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APARTMENT MARKET OVERVIEW

PERFORMANCE AND SALES TRENDS

Jordan Callaway & Eric Bell

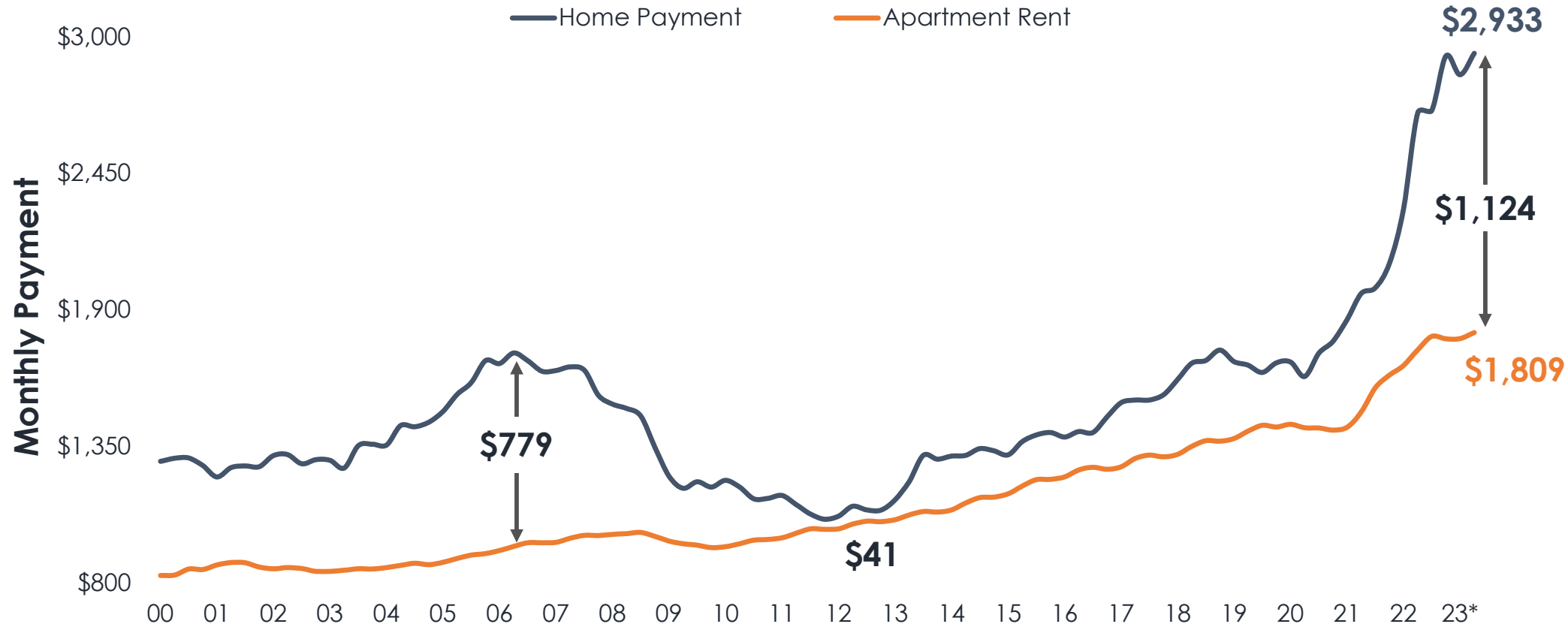
NATIONAL APARTMENT VACANCY VS. CONSTRUCTION



Marcus & Millichap
 Jordan Callaway | Eric Bell

* Forecast
 Sources: Marcus & Millichap Research Services, RealPage, Inc.

AFFORDABILITY GAP SPREAD BETWEEN HOME PAYMENT AND AVERAGE RENT HAS INCREASED DRAMATICALLY

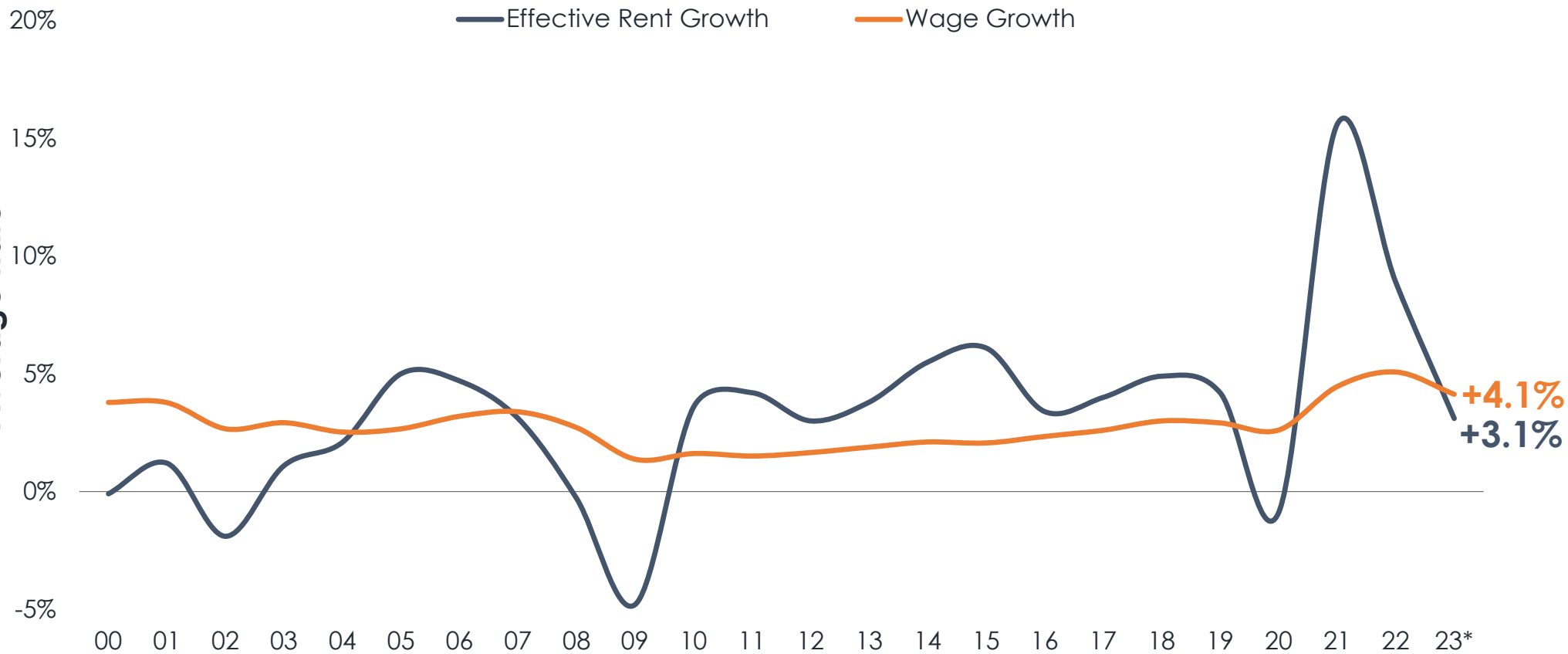


* Through 2Q

Mortgage payments based on quarterly median home price for a 30-year fixed rate mortgage, 90% LTV, taxes, insurance, and PMI
Sources: Marcus & Millichap Research Services, RealPage, Inc., Freddie Mac, National Association of Realtors

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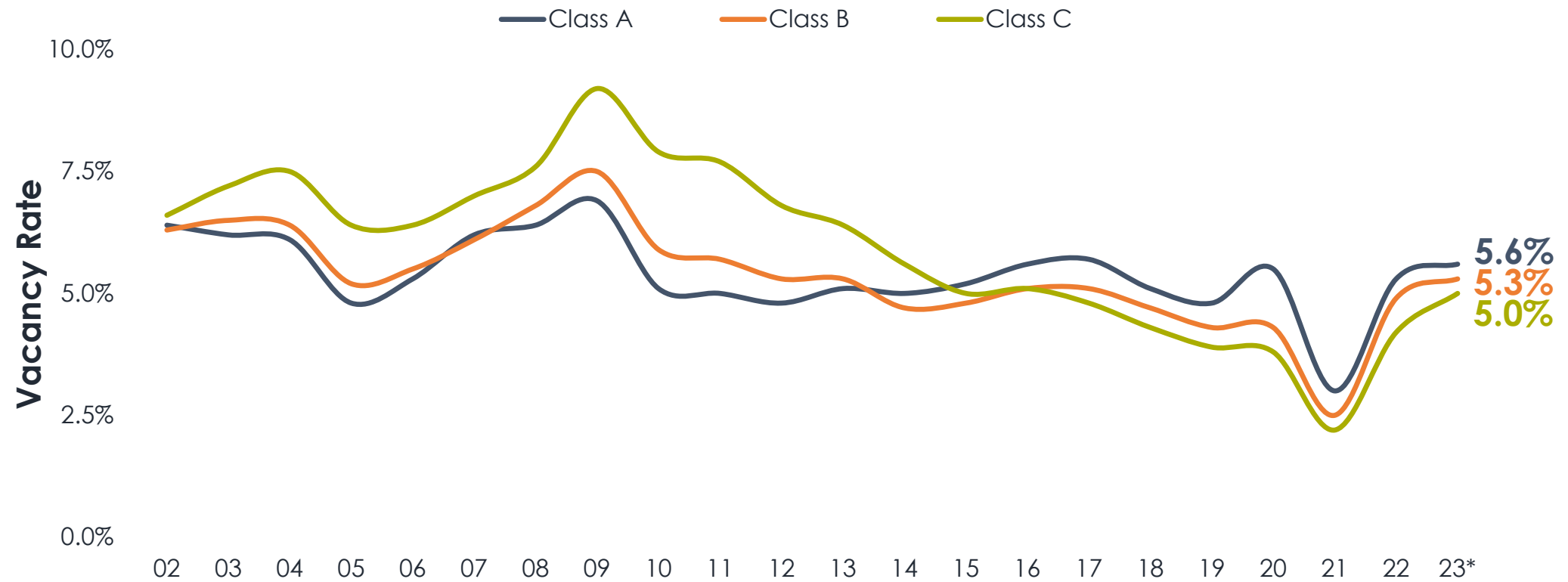
RENT GROWTH EXPECTED TO FALL BELOW WAGE GROWTH FOLLOWING PANDEMIC-DRIVEN DISRUPTIONS



* Forecast
Forecast using Moody's August 2023 baseline forecast
Sources: Marcus & Millichap Research Services, RealPage, Inc., BLS (Employment Cost Index), Moody's Analytics

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Jordan Callaway | Eric Bell

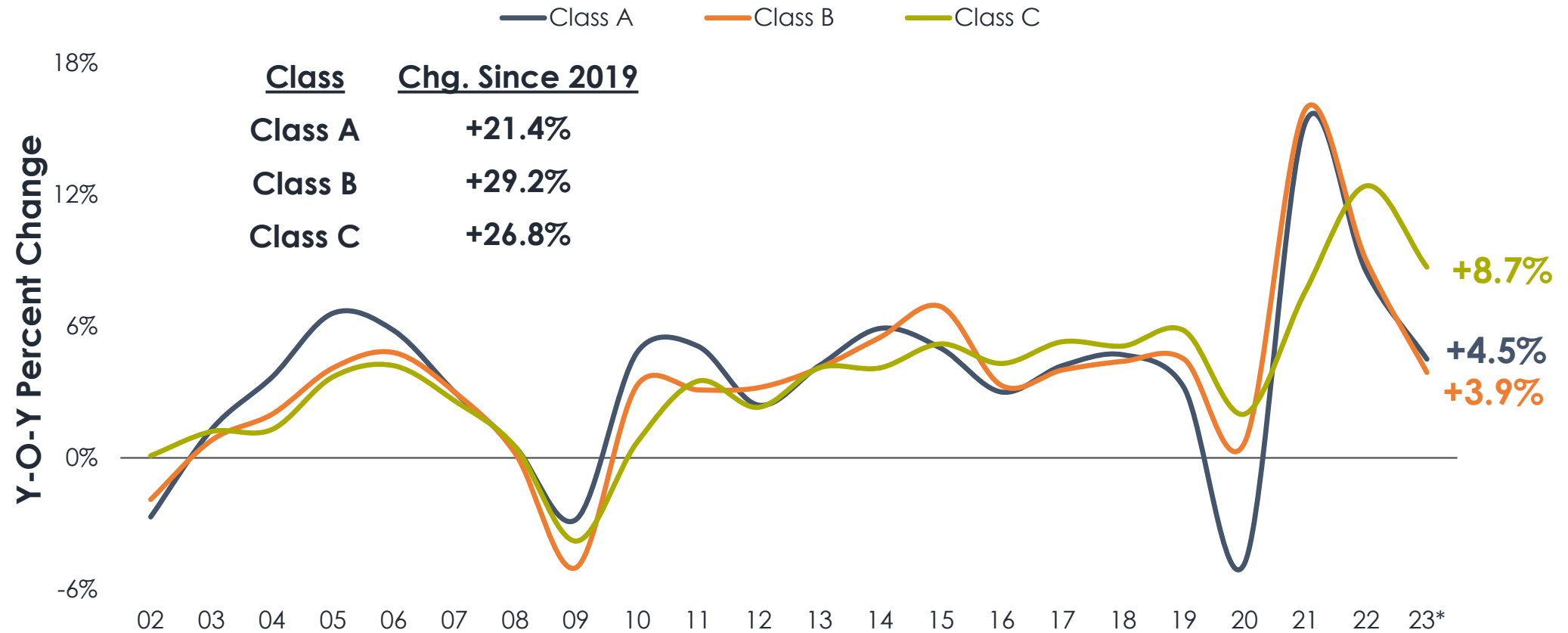
ALL APARTMENT CLASS TYPES HAVE SEEN RISES IN VACANCY RATES



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Jordan Callaway | Eric Bell

* Through 2Q
Sources: Marcus & Millichap Research Services, RealPage, Inc.

DEMAND FOR WORKFORCE HOUSING DRIVING CLASS C RENT GAINS

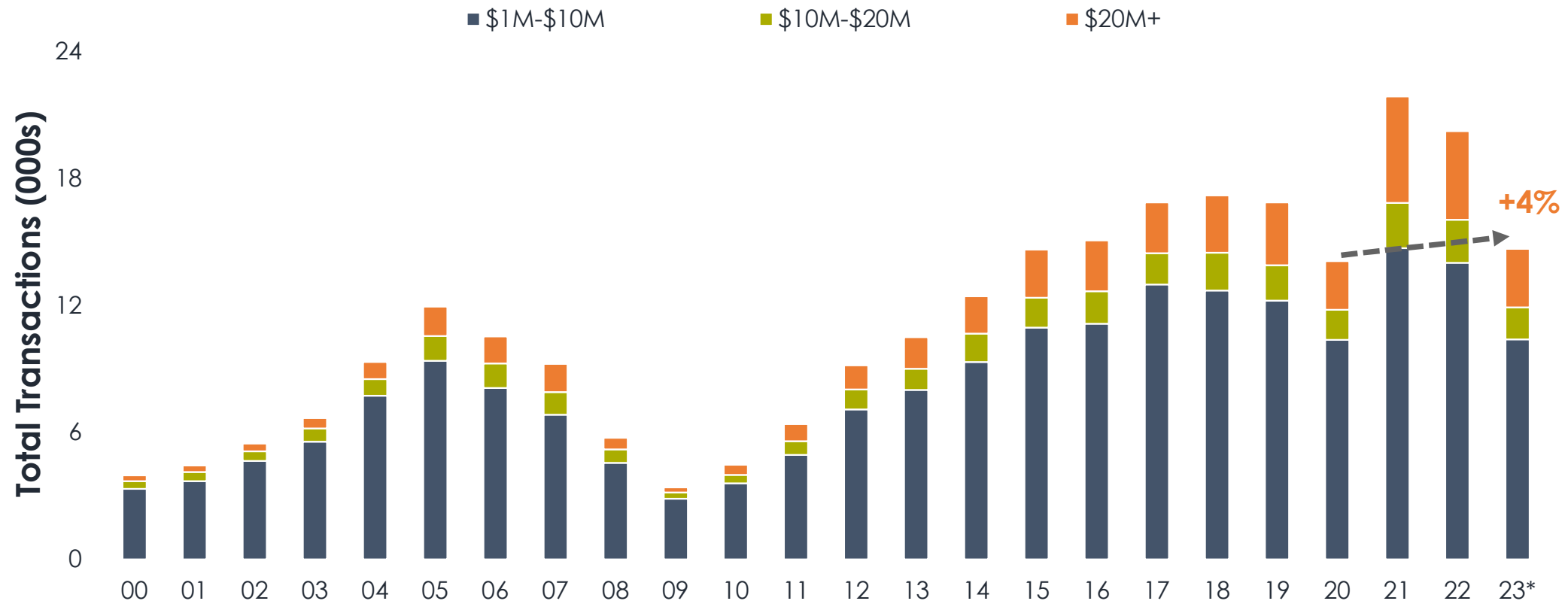


Marcus & Millichap
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* Through 2Q
Sources: Marcus & Millichap Research Services, RealPage, Inc.

U.S. APARTMENT INVESTMENT TRENDS

ANNUAL TRANSACTION ACTIVITY BY PRICE TRANCHE

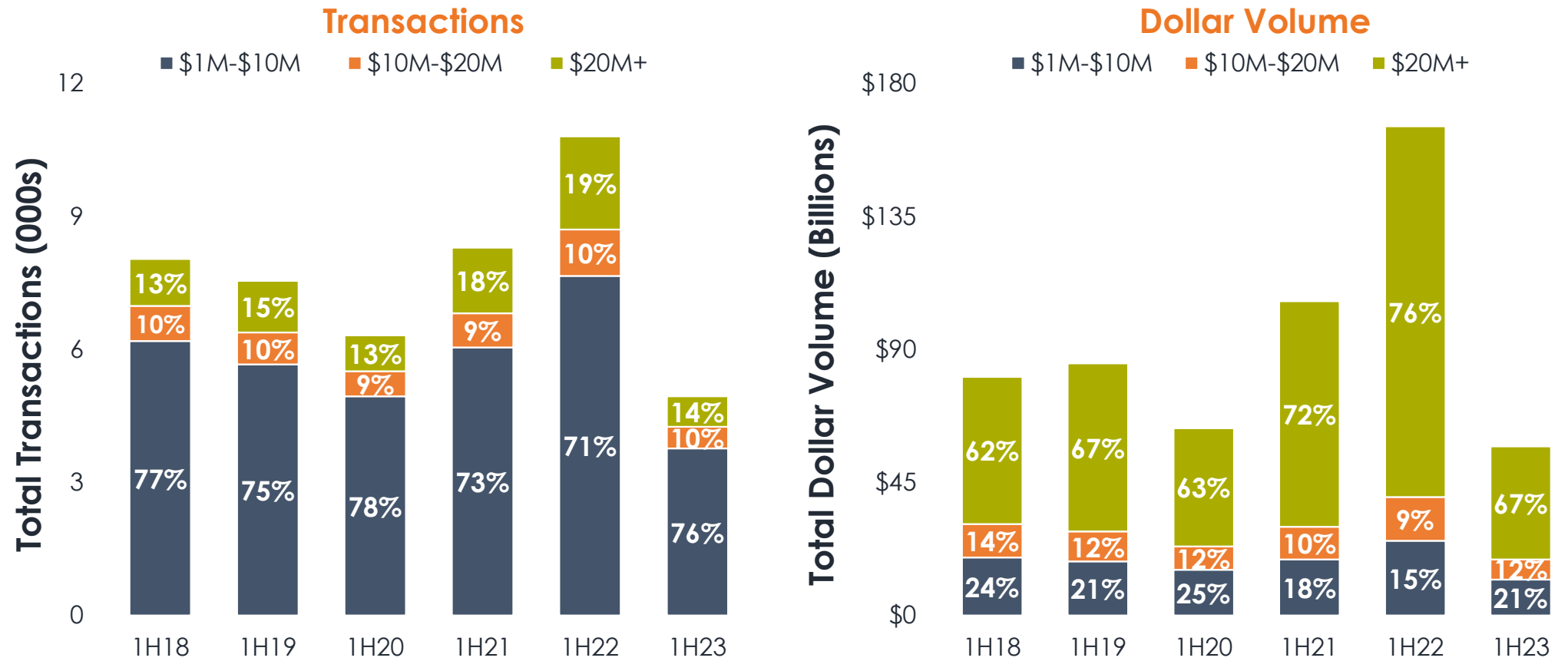


+4%

* Trailing 12 months through 2Q
 Includes sales \$1 million and greater
 Sources: Marcus & Millichap Research Services, CoStar Group, Inc., Real Capital Analytics

Marcus & Millichap
 Jordan Callaway | Eric Bell

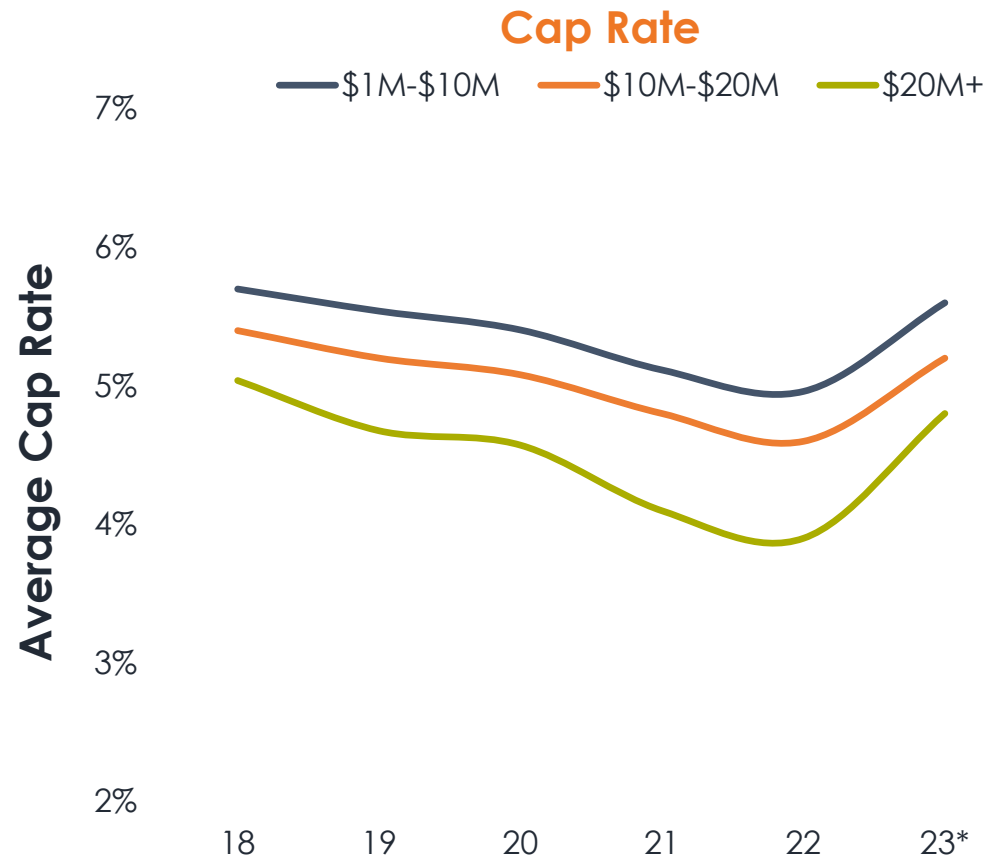
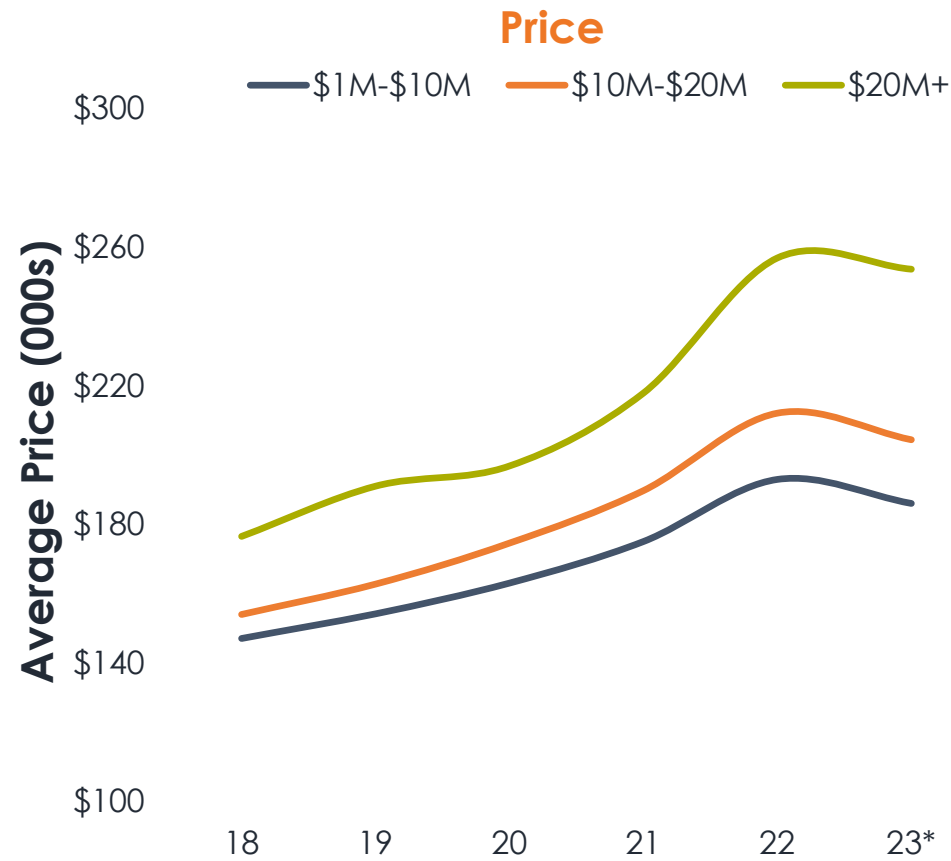
U.S. APARTMENT INVESTMENT TRENDS FOR FIRST HALF OF YEAR: TRANSACTIONS AND DOLLAR VOLUME BY PRICE TRANCHE



Includes sales \$1 million and greater
Sources: Marcus & Millichap Research Services, CoStar Group, Inc., Real Capital Analytics

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U.S. APARTMENT PRICE AND CAP RATE TRENDS BY PRICE TRANCHE



* Preliminary estimate through 2Q
 Includes sales \$1 million and greater
 Sources: Marcus & Millichap Research Services, CoStar Group, Inc., Real Capital Analytics

CRE SALES TRENDS

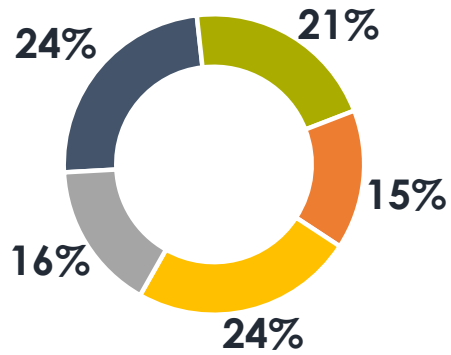
ARE THE MECHANICS STILL FAVORABLE?

Jordan Callaway & Eric Bell

U.S. QUARTERLY CRE TRANSACTION ACTIVITY BY PROPERTY TYPE

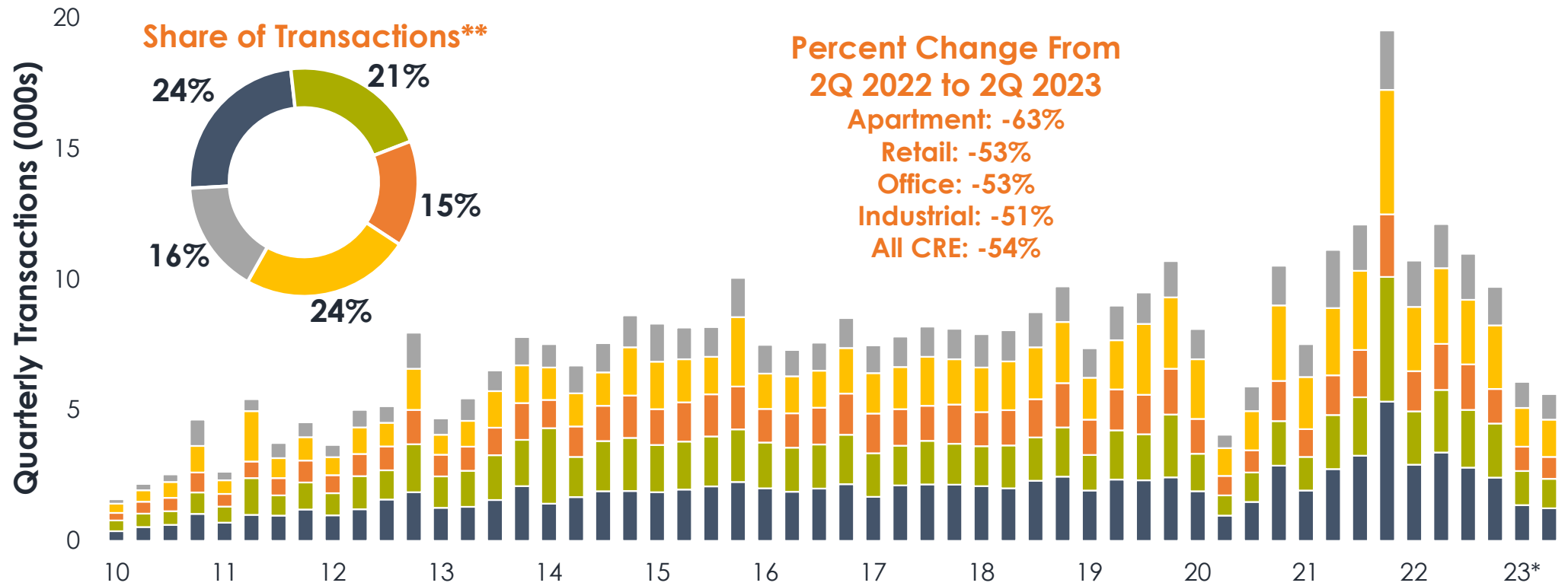
■ Apartment ■ Retail ■ Office ■ Industrial ■ Other

Share of Transactions**



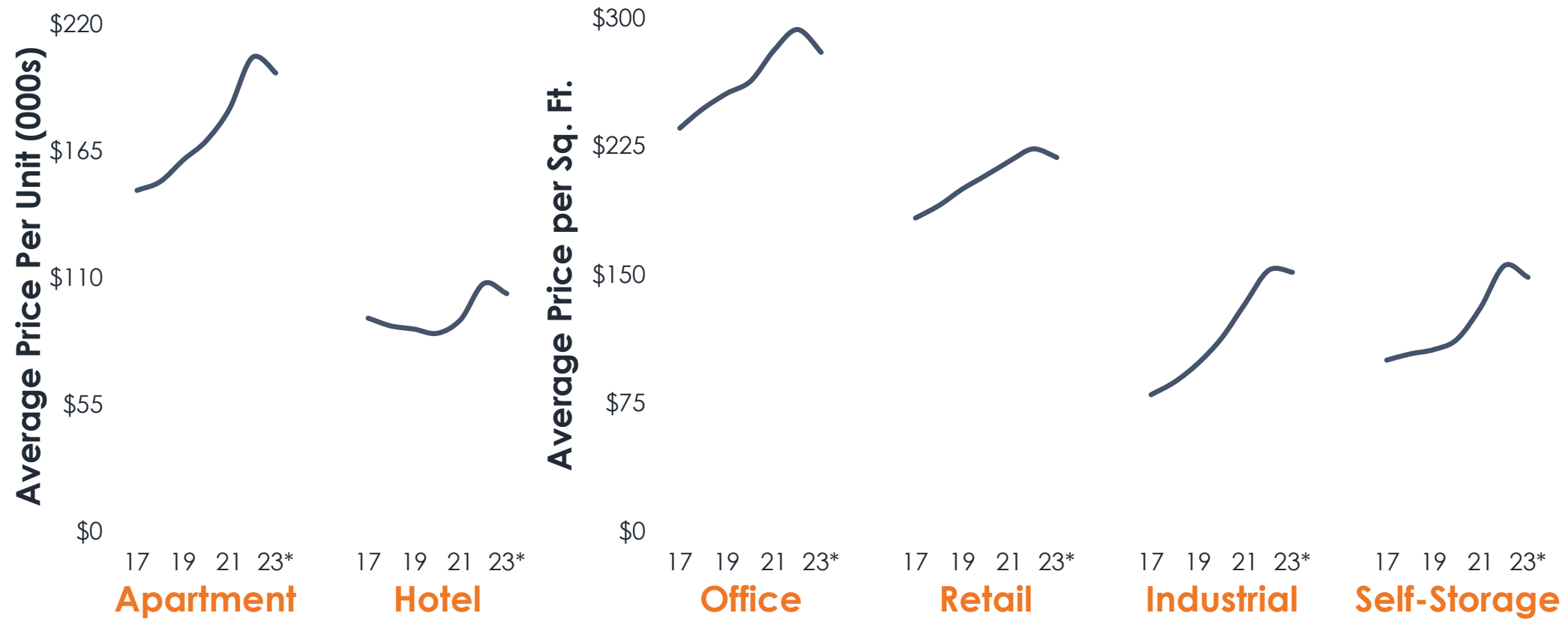
Percent Change From 2Q 2022 to 2Q 2023

Apartment: -63%
 Retail: -53%
 Office: -53%
 Industrial: -51%
 All CRE: -54%



* Through 2Q
 ** For trailing 12 months through 2Q 2023
 Includes Apartment, Retail, Office, Industrial, Hotel, Self-Storage and Seniors Housing sales \$2.5 million and greater; Omits STORE deal
 Other includes Hotel, Self-Storage and Seniors Housing
 Sources: Marcus & Millichap Research Services, Real Capital Analytics

U.S. AVERAGE CRE PRICE CORRECTION IS IN PROCESS; DATA HAS YET TO SETTLE, BUT MARKET COULD SOON STABILIZE



* Through 2Q
 Includes sales \$1 million and greater
 Sources: Marcus & Millichap Research Services, CoStar Group, Inc., Real Capital Analytics

COMMERCIAL REAL ESTATE CAP RATES BY PROPERTY TYPE

CAP RATES 2Q 2020 VS. 2Q 2023



Apartment:
5.1% ⇨ 5.4%



Office:
7.1% ⇨ 7.4%*



MT-Retail:
7.0% ⇨ 7.1%



Industrial:
6.9% ⇨ 6.7%



Hotel:
8.4% ⇨ 8.0%



Self-Storage:
6.2% ⇨ 5.9%



STNL:
6.1% ⇨ 6.4%

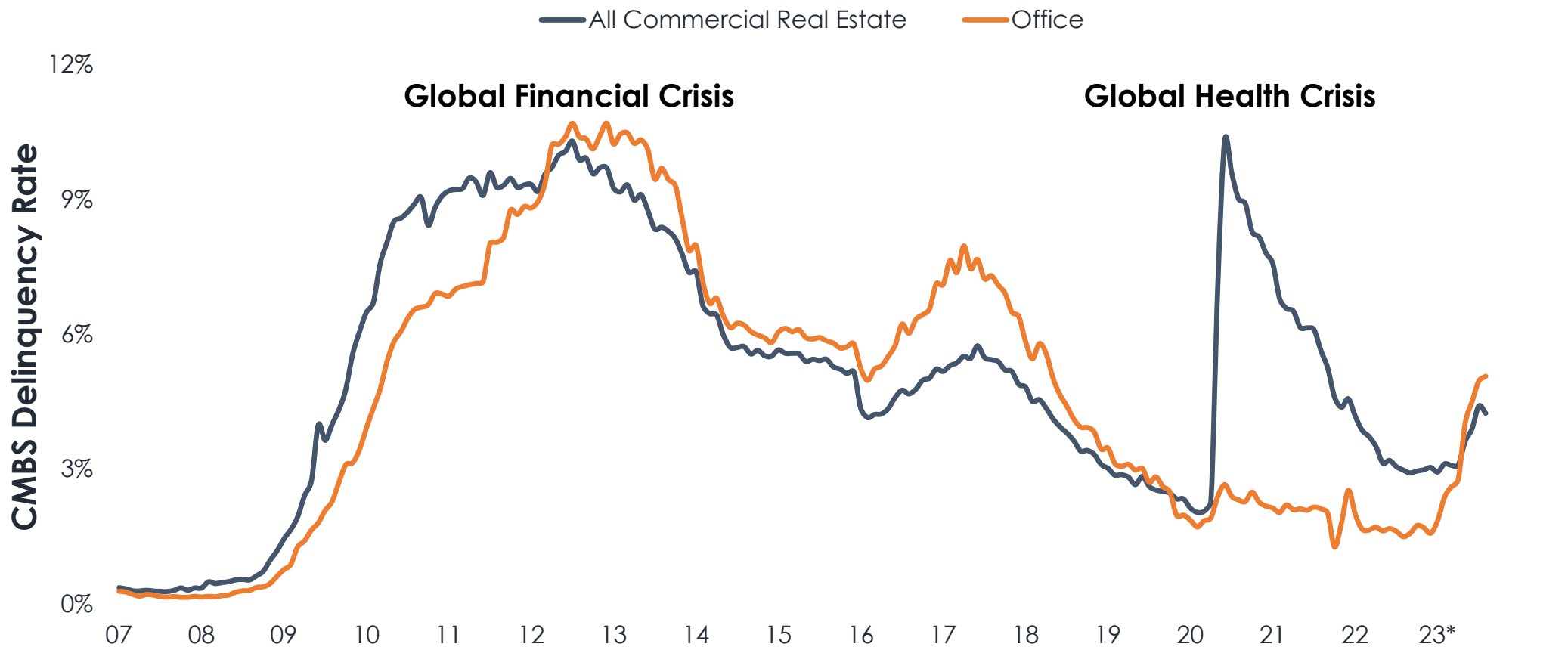


Medical Office:
7.0% ⇨ 7.3%

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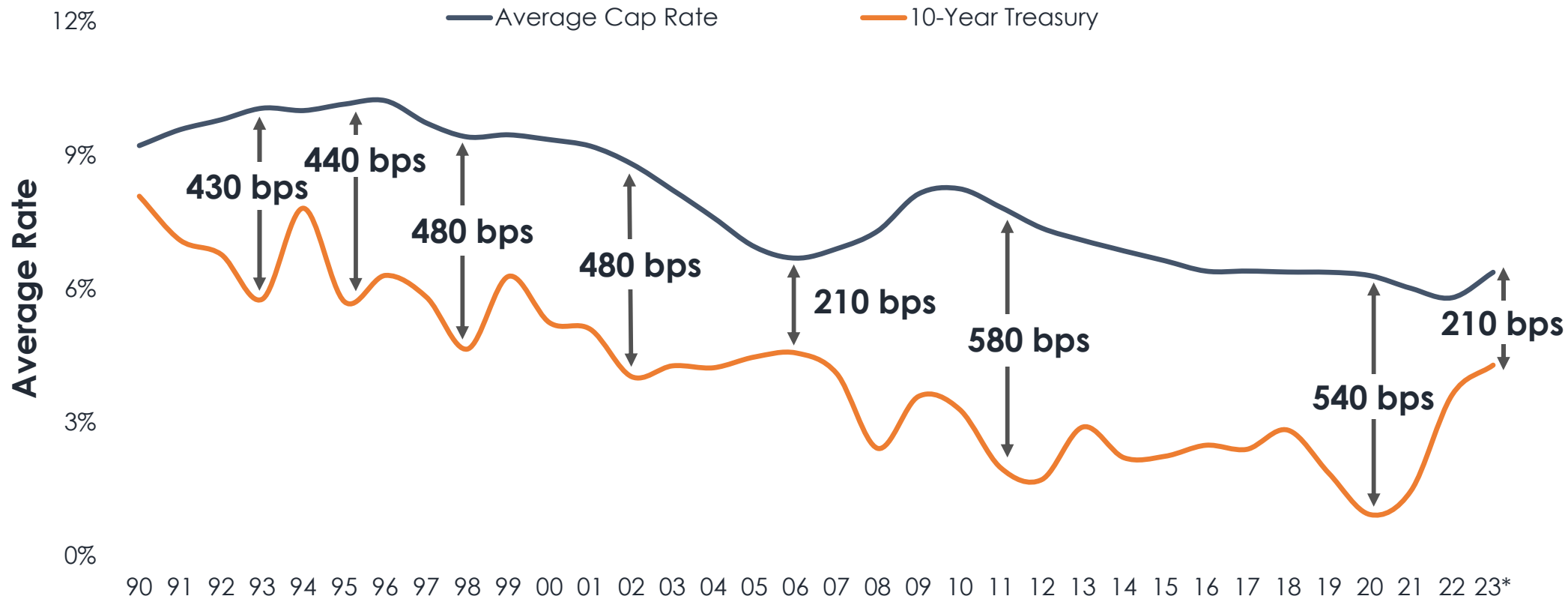
* Caution: Current Cap rate reflects traded deals, but the market has not stabilized and values have been falling For 2Q 2020 and 2Q 2023; Estimated cap rate includes sales \$1 million and greater
Sources: Marcus & Millichap Research Services, Real Capital Analytics

COMMERCIAL REAL ESTATE CMBS LOAN DELINQUENCY RATE RISING, BUT WELL BELOW PREVIOUS PERIODS OF MARKET VOLATILITY



* Through August
For loans 30+ days delinquent
Sources: Marcus & Millichap Research Services, Trepp

COMMERCIAL REAL ESTATE AVG. CAP RATE VS. 10-YEAR TREASURY; SPREAD BEGINNING TO OPEN BACK UP, BUT AMPLITUDE IN QUESTION



* Cap rate through 2Q; 10-year treasury through September 11
Includes apartment, retail, office and industrial sales \$1 million and greater
Sources: Marcus & Millichap Research Services, CoStar Group, Inc., Real Capital Analytics, Federal Reserve

JORDAN CALLAWAY | ERIC BELL

WWW.BELLCALLAWAY.COM

MARCUS & MILLICHAP

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