

Client Alert

Biden's Legislative Proposals – How The Proposed Changes May Affect Estate and Tax Planning – and New Proposed Legislation Affecting Donor Advised Funds and Private Foundations

June 23, 2021

Biden's Legislative Proposals

The Treasury Department recently published the Biden administration's revenue and tax policy proposals for fiscal year 2022. Some of those proposals, if enacted by Congress, would have significant estate and tax planning implications. The proposals include:

- **Tax Rate Increases**
 - The top ordinary individual income tax rate is increased to 39.6% (43.4% including the net investment income tax).
 - The tax rate on long-term capital gains and qualified dividends of taxpayers with adjusted gross income of more than \$1 million is increased to the ordinary income tax rate, but only to the extent the taxpayer's income exceeds \$1 million. This proposal is effective for gains required to be recognized after April 28, 2021.
- **Gain Realization Events**
 - Gifts: The donor of an appreciated asset would realize capital gain, as of the date of the gift, equal to the excess of the asset's fair market value on the date of the gift over the donor's basis in the asset (subject to a \$1 million lifetime exclusion, described below) unless the appreciated asset is transferred to a U.S. spouse or charity.
 - Trust (Entity) Transfers: Transfers of property into, and distributions in kind from, a trust or other entity (other than a grantor trust wholly owned and revocable by the grantor) would be deemed to be realization events and subject to tax on gains.
 - Death: The deceased owner of an appreciated asset would realize capital gain, on the date of death, equal to the excess of the asset's fair market value on the date of death over the decedent's basis in the asset (subject to a \$1 million exclusion, described below).
 - Passage of Time: Gains on unrealized appreciation would be deemed recognized by the owner (including any trust, partnership, or other non-corporate entity) if that property has not been the subject of a recognition event within the prior 90 years, with the period beginning January 1, 1940. According to the Treasury Department, this means that the first possible deemed realization date would be December 31, 2030 for appreciated assets owned in trust or by a partnership or other non-corporate entity.
 - Exclusions:
 - A \$1 million exclusion from the deemed realization of capital gains on property transferred by lifetime gifts or held at death would be granted to each person and would be portable to a decedent's surviving spouse.
 - In addition to the \$1 million exclusion described above, the \$250,000 exclusion from capital gains for principal residences would remain and would be portable to a decedent's surviving spouse.
 - Transfers of tangible personal property (excluding collectibles) will not trigger a capital gains tax.

- Transfers to a U.S. spouse and transfers to charity will not trigger a capital gains tax (though transfers to split-interest trusts would only allow an exclusion for the charity's share).
 - Treatment of Losses: Capital losses and carry-forwards would continue to be allowed and taxes on any deemed realized gains would be deductible on a decedent's estate tax return.
- **Effective Date**

The proposals (except as noted above) would be effective for transfers and assets held at death after December 31, 2021, and property owned by trusts, partnerships, and other non-corporate entities on January 1, 2022.

The likelihood of any of these proposals being enacted is uncertain. It should be noted that there are also other legislative proposals affecting estate planning in the House and Senate. At this time, it remains unclear what future tax laws will provide. We will continue to monitor the situation and apprise you of any relevant developments.

Accelerating Charitable Efforts Act Introduced by Senators Grassley and King

On June 9, 2021, Senators Chuck Grassley and Angus King introduced the "Accelerating Charitable Efforts Act" or "ACE Act", legislation designed to expedite charitable giving from donor-advised funds (DAFs) and private foundations. Highlights of the recently introduced legislation include the following proposals:

- **Limitations on Charitable Deduction for DAF Contributions**
 - 15 Year Distribution Requirement: In order to receive an upfront charitable contribution deduction from income tax, contributions would need to be made either to "qualified" DAFs defined as DAFs requiring contributions be distributed (or advisory privileges released) within 15 years of when such contributions are made or to "qualified community foundation" DAFs established at qualified community foundations and meeting one of the additional requirements noted below.
 - Limitation on Deduction For Non-Publicly Traded Assets: The deduction for contributions of non-publicly traded assets to such a DAF would not be allowed until such assets were sold by the fund sponsor and would be limited to the amount of gross sales proceeds.
 - 50 Year Duration DAFs: Alternatively, DAF accounts and related advisory privileges could be established to continue for as long as 50 years, but in such case, no deduction would be allowed until distributions were made and only to the extent of such distributions. In-kind contributions to "50-year" DAFs (or "nonqualified" DAFs) would not be eligible for an income tax deduction until such assets were sold and distributed and would be limited to the amount of such distribution.
- **Additional Requirements for Qualified Community Foundation DAFs**
 - DAF accounts established at qualified community foundations would be required to distribute at least 5% of their value each year.
 - Exemption is made for any such accounts having a value of \$1 million or less.
- **Treatment of DAF Contributions to Public Charities**

As proposed, for purposes of determining a recipient charity's level of public support, contributions from a DAF would be treated as received from one person (which may include the donor of the DAF, if identified by the sponsoring organization). In contrast, under current law, contributions from a DAF to a charity are treated as made by other public charities for the purposes of determining the recipient charity's level of public support.
- **New Private Foundation Provisions**
 - Exclusion of DAF Distributions From 5% Qualifying Distributions: Private foundations, which are already required to make qualifying distributions of 5% of their value each year, would be precluded from meeting such obligations through distributions to DAFs or by the payment of administrative expenses to certain disqualified persons, including salaries paid to family members of founders.
 - Exemption from Net Investment Income Tax For Certain Private Foundations: Private foundations making qualifying distributions of at least 7% of their value each year and new private foundations having a duration of 25 years or less would be exempt from the net investment income tax of 1.39%.

- Additional Disclosures Required for Contributions to DAFs: Private foundations, which were already required to disclose contributions to DAFs on their annual returns, would now also be required to disclose any “donation advice” given to the DAF sponsor. This provision, although not entirely clear, would probably include any donation advice given to the DAF by a trustee, director or officer of the private foundation that made such contribution, particularly if the trustee, director or officer serves as advisor to the DAF. Note that this disclosure would need to be made on any returns filed after December 31, 2021.
- **Effective Date**
 - The proposals affecting the availability of the charitable deduction for contributions to DAFs and the proposal regarding the treatment of contributions from DAFs for purposes of the public support test, if passed, would apply to contributions made after the date of enactment.
 - If passed, the changes regarding the treatment of private foundation administrative expenses would apply to tax years beginning after December 31, 2021 while the changes affecting private foundation distributions to DAFs would apply to distributions made after December 31, 2021 and returns required to be filed after December 31, 2021.
 - The remaining proposals, if passed, would apply to tax years beginning after the date of enactment.

Prior proposals to accelerate distributions from DAFs and private foundations have been viewed as controversial and have divided the charitable sector. Experiences coming out of the pandemic, however, have potentially reshaped views on the role of DAFs and private foundations in the charitable sector and, as a result, such legislation may garner more support than in the past. At present, it is difficult to surmise the likelihood of its passage. We will continue to monitor the legislation and will apprise you of any relevant developments.

Welcome Jessica Soojian

We wish to welcome Jessica Soojian, who recently joined Milbank as a partner in the Trusts & Estates Group. Jessica is a graduate of Georgetown University and Yale Law School, and we are thrilled to have her as part of our team.

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