

# Trusts & Estates Update - Proposed Tax Changes

## Wegman Hessler Client Alert

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After weeks of negotiations, the most recent iteration of the Build Back Better Act, was released by Congress on November 3, 2021 and represents a notable shift from the earlier House Ways and Means tax proposals released on September 13, 2021 (this previous version of the tax proposals was discussed in our September 29, 2021 Client Alert). The House plans to pass the final version of the Act the week of November 15. **Please note that this is proposed legislation – subject to change.**

The adjustments to the most recent proposal were made in an effort to reduce the overall price tag of the legislation, and as such, the new revenue provisions are substantive changes from the previous drafts. The new proposal is intended to reduce the cost from \$3.5 Trillion to \$1.85 Trillion. The most recent version notably pushed aside the Senate Finance Committee's "Billionaires Tax" proposal released on October 27, 2021. Below is a discussion of what is in the latest version of the Act and what was left out.

### WHAT IS IN

#### Individual and Small Business Taxes:

- Income above \$400,000 single/\$500,000 married filing jointly – 3.8% net investment income tax (“NIIT”) applied on trade or business income not otherwise subject to Medicare taxes.
  - This is an expansion of the current definition of NIIT that would apply the tax to income derived from business interests (S corporations, partnerships, etc.) and on undistributed income from taxed trusts and estates.
  - Under the current law, NIIT generally only applies to passive investment income (interest, dividends, etc.).
  - Net operating losses would no longer be accounted for in determining NIIT.
- Annual income in excess of \$10 million – 5% surtax applied.
- Annual income in excess of \$25 million – additional 3% surtax applied.

Corporate Taxes:

- Corporate stock buybacks – 1% surcharge.
- Large corporations – 15% minimum corporate tax.
- Sale of Qualified Small Business Stock – limits on applicability of section 1202 gain. exclusion for taxpayers with adjusted gross income over \$400,000.

Trust Taxes:

- The annual income surtax applies at much lower income thresholds for non-grantor trusts. The 5% surtax applies to trust income above \$200,000 and the additional 3% surtax applies to trust income in excess of \$500,000.
- The highest federal tax rate for non-grantor trusts becomes 45% (48.8% including NIIT).
- These proposed changes highlight the benefits of using grantor trusts and strategic planning for beneficiary distributions and distributable net income (“DNI”)

## WHAT IS OUT

The inclusions discussed above are important, but so are the critical items removed during the House negotiations. Many of income tax increases proposed in the September 13, 2021 version of the Act were removed. While this reduces the likelihood of inclusion in the final version of the legislation, anything remains possible, and it is not unheard of for previously omitted provisions to be added back in at the last minute. Below are some of the key tax provisions removed from the most recent release of the Act on November 2, 2021:

- Reduction of gift and estate tax exemption from the current \$11.7 million per person (though this is still subject to sunset to pre-2017 rates in 2025).
- Changes to the tax treatment of grantor trusts which would limit their usefulness for estate tax planning purposes.
- Limits to valuation discounts for transfer tax purposes.
- Increase in corporate tax rate.
- Limits to QBI deduction.
- Roth conversion restrictions and RMDs for large IRAs.
- Increase in capital gains rate for high income taxpayers.
- Increase in top marginal income tax rate to 39.6%.
- Wealth tax on unrealized gains of ultra-high net worth individuals.

**Again, please note that this is proposed legislation, subject to change.**

It is more important than ever to stay connected with your trusted advisors. If you have questions about these changes and the impact on your income, estate or gift tax planning, or estate planning in general, please contact the Trusts & Estates group at 216-642-3342, or reach out directly to Rachel E. Lyons at [relyons@wegmanlaw.com](mailto:relyons@wegmanlaw.com) or Erika Flynn Apelis at [efapelis@wegmanlaw.com](mailto:efapelis@wegmanlaw.com).