

Three Improvements the Administration Wants to Make Regarding Administration for Trusts and Decedents' Estates

When a person dies, there are often several tasks that need to be completed to properly wind down their affairs (their estate)—funerals and other preparations need to be planned, bank and investment accounts closed, property transferred, arrangements made for pets, tax returns filed, and final bills paid. There are several proposals in the Greenbook that are meant to help alleviate some of the complications that have arisen in estate and trust tax matters and simplify the process.

Required Reporting on Trust Value

One Greenbook proposal would require reporting the estimated total value of a trust's money and property (otherwise known as *assets*) and other information about trusts to the Internal Revenue Service (IRS) on an annual basis. Currently, most domestic trusts must file an annual income tax return. However, trusts do not have to report the nature or value of the trust's accounts and property.¹ Because of this, "the IRS has no statistical data on the nature or magnitude of wealth held in domestic trusts."² This lack of statistical data has made it difficult for the administration "to develop administrative and legal structures capable of effectively implementing appropriate tax policies and evaluating compliance with applicable statutes and regulations."³ This in turn further hampers the administration's "efforts to design tax policies intended to increase the equity and progressivity of the tax system."⁴ The proposal outlined in the Greenbook would require certain trusts to report certain information to the IRS on an annual basis to facilitate the analysis of tax data, the development of tax policies, and the administration of the tax system.⁵

The Greenbook continues its proposals by providing that the information could be reported on an annual income tax return or other form, as determined by the Secretary, and would include the name, address, and taxpayer identification number of each trustee and trustmaker, and general information about the nature and estimated total value of the trust's accounts and property.⁶ Also, each trust (regardless of value or income) would be required to report the inclusion ratio of the trust at the time of any trust distribution to a non-skip person, as well as information about trust modifications or transactions with other trusts that occurred that year.⁷ "The proposal would apply for taxable years ending after the date of enactment."⁸ It is anticipated that increased reporting would require increased participation by attorneys in the preparation of fiduciary income tax returns.⁹

¹ Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2024 Revenue Proposal [hereinafter *General Explanations*] at 115, <https://home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf>.

² *Id.*

³ *Id.* at 117.

⁴ *Id.*

⁵ *Id.* at 118.

⁶ *Id.*

⁷ *General Explanations*, *supra* n. 1, at 118.

⁸ *Id.* at 119.

⁹ James Dougherty and Marissa Dungey, *The 2024 Green Book Limits Use of Defined Value Clauses*, WealthManagement.com (Mar. 17, 2023), <https://www.wealthmanagement.com/estate-planning/2024-green-book-limits-use-defined-value-clauses>.

Require Defined Value Formula Clause Be Based on Variable Without IRS Involvement

A second proposal aimed at simplifying issues involving estate and trust matters requires that a defined value formula clause be based on a variable not requiring IRS involvement. Many taxpayers like to use gifts, bequests, or disclaimers as part of a particular tax strategy. To achieve this result, sometimes a defined value formula clause is necessary to determine how much money or property should be transferred. A defined value clause is the amount transferred based on a value as determined for tax purposes and using a formula based on IRS enforcement activities.¹⁰ After losing a number of court decisions upholding taxpayer use of formula clauses for hard-to-value assets, the Biden administration has found the defined value formula poses a number of challenges as it currently exists because it potentially (a) allows a gift giver to escape the gift tax consequences of undervaluing transferred property, (b) makes examination of the gift tax return and litigation by the IRS cost-ineffective, and (c) requires the reallocation of transferred property among gift recipients (donees) long after the date of the gift.¹¹ Additionally, the administration feels that “defined value formula clauses that depend on the value of an asset as finally determined for Federal transfer tax purposes create a situation where the respective property rights of the various donees are being determined in a tax valuation process in which those donees have no ability to participate or intervene.”¹² To address these concerns, the Greenbook proposal provides “that if a gift or bequest uses a defined value formula clause to determine value based on the result of involvement of the IRS, then the value of such gift or bequest will be deemed to be the value as reported on the corresponding gift or estate tax return.”¹³ Transfers made by gift or occurring upon a death after December 31, 2023, would be subject to this proposal.

Eliminating Present Interest Requirement for Annual Gifts

A third Greenbook proposal to simplify estate and trust matters is to eliminate the requirement that gifts must be of a present interest to qualify for the gift tax annual exclusion. Currently, annual per-donee gift tax exclusion is available only for gifts of a present interest. According to the Greenbook, “[a] present interest is an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property.”¹⁴ If a taxpayer wants to make a gift in trust for the beneficiary, using the annual exclusion amount, the trust beneficiary must usually be given timely notice of a limited right to withdraw the trust contribution (referred to as a *Crummey* notice) to qualify the gift as a present interest.¹⁵ Complying with the notice requirement and record maintenance can pose a significant cost for taxpayers and the administration, and enforcement of these rules also imposes a large cost to the IRS.¹⁶ Under the new proposal, gifts would no longer have to be of a present interest to qualify for the gift tax annual exclusion. “Instead, the proposal would define a new category of transfers (without regard to the existence of any withdrawal rights) and would impose an annual limit of \$50,000 per donor, indexed for inflation after 2024, on the gift giver’s transfers of property within this new category that would qualify for the gift tax annual exclusion.”¹⁷

¹⁰ *General Explanations*, *supra* n. 1, at 116.

¹¹ *Id.* at 117.

¹² *Id.*

¹³ *Id.* at 119.

¹⁴ *Id.* at 116.

¹⁵ *Id.* at 117.

¹⁶ *General Explanations*, *supra* n. 1, at 117, 118.

¹⁷ *Id.* at 119.

Even though we do not know for certain which, or if any, of these proposals will come to fruition, we are carefully monitoring the latest legislation to ensure that you are properly prepared if and when Congress does act.