

TOOLBOX SEMINAR HOT TOPIC

Presented by: Lorne Saltman
July 20, 2021



Topics to Discuss

1. Federal Budget Changes
 - Limits on Interest Deductibility
2. International Tax Initiatives
 - Global Minimum Tax Rate of 15%

Federal Budget Tax Changes

- **Interest Deductibility Limits**
 - Starting in 2023 a corporation that is affiliated with a non-resident will be able to deduct only 40% of “tax EBITDA”
 - Namely, 40% of taxable income before taking into account interest expense, interest income and income tax, and deductions for depreciation and amortization
 - After 2023, the limit is reduced to 30%
 - Two important exclusions:
 - CCPC’s and their associated corporations having taxable capital of less than \$15 million, and
 - Groups of corporations and trusts whose aggregate net interest expense is \$250,000 or less



International Tax Initiatives

Global Minimum Tax of 15%

- OECD/G20 Framework on base erosion and profit shifting (“BEPS” project)
- Starting in 2023, a Multinational Corporation with annual sales of at least €750 million will be required to pay a minimum tax of 15% determined on a country-by-country basis
- There will be a formulaic substance carve-out that will exclude an amount of income that is at least 5% (in the transition period of five years, at least 7.5%) of the carrying value of tangible assets and payroll in a jurisdiction, and a *de minimis* exclusion





Questions?



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Snow Washing is Now More Difficult in Canada, But at What Cost?

The Effects of the 2021 Annual Budget

Presented by: Kenneth Jull & Ian Spiegel
July 20, 2021



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1. Definition of “snow washing”
2. 2018 Annual Budget’s Approach
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7. Overview of Risk and Compliance
8. Potential Risks of Public Registry

Snow Washing

What is it?

- “Snow washing” is a term that refers to the purifying of illegitimate funds through using shell corporations to launder money in Canada
- The term amalgamates snow, which represents purifying (and the Canadian climate), with washing, referring to the often used term “money laundering”
- For many years, Canada has been a haven for those wishing to launder their illegitimate funds

2018 Annual Budget

Update to the *Canada Business Corporations Act* (the “CBCA”)

- Partly as a response to information leaks (e.g. the Panama Papers), the 2018 Annual Budget added section 21.1 to the *CBCA*:

Register

21.1 (1) The corporation shall prepare and maintain, at its registered office or at any other place in Canada designated by the directors, a register of individuals with significant control over the corporation that contains

- (a) the names, the dates of birth and the latest known address of each individual with significant control;
- (b) the jurisdiction of residence for tax purposes of each individual with significant control;
- (c) the day on which each individual became or ceased to be an individual with significant control, as the case may be;
- (d) a description of how each individual is an individual with significant control over the corporation, including, as applicable, a description of their interests and rights in respect of shares of the corporation;
- (e) any other prescribed information; and
- (f) a description of each step taken in accordance with subsection (2).

2018 Annual Budget

Update to the *Canada Business Corporations Act* (the “CBCA”)

- Section 21.1 came into effect on June 13, 2019
- It imposed the requirement for corporations to create a register of every registered or beneficial owner with “significant control” over the corporation
 - Public corporations were exempted

Criticisms of the 2018 Approach

A “Tepid” Response

- The addition of section 21.1 in the CBCA was met with harsh criticism
 - The registry only kicks in with “significant control” which has been described as 25% ownership. This is much higher than the 10% disclosure required of public companies
 - This is not a “report” – the registry is not public. This is a “tepid” response that falls short of other G7 countries
 - <https://www.terracestandard.com/news/canada-slowly-pushes-for-corporate-transparency-as-part-of-anti-corruption-push>.

2021 Annual Budget

Creation of a Public Registry

- The 2021 Annual Budget was released on April 19, 2021
 - The Budget “proposes to provide \$2.1 million over two years to Innovation, Science and Economic Development Canada to support the implementation a publicly accessible corporate beneficial ownership registry by 2025”
- This will provide a significant change to how regulated entities under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the “PCMLTFA”) carry out their Know-Your-Client (KYC) obligations
 - With a public registry, these entities will be able to access beneficial ownership more easily.

Proposed Improvements to the Public Registry

Closer to the other G7 Countries

- With the public registry, Canada moves closer to the other G7 countries in terms of transparency
 - This should significantly improve Canada's attempts to curb money laundering and similar illegal activity

Proposed Improvements to the Public Registry

Closer to the other G7 Countries

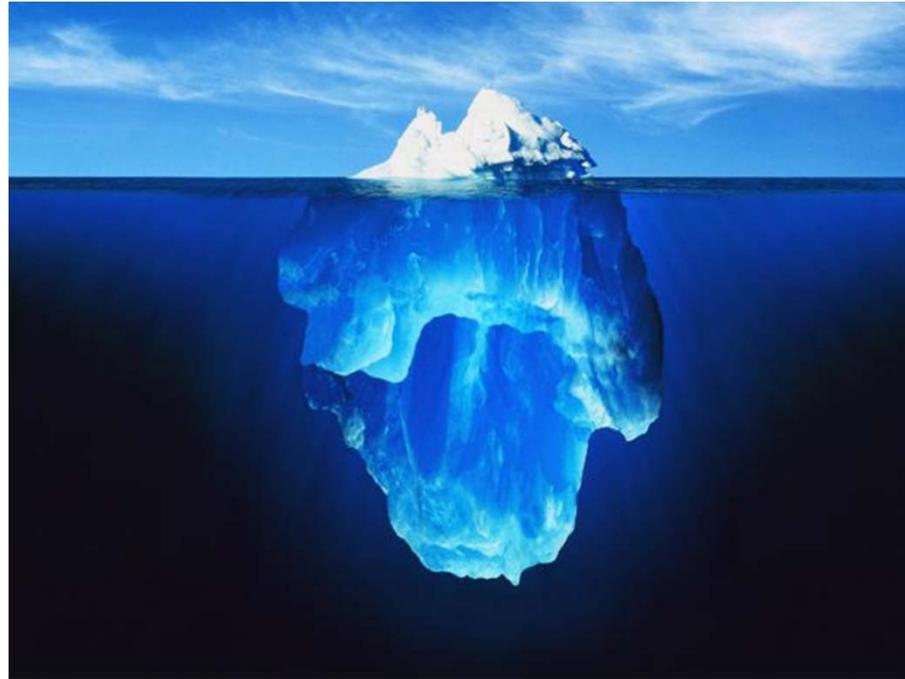
- James Cohen, executive director of Transparency International Canada, suggests these improvements:
 - The registry must be fully accessible and easy to use;
 - The 25% threshold is arbitrary and may be more useful if it was 10%;
 - The registry should include data verification systems and carry penalties for false information;
 - The federal government must work with the provinces and territories to ensure proper use and a tip-line should be set up to bolster investigations; and
 - The registry as proposed is only for private corporations. It should be expanded to include trusts and partnerships
 - <https://ipolitics.ca/2021/05/17/fighting-tax-evasion-and-corruption-with-a-beneficial-ownership-registry/>.

Proposed Risk-Based Approach to Registry

Made by the Financial Action Task Force (FATF) – June 25, 2021

- Risk-based approach for foreign legal persons
 - Cross-border beneficial ownership structures are common
 - FATF suggests limiting the scope of registries to only foreign-registered legal persons with a sufficient link to the country
 - Should countries be required to apply measures to assess the money laundering and terrorist funding risks to all types of legal persons created in the country and also to at least some foreign-created legal persons and take appropriate steps to manage and mitigate the risks?
 - What constitutes a sufficient link with the country? How should countries determine which foreign-created legal persons have a sufficient link with the country? Is there an alternative standard to “sufficient link” that could be used? What are the practical issues met/envisaged regarding the identification and risk assessment of foreign created legal persons?
 - <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/white-paper-r24.html>

Risk



Overview of Risk and Compliance

Proceeds of Crime (Money Laundering) and Terrorist Financing Act

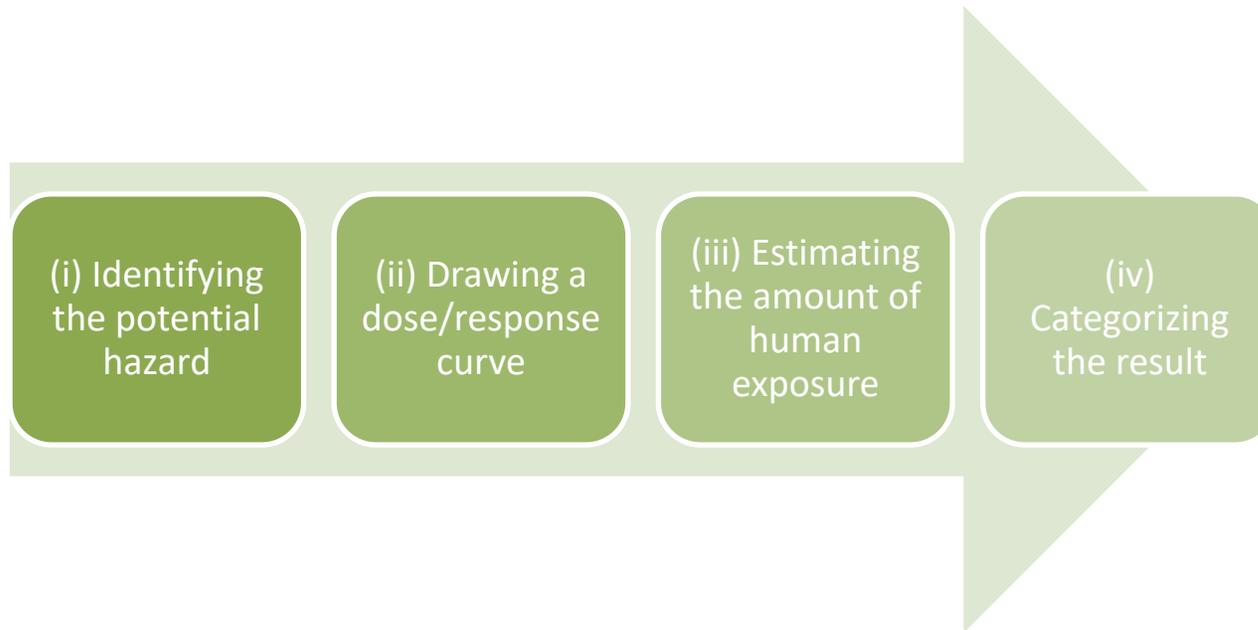
- Compliance program
 - **9.6 (1)** Every person or entity referred to in section 5 shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this Part and Part 1.1.
- Risk assessment
 - **(2)** The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence or a terrorist activity financing offence.
- Special Measures
 - **(3)** If, at any time, the person or entity considers that the risk referred to in subsection (2) is high, or in the prescribed circumstances, the person or entity shall take the special measures referred to in the regulations.



Overview of Risk and Compliance

Risk Assessment

- The basic and generally accepted model of risk assessment is divided into four activities:



Overview of Risk and Compliance

Compliance: Behavioural Theory, Gender and Diversity

- The use of matrix analysis is a core concept of risk management and central to this book. The matrix is a mathematical model that was first applied in engineering. Rao Kolluru was a pioneer in the development of a matrix approach to risk management.
- (Risk Assessment and Management Handbook: For Environmental, Health, and Safety Professionals, Rao Kolluru, Editor in Chief (McGraw-Hill, Inc. New York, Toronto, 1996).



Overview of Risk and Compliance

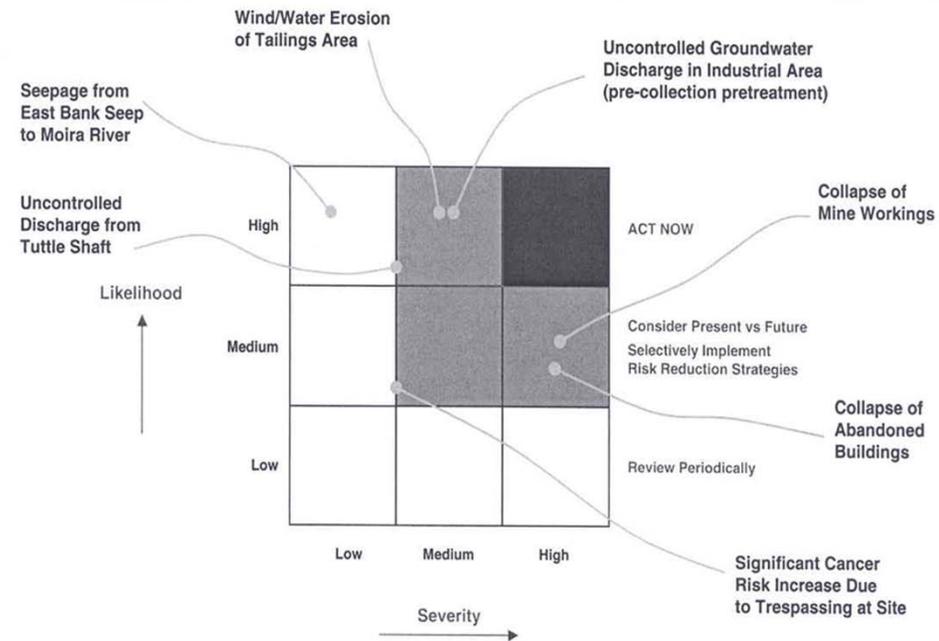
Compliance: Behavioural Theory, Gender and Diversity

- A key insight from this work is that a risk matrix provides priorities for action. The matrix identifies the issue that requires immediate action, and then sequentially identifies those issues with lesser priorities.
 - Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance* | (Toronto: Thomson Reuters, 2020), Chapter 15. Bribery and Corruption.

Overview of Risk and Compliance

Risk Management Priorities

FIGURE 6
RISK MANAGEMENT PRIORITIES – HISTORICAL SCENARIOS THAT HAVE BEEN MITIGATED



Overview of Risk and Compliance

Risk Management Flowchart

Impact			
<i>Significant</i>	Management effort worthwhile	Significant Management effort required	Act now: Extensive management essential
<i>Moderate</i>	Accept risks with monitoring	Management effort required	Significant Management effort required
<i>Minor</i>	Accept risks	Accept risks with monitoring	Management effort worthwhile
	<i>Low</i>	<i>Medium</i>	<i>High</i>
			Likelihood

Potential Risks of the Public Registry

Regulatory Overreach?

- While theoretically a good thing, is a public registry too far?
- The public registry does not provide:
 - Privacy protection for information on the registry; or
 - Challenges to the release of information

Potential Risks of the Public Registry

Regulatory Overreach?

- Information on the registry could be used for nefarious purposes, endangering businesses and, potentially, lives
 - Lorne Saltman points out the potential danger to the those from a corrupt country whose taxing authority could potentially access public personal information
 - Lorne Saltman, “The New Tax World: No More Secrecy, But Instead, Transparency and the Automatic Exchange of Information”, Presentation to Canadian Association of Management Consultants (February 14, 2019).

Conclusion

- Canada will be on par with other G7 countries in combatting money laundering, terrorism and other illegal activity
- Will there be future amendments to the registry to address the shortcomings and potential dangers outlined today?



Questions?



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Bill 245: Modernizing Wills and Power of Attorney Legislation for the 21st Century

Presented by: Lindsay Ann Histrop
July 20, 2021



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Today's Agenda

1. Virtual signing permanently a valid execution method
2. Courts given new substantial compliance authority to validate wills and other testamentary documents
3. New rules regarding wills of separated spouses
4. New rules regarding effect of formal marriage on validity of previously signed wills
5. Consultation paper on the legal authority to make decisions regarding deceased persons

Virtual Signing

April 7, 2020

- The government of Ontario passes Ontario Regulation 129/20 under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act*
- The regulation allows for signatures of wills executed under the *Succession Law Reform Act* (“SLRA”) and powers of attorney executed under *Substitute Decisions Act, 1992* (“SDA”) to be witnessed using “audio-video communication technology” and in counterpart

Virtual Signing

April 19, 2021

- Bill 245 given Royal Assent
 - Schedule 8 adds section 3.1 to the *SDA*
 - Schedule 9 amends section 4 of the *SLRA*
- Both of these changes authorize virtual signing under Ontario Regulation 129/20 permanently valid



Virtual Signing

April 19, 2021

- Requirements for signature using audio-visual communication technology:
 - At least one person who acts as a witness is a licensee within the meaning of the *Law Society Act* at the time
 - The signatures and subscription required under the specific legislation are contemporaneous (meaning circulation of the same document for witness signatures at different times are no longer acceptable)
 - The prescribed requirements, if any under the specific legislation, are met
- Documents may be completed in counterpart by signing complete and identical copies



Virtual Signing

Looking Ahead

- In person witnessing continues to be the preferred method of execution for wills and powers of attorney
- Issues include:
 - Challenges as to validity based on capacity
 - Challenges as to validity due to possible undue influence (who is in the room with the testator but not on camera?)
 - What if the documents signed by the testator and the witnesses are not identical
 - Acceptance of virtual and counterpart signed documents in other jurisdictions may be problematic



Court-Ordered Validity

Superior Court may validate imperfect testamentary documents

- The *SLRA* historically deemed documents not properly drafted or executed to be invalid
- As of January 1, 2022, Bill 245 adds section 21.1 to the *SLRA* allowing the Superior Court of Justice to deem a document not properly drafted or executed to be valid, if satisfied that the document properly sets out the testamentary intentions of the deceased
- How far the courts will go remains to be seen
- Electronically signed documents are not capable of being validated under section 21.1

Separated Spouses

Effect of Separation on Succession will be Aligned to Divorce

- Section 17 of the *SLRA* provides that, in general, a will is not revoked by presumption of intention
- Subsection 17(2) provides an exception to the rule where spouses are divorced,
 - a devise or bequest and an appointment as executor or trustee and powers of appointment in favour of a spouse are revoked upon divorce, and
 - a will is treated as though the former spouse has predeceased the testator
- As of January 1, 2022, Bill 245 adds subsections 17(3)-17(5) to the *SLRA* which treats separated spouses as if they were divorced



Separated Spouses

What is considered “separated” for the purposes of the SLRA?

- New subsection 17(4) of the *SLRA* sets out the criteria for determining whether spouses will be considered separated at the time of the testator’s death
- There are two criteria and both criteria must be present for the spouses to be considered separated
- Criteria # 1: Before the testator’s death,
 - the spouses lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death,
 - they entered into an agreement that is a valid separation agreement under Part IV of the *Family Law Act*,

Separated Spouses

What is considered “separated” for the purposes of the SLRA?

- a court made an order with respect to the spouses’ rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or
 - a family arbitration award was made under the *Arbitration Act, 1991* with respect to the spouse’s rights and obligations in the settlement of their affairs arising from the breakdown of their marriage
- **Criteria # 2:** At the time of the testator’s death, the spouses were living separate and apart as a result of the breakdown of their marriage
 - The question of fact as to whether or not the separation requirement is met will no doubt lead to increased litigation

Separated Spouses

Separation to have the Effect of Divorce on Succession Entitlement

- Prior to Bill 245, if a spouse died intestate (i.e. without a will), legally married but separated spouses could claim entitlement to the statutory intestate entitlement under section 45 of the *SLRA* or to an equalization payment on death under section 5 of the *Family Law Act* (“*FLA*”)
- As of January 1, 2022, Bill 245 adds section 43.1 to the *SLRA* and subsection 6(21) of the *FLA* which removes these succession entitlements for legally married spouses who are separated at the time of the first spouse’s death

Marriage and Existing Wills

Existing wills no longer revoked by marriage

- Prior to Bill 245, marriage of a testator would revoke an existing will under section 16 of the *SLRA*, except in the following circumstances:
 - There is a declaration that the will is made in contemplation of marriage,
 - The spouse of the testator elects in writing within one year of the testator's death to take their interest under the will, or
 - The will is made in exercise of power of appointment if property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate



Marriage and Existing Wills

Existing wills no longer revoked by marriage

- As of January 1, 2022, Bill 245 repeals section 16, allowing for the continued operation of an existing will upon the marriage of a testator
- This means it is even more important for couples entering into formal marriage to review and update their existing wills



Legal Authority to Make Decisions Regarding Deceased Persons

Priority of Persons

- The Ministry of Government and Consumer Services published a consultation paper in June, 2021 seeking feedback on proposed changes to the *Funeral, Burial and Cremation Services Act, 2002* (the “FBCSA”)
- Among the topics was a discussion on adding priority of persons with regards to legal authority of the final disposition of a deceased’s remains

Legal Authority to Make Decisions Regarding Deceased Persons

Current Requirements

- The *FBCSA* requires a contract be made to provide bereavement supplies and services
- As a matter of common law, the executor(s) named in the will is responsible for directing and authorizing disposition of remains, but the deceased's wishes for disposition as set out in the will are not binding
- Where there is no will, there is no one with authority
- There is currently no priority of persons establishing authority to control final disposition. This has led to many difficult situations



Legal Authority to Make Decisions Regarding Decedents

Proposed Changes

- Establish a clear hierarchy of priority of persons with the right to control final disposition of remains, including situations in which no one with a relationship to the deceased is available or willing to provide disposition instructions
- Require bereavement suppliers to obtain proper identification and written authorization from person with legal authority to control final disposition
- Written disposition instructions by the deceased (i.e. in their will) should be considered binding on the person with legal authority for final disposition





Questions?



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Planning in Anticipation of U.S. Tax on Death Reforms

July 20, 2021

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Current Estate Tax Law

- Current U.S. estate / gift tax exemption
 - Applies to all U.S. citizens and residents, and non-residents making gifts of U.S. situs property
 - \$11.7M per person for U.S. citizens and residents
 - “Unified” gift and estate tax exemption
 - “Portability” between spouses at death (so a couple has \$23.4M)
 - Indexed annually for inflation (example: 2021 increase was \$120K)
 - Scheduled to sunset on December 31, 2025

Speculation About Rollback of Exemption

- President Biden's campaign platform included lowering estate tax exemption to \$3.5M
- Massive amounts of gifting ensued at end of 2020
 - Fear of roll back of exemption
 - Fear of retroactivity to 1/1/21
 - Some practitioners are still talking about retroactivity

Speculation About Rollback of Exemption (Cont'd)

- For gifting to be effective to preserve exemption, must be a large gift
 - An \$11.7M gift allows you to use the entire exemption
 - A \$1M gift hasn't really saved any of exemption
- Examples of planning conversations
 - Spouses with \$8M
 - Spouses with \$20M
 - Spouses with \$100M
- Non-Reciprocal "SLATS"

PRESIDENT BIDEN'S TAX PROPOSAL

Estate and Gift Tax

- Proposed changes to the Estate and Gift Tax Rules:
 - None.

Increase to Top Ordinary Income Tax Rate

- Increase top individual income tax rate from 37% to 39.6%.

	Proposed 39.6% Rate Thresholds	Current 37% Thresholds
Married Filing Jointly/Surviving Spouse	\$509,300	\$628,300
Married Filing Separately	\$254,650	\$314,150
Single	\$452,700	\$523,600
Head of Household	\$481,000	\$523,600

- Would be effective for tax years beginning after December 31, 2021.
- After 2022, the thresholds would be indexed for inflation.

Taxation of Capital Gains

- Long-term capital gains and qualified dividends would be taxed at ordinary income rates.
 - Applicable to taxpayers with adjusted gross income over \$1M (\$500K for married filing separately).
 - Would apply retroactively to gains required to be recognized after April 28, 2021.

Taxation of Capital Gains

- Gain on unrealized appreciation
 - Non-corporate entities (e.g., trusts, partnerships) that own property that has not been the subject of a recognition event in the past 90 years would recognize capital gain on unrealized appreciation.
 - No grandfathering of existing structures and holdings.
 - Look back period beginning January 1, 1940, so the first possible recognition event would be December 31, 2030.

Transfers of Appreciated Property by Gift or on Death

- Current law:
 - Property transferred at death receives a step-up in basis and property transferred by gift takes a carryover basis.

- Proposal:
 - Donor/decedent would be taxed on the appreciation in assets transferred on death or by gift.
 - No stepped-up basis.
 - Would apply to transfers by gift, and on property owned at death by decedents dying, after December 31, 2021.

Transfers of Appreciated Property by Gift or on Death (Cont.)

- Exclusions:
 - Transfers to revocable trusts
 - Transfers to a U.S. spouse, but the spouse would take a carryover basis in the property
 - Transfers to charity, but the charity would take a carryover basis in the property
 - Transfer of tangible personal property (e.g., household furnishings, personal effects) other than collectibles
 - Gain exclusions:
 - \$250,000 gain exclusion per person on a principal residence (portable to a surviving spouse)
 - \$1M gain exclusion per person, indexed for inflation (portable to a surviving spouse)

Transfers of Appreciated Property by Gift or on Death (Cont.)

- Deferral of tax
 - For certain family-owned and operated businesses, the tax would be deferred until the business is sold or ceases to be family owned and operated.
 - A 15-year fixed-rate payment plan would be available for tax on appreciated assets transferred at death (other than liquid assets).

QUESTIONS?

