THE BIG EASY: RATIONAL ESTATE PLANNING OPTIONS TO SIMPLIFY YOUR CLIENT'S PHILANTHROPY

EDUARDO L. MORALES
HORNBERGER FULLER & GARZA, INCORPORATED
7373 BROADWAY, SUITE 300
SAN ANTONIO, TEXAS 78209-3266
T: 210.271.1700
F: 210.271.1740
E: lalo@hfgtx.com

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I. Introduction. In 2015 total charitable giving in the U.S. was $358.38 billion (2% of GDP—a percentage which has remained steady since 2010). Although corporate PR departments tout corporate philanthropy, donations from individuals, bequests and family foundations total 90% of all charitable giving.

We know from our practices that all of our clients, regardless of the values listed on their balance sheet, make contributions in both toil and treasure to their churches, kids PTA's, and all sorts of other arts and human services organizations. Charitable planning is therefore not only for our wealthy clients, but for all of our clients who wish to engage in philanthropy. Further, our client's philanthropy need not end at the time of their death. The same organizations to which our clients contributed during their life may also be named as beneficiaries in our clients' wills and trusts.

Community foundations are often referred to as being among the best kept secrets amongst philanthropists. Since the first community foundation was created in Cleveland in 1914, the amount of philanthropy they have generated and facilitated is enormous. Today there are over 780 community foundations in the United States with assets totaling $73.8 billion and whose charitable gifts totaled $5.3 billion in 2014. Texas has at least 32 community foundations which are located all over the State, and whose assets total $3 billion. These Texas community foundations made over $311 million in charitable gifts in 2014.

Wikipedia defines community foundations as "instruments of civil society designed to pool donations into a coordinated investment and grant making facility dedicated primarily to social improvement of a given place." They have been described as "democratizing" philanthropy by making charitable giving easy and inexpensive for the average person.

It is therefore the basic utility of community foundations—combined with the inherent low cost of using them to implement any of your client's charitable objectives—that makes them so valuable. This presentation does not focus on creating or representing community foundations. The focus is on how professional advisors can most easily utilize community foundations to meet their client's philanthropic objectives.

II. Estate Planning Options Available to Implement Your Client's Philanthropy

A. **Tax-Exempt Organizations.** The Code[1] provides exemption from federal income tax for many different types of organizations that are considered to promote the public welfare. Such organizations are generally exempt from tax under §501(a) and are described by category in §501(a).

   Exemption from federal income tax is granted to qualified organizations by law and only recognized by the IRS in response to requests submitted by the organization. Except for certain organizations described in §501(c)(3),(4), (9), (17) or (29), the Code does not require organizations to apply for recognition of exemption. However, organizations are subject to being taxed on their incomes until they establish their qualification for exemption and therefore most organizations do apply for exemption, even though it is not necessary. Churches, as well as organizations with annual gross receipts of no more than $5,000, are expressly exempted from establishing their qualifications for exemption under §501(c)(3).

   1. **501(c)(3) Entities**: Treas. Reg. §1.501(c)(3)-1 sets out the analytical framework for charitable exempt organizations. 501(c)(3) organizations:
      - Must be organized for one or more exempt purposes (defined above and further clarified in the Regs.);
      - Must be operated exclusively for one or more exempt purposes (the IRS has interpreted "exclusively" to mean "primarily," allowing an organization to engage in an insubstantial amount of activities apart from its exempt purposes);
      - Are prohibited from engaging in partisan political activity;
      - Are limited in their lobbying activities;
      - Are restricted from creating private inurement for individuals connected to the organization; and
      - Must permanently dedicate the organization's assets to charitable purposes.

      a. State Entities Available:
         i. Nonprofit corporation (most commonly used)
            1. Governed by Chapter 22 of BOC
            2. No private inurement, thus, no dividends;

[1] Unless otherwise indicated, all references to the "Code" or the "I.R.C.," or to statutes in general, are to the Internal Revenue Code of 1986, as amended.

3. May have more than one class of members;
4. May be managed by members or directors;
5. If the organization has a board of directors, it may not have fewer than three directors
6. Loans to directors are prohibited;
7. Should have a distribution plan upon dissolution;
8. Upon dissolution, all property of the corporation must be either returned or distributed only for tax-exempt purposes to one or more 501(c)(3) or 170 (c) organizations.

ii. Nonprofit association (lack extensive statutory and case law guidance;
iii. Charitable trust (too rigid); and
iv. LLC (rarely used)

b. Formation Requirements
   i. Certificate of formation or declaration of trust
   ii. Formation documents should define its charitable purpose and prohibit private inurement

c. Requirements for Tax Exemption
   i. Organizational Test
      1. Must be able to show that the organization's assets are dedicated to an exempt purpose

   ii. Operational Test
      1. Must establish that the organization engages primarily in activities which accomplish one or more exempt purposes

d. Choosing Classification as Private Foundation or Public Charity
   i. Private foundation:
      1. Allows donor more control of the organization's investments and distributions
      2. Donor's family can continue control by subsequent generations
      3. Not required to continuously raise funds
      4. Donors only allowed 30% deduction (if to nonoperating foundation)
      5. Must comply with private foundation rules
      6. Compliance cost are significant

   ii. Public charity:
      1. Needs to have many sources of funding and/or engage in fundraising activities
      2. Donors may deduct up to 50% of their donations
      3. Must comply with public charity rules

e. Filing Requirements
   i. IRS Form 1023 must be filed within 27 months from the end of the month when the organization became an organization described in 501(c)(3). **If timely filed, exemption status is retroactive. If not timely filed, exemption status is only prospective.**
      1. 26 pages
      2. IRS has 270 days to rule on the application

   ii. IRS Form 1023-EZ
      1. 3 pages long
      2. As many as 70% of all applicants qualify
      3. For new domestic organizations who
         a. Project annual gross receipts to be less than $50k over the next 3 years
         b. Have assets with a FMV less than $250k
         c. Have a domestic mailing addres
         d. Are not successors to or controlled by suspended organizations
         e. Are not successors to for-profit entities
         f. Are not churches, schools, hospitals etc., HMO, engaged in credit counseling, sale of carbon credits/offsets, maintain DAF's, testing for public safety or a private operating foundation

   iii. Annual IRS Form 990
   iv. Application should also be made to the Office of the Comptroller for exemption from franchise taxes and sales taxes.

f. Corporate Formalities
   i. Bylaws
   ii. Organizational Meeting/Annual Meetings
   iii. Conflicts of Interest Policy
   iv. Whistleblower Policy
   v. Document Retention Policy

vi. Hire consultants to justify/defend employee compensation

g. Tax Treatment by Donors of Contributions

    i. Gifts of cash and non-appreciated property:
        1. Nonoperating foundations: 30% of donor's AGI
        2. Operating foundations and public charities: 50% of donor's AGI
        3. Corporate donors limited to deduction of 10% of taxable income
        4. Five-year carry forward
        5. Subject to further itemized deduction limitations

    ii. Gifts of appreciated property:
        1. Non-operating foundations: 20% of donor's AGI, limited to donor's basis
        2. Operating foundations and public charities: 30% of donor's AGI, limited to donor's basis
        3. Five-year carry forward
        4. Subject to further itemized deduction limitations

h. Tax Issues Relevant to Public Charities

    i. Sanctions
        1. Private Inurement Rules of §4958
            a. Excess benefit = economic benefit exceeding the value of the consideration provided for the benefit
                i. Thus, its goal is to curb abuses regarding non-FMV transactions as well as revenue-sharing transactions
            b. Disqualified person = any person who was in a position to exercise substantial influence over the affairs of the organization during the last five years, a member of such person's family, or a controlled entity
            c. 10% for organizational managers/25% for disqualified persons on excess benefit
            d. Joint and several liability

e. 200% penalty tax if not corrected
f. Also applies to any grant, loan, compensation or other similar payment from a donor advised funds
g. This is known as an intermediate sanction because it may be imposed by the IRS as an enforcement tool short of revocation of exemption.
h. Must be reported on the organization's 990

2. **Prohibition on political activities.** Section 501(c)(3) requires that no substantial part of an organization's activities involve carrying on propaganda, or otherwise attempting, to influence legislation, except as provided in §501(h), and that the organization does not directly or indirectly participate in or intervene in, including the publishing or distributing of statements, any political campaign on behalf of or in opposition to any candidate for public office. Thus, §501(c)(3) prohibits qualifying organizations from participation in any political campaign and limits the amount of permissible legislative activity. If the organization engages in substantial legislative activities or any political campaign activities, the organization is an "action" organization and exemption will be denied.
    a. The code contains numerous penalties and enforcement procedures for certain excessive legislative and political campaign expenditures of public charities.
    b. If entity want to engage in substantial legislative activities, it should elect to do so under §501(h).
    c. Sanctions for excessive lobbying include:
        i. 25% of excessive lobbying expenditures;
        ii. Revocation of exemption

3. Unrelated Business Income Tax ("UBIT")
    a. Tax imposed on an organization's unrelated trade or business taxable income. *See* §§511-515
    b. UBIT imposed on exempt organizations at the rate applicable to corporations/trusts
    c. Unrelated Trade or Business is "any trade or business the conduct of which is not substantially related to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption."
    d. The definition of UBIT encompasses the fairly well-developed body of law under §162 which sets forth the requirements for the business expense deduction
    e. Basically any activity carried on for the production of income and which possessed the characteristics of a trade or business
    f. Tax imposed on all income from all debt-financed property
    g. Government nearly always prevails on this issue

i. Tax Issues Relevant to Private Foundations

  i. Excise Tax on Investment Income. *See* §4940
    1. 2% tax on net investment income
    2. NII = interest, dividends, rents, royalties and realized capital gains – ordinary & necessary expenses paid or incurred for the production or collection of such income
    3. May be reduced to 1% if foundation meets the "maintenance of effort" test

  ii. Self-dealing transactions. *See* §4941
    1. Prohibits (with certain exceptions) the following transactions between DP's and the foundation
        a. Sales, exchanges, or leases of property between DP's and foundation
        b. Loans
        c. Furnishing of goods, services or facilities

d. Transfer or use of income or assets of the foundation to the DP
e. Payments to government officials

2. Curbs abuse in the following context:
   a. Compensation and reimbursements paid by foundation to DP's must be reasonable
3. Penalties include
   a. 10%/200% on DP
   b. 5%/50% on foundation manager
   c. Termination tax for repeated willful acts of self-dealing
      i. Exemption is terminated
      ii. Tax = lower of aggregate tax benefit resulting from 501(c)(3) status or the NAV of foundation

iii. Minimum Distribution Requirements. *See* §4942

1. Private foundation must generally distribute 5% of its investment assets annually in qualifying distributions
2. Qualifying distributions consist of
   a. Grants to qualified charitable organizations
   b. Grants to non-charities for "charitable purposes"
   c. Costs of all charitable activities
   d. Amounts paid to acquire assets directly utilized in carrying out charitable purposes, set asides, program-related investments; and
   e. All reasonable administrative expenses necessary for the conduct of the foundation's charitable activities
   f. Does not include investment management fees
   g. Failure to satisfy MDR
      i. 30%/100% of difference between amount of MDR and amount actually distributed

iv. Excess Business Holdings. *See* §4943

1. Business enterprise is an active business; Not a company engaged in passive rental real estate or marketable securities.

2. Foundation may own up to 20% of the voting stock in a corporation, reduced by stock held by Disqualified Persons
3. If corporation controlled by non-Disqualified Persons, then the Foundation and DP's may own up to 35% of voting stock in such corp.
4. Foundation may own nonvoting stock but only if DP's own less than 20% of voting stock
5. Foundation may own up to a de minimis 2% of voting stock in a corp. without having to consider ownership by DP's
6. Foundation has 5 years to dispose of EBH to a non-DP. In cases of unusually large gift/bequest, disposal period is 10 years
7. 10%/200% penalty

v. Jeopardizing Investments. *See* §4944
1. Foundation managers will be held to a "prudent investor" standard of care with regard to their investment decisions
2. Failure to adhere to such a standard results in a 10%/25% on the foundation and managers that participated in such decision

vi. Taxable Expenditures. *See* §4945
1. These are expenditures made which do not further the foundation's exempt purposes (e.g. carrying on propaganda or otherwise attempting to influence legislation or the outcome of a public election).
2. Also applicable to grants to other foundations/for-profit entities
3. Also targets grants to individuals
4. 20%/100% tax on each TE payable by foundation
5. 5%/50% tax on each foundation manager who willingly participated in the TE

B. Charitable Lead/Remainder Trusts. Generally, the Code does not allow a charitable deduction for a gift of a partial interest in property. *See* IRC §170(f)(3)(A). But donors have options if they want to make a gift of a partial interest in property in trust. If the donor wants to retain a present interest in property and make a gift of an interest in property later to an organization eligible to receive charitable donations under IRC §170 ("a

§170(c) organization”), donors can create a charitable remainder trust (“CRT”).

Alternatively, if the donor wants to make a present gift of an interest in property to a §170(c) organization, and retain a remainder interest in the property, donors can create a charitable lead trust (“CLT”). *See* IRC §170(f)(2)(B).

1. **Charitable Remainder Trusts.** A CRT is a split-interest trust that benefits a noncharitable beneficiary during the lead term, with the remainder interest passing to or for the benefit of a charitable beneficiary. During the lead term, an annuity payment or a unitrust payment must be made annually to the non-charitable beneficiary. At the conclusion of the lead term of the CRT, the remaining trust interest must either be distributed outright to one or more §170(c) organizations, or remain in trust for charitable purposes. IRC §664(d).

   A CRT may only be an annuity trust or a unitrust in every respect. Treas. Reg. §1.664-1(a)(2). It is not possible to create a CRT with both an annuity trust payment scheme and a unitrust payment scheme. For example, a CRT may not behave as an annuity trust for a number of years, then switch to a unitrust for the remainder of the lead term. A CRT must function as a CRT exclusively from its creation. Treas. Reg. §1.664-1(a)(4).

   Both testamentary and inter vivos CRTs can be created. *See* IRC §664(b). Additionally, CRTs are subject to certain portions of the Private Foundation rules and rules relating to the provisions required for governing instruments. *See* IRC §4947(a)(2).

   a. Charitable Remainder Annuity Trust (“CRAT”)
      i. Lead Term Annuity Amount
         i. Annual payments of not less than 5% and not more than 50% of the initial FMV of the CRAT’s assets
         ii. Must be made to one or more persons, one of which is not a §170(c) organization

      ii. Remainder Payment
         i. To one or more §170(c) organization

      iii. Calculation of Remainder Interest
         i. Determined under §7520

        ii. Must be at least 10% of initial FMV of trust

    iv. Tax Consequences
        i. Inter vivos CRAT
            1. Income tax charitable deduction = remainder interest going to §170(c) organization
            2. Gift tax charitable deduction = remainder interest going to §170(c) organization
            3. Income tax gain recognition deferred on sale of appreciated assets during lead term.
            4. Non-charitable beneficiaries subject to income tax when annuity payments are made
            5. CRAT is subject to UBIT

        ii. Testamentary CRAT
            1. Estate tax charitable deduction = remainder interest going to §170(c) organization
    v. Trust Terms
        i. Lead term may not exceed 20 years
        ii. No person may alter amount to be paid to §170(c) organization which would cause grantor trust status

b. Charitable Remainder Unitrust ("CRUT")
    i. Lead Term Unitrust Amount
        i. Annual payments of not less than 5% and not more than 50% of the FMV of the CRUT's assets valued annually
        ii. Must be made to one or more persons, one of which is not a §170(c) organization

    ii. Remainder Interest
        i. To one or more §170(c) organization

    iii. Calculation of Remainder Interest
        i. Determined under §7520 and Treas. Reg. §1.664-4(e)(6)
        ii. Must be at least 10% of initial FMV of trust

    iv. Tax Consequences

i. Inter vivos CRUT
1. Income tax charitable deduction = remainder interest going to §170(c) organization
2. Gift tax charitable deduction = remainder interest going to §170(c) organization
3. Income tax gain recognition deferred on sale of appreciated assets during lead term.
4. Non-charitable beneficiaries subject to income tax when annuity payments are made
5. CRUT is subject to UBIT

ii. Testamentary CRUT
1. Estate tax charitable deduction = remainder interest going to §170(c) organization

v. Trust Terms
i. Lead term may not exceed 20 years
ii. No person may alter amount to be paid to §170(c) organization which would cause grantor trust status
iii. Must either prohibit additional contributions or require that new contributions be valued at the time they are contributed.

2. **Charitable Lead Trusts.** A CLT is a split-interest trust that benefits a §170(c) organization during the lead term, with the remainder interest passing to or for the benefit of a non-charitable beneficiary. During the lead term of the CLT, an annuity payment or a unitrust payment must be made annually to a §170(c) organization. *See* §170(f)(2)(B).

CLT's must be taxed as grantor trusts to be eligible for the income tax deduction. *See* §170(f)(2)(B). Additionally, CLT's are subject to certain portions of the private foundation rules and rules relating to the provisions required for governing instruments. *See* §4947(a)(2).

a. Charitable Lead Annuity Trusts
i. Lead Term Annuity Amount

i. Must be an irrevocable right to a determinable amount that is paid periodically but not less frequently than annually
ii. Lead interest may be for the life or lives of certain ascertainable measuring lives

ii. Remainder Interest
  i. May be paid to any person or entity, outright or in trust

iii. Calculation of Remainder Interest
  i. Calculated pursuant to Treas. Reg. §20.2031-7

iv. Tax Consequences
  iv. Inter vivos CLAT
    1. Income tax charitable deduction = lead interest going to §170(c) organization
    2. Gift tax charitable deduction = lead interest going to §170(c) organization
    3. CLAT is subject to UBIT

  v. Testamentary CLAT
    1. Estate tax charitable deduction = lead interest going to §170(c) organization

v. Trust Terms
  i. No restriction on the length of the lead term

b. Charitable Lead Unitrusts
  i. Lead Term Unitrust Amount
    i. An irrevocable right to receive payment, not less often than annually, of a fixed percentage of the net FMB of the trust's assets, determined annually

  ii. Remainder Payment
    i. May be paid to any person or entity, outright or in trust

  iii. Calculation of Remainder Amount
    i. Calculated as under §7520 and Treas. Reg. §1.664-4(e)(6) like a CRUT

  iv. Tax Consequences
    i. Inter vivos CLUT

1. Income tax charitable deduction = lead interest going to §170(c) organization
2. Gift tax charitable deduction = lead interest going to §170(c) organization
3. CLUT is subject to UBIT

ii. Testamentary CLUT
1. Estate tax charitable deduction = lead interest going to §170(c) organization

v. Trust Terms

3. **Private Foundation Rules Applicable to CLT's and CRT's**
   a. Governing instrument requirement. *See* §508(e)
   b. Self-dealing. *See* §4941
   c. Excess Business Holdings. *See* §4943
   d. Jeopardizing Investments. *See* §4944
   e. Taxable Expenditures. *See* §4945

C. **Community Foundations.** Many clients desire to create a private foundation, but decide not to after learning of the expenses and time involved with running a private foundation. Donor-Advised Funds ("DAF's") provide significant advantages over private foundations. If a community foundation satisfies the "public support test" by attracting contributions from a diverse group of donors, it will be classified as a public charity under §501(c)(3) and thereby have significant advantages over a private foundation. *See* §170(b)(1)(A)(vi).

1. Benefits of DAF vs. PF
   - DAFs share the tax-exempt status of the community foundation and do not have to apply for tax-exempt status;
   - Tax deduction of up to 50% of AGI while the private foundation tax deduction is limited to 30% of AGI;
   - The fund assets are professionally invested through the community foundation, while still allowing the donor to make grant recommendations;
   - Private foundation self-dealing rules do not apply;
   - No required public disclosure of grants/anonymity available;
   - No annual taxes; and
   - The community foundation fulfills the associated fiduciary responsibilities while a private foundation board has full fiduciary responsibility.

2. Practical Uses for DAF's
    a. Endowment
    b. As a conduit for a PF
        1. A PF may satisfy the §4942 qualifying distribution minimum by donating to a DAF and postponing distributions therefrom
        2. A PF may make anonymous grants through a DAF
        3. Overseas Grant-Making
    c. Scholarship Fund
    d. Field of Interest Fund

3. Tax Consequences
    a. Federal Income Tax Deduction
    b. Federal Estate Tax Deduction
    c. Gift Tax Deduction

4. Requirements for a community foundation to be treated as a single entity, rather than as an aggregate of separate funds. *See* Treas. Reg. §1.170A-9(f)(11)

5. Component Funds
    a. Creation
    b. Material Restrictions
    c. Failure to meet above two requirements

6. Donor-Advised Funds
    a. Background
    b. Tax Issues Relevant to Donor-Advised Funds
        1. Excess Business Holdings. *See* §4943
        2. Excess Benefit Transactions. *See* §4958
            a. Disqualified person, for purposes of a DAF, includes donors (or any person appointed by such donor) with advisory priveleges.
        3. Improper Distributions by Sponsoring Organizations. *See* §4966
        4. If a donor, donor advisor, or a person related thereto provides advice as to a distribution resulting in any such person receiving, directly or indirectly, a more than incidental benefit, an excise tax of 125% of such benefit is imposed on the person who advised as to the distribution **and** the recipient of the benefit. *See* §4967

D. Inter Vivos Charitable Donations, Outright and Free of Trust

1. **Income Tax Deduction.** For federal income tax purposes, an individual who itemizes his or her deductions is allowed a deduction from his or her adjusted gross income for charitable contributions if the requirements of §170 and certain other Code sections are satisfied. These requirements address the kinds of organizations to which deductible charitable contributions may be made, the various property interests that may be donated, the imposition of adjusted gross income percentage limitations on deductions, and other prerequisites that must be satisfied in order for a charitable contribution deduction to be allowed.

   Aggregate contributions to publicly supported organizations ("public charities"), private operating foundations, and two special types of private nonoperating foundations are limited to 50% of the individual's contribution base for the tax year. A 30% limitation applies (i) to contributions to semi-public charities and private foundations and to contributions "for the use of" any charitable organization, (ii) as well as contributions of capital gain property to public charities. Contributions of appreciated property to semi-public charities and private foundations are deductible only to the extent of 20% of the donor's contribution base.

2. **Gift Tax Deduction.** Section 2522(a) allows a gift tax deduction for transfers to qualifying recipients for public, charitable, religious, and other similar purposes. In effect, the deduction operates as an exclusion. Although charitable transfers are included in the definition of "taxable gifts," and the annual exclusion for gifts (other than future interests) also applies, amounts in excess of annual exclusion are then removed from the application of the gift tax by means of the deduction. The entire amount of the charitable transfer is deductible; there are no percentage limitations comparable to those applicable to the income tax deductions.

E. Testamentary Charitable Gifts, Outright and Free of Trust

1. **Estate Tax Deduction.** Section 2055 allows a deduction from a decedent's gross estate for bequests and other transfers to qualifying recipients for public, charitable, religious, and other similar purposes. The deduction has been allowed almost since the inception of the modern federal estate tax. Although the basic concept has been altered by a number of statutory refinements and

limitations, the original underlying policy of encouraging charitable giving remains unchanged.

III. Legislative/Case Law Update

A. More Flexibility in the Support and Administration of Charities:

1. **Legislation:** The Protecting Americans from Tax Hikes Act of 2015 (PATH Act) was the nearly annual "extenders" of a variety of temporary provisions. Included were five provisions described as "Incentives for Charitable Giving." These now-permanent provisions include:

   a. The ability of individuals over 70½ years old to make charitable distributions from individual retirement accounts (IRAs), up to $100,000 per year, without including those amounts in gross income;

   b. Donor-favorable rules for contributions of real property for conservation purposes, especially for farmers and ranchers, and for certain contributions of food inventory; and

   c. The special rule that the basis in an S corporation shareholder's stock is not reduced by the unrealized appreciation in property contributed to charity by the S corporation.

   Continuing to react to news headlines regarding IRS handling of applications for recognition of tax exemption, Congress has also included in the PATH Act requirements that:

   a. The IRS allow administrative appeals of adverse exemption determinations to the Office of Appeals;
   b. A streamlined recognition process for section 501(c)(4) social welfare organizations;
   c. Extension of the availability of declaratory judgment relief under §7428 to all organizations described in section 501(c), not just section 501(c)(3) and explicitly including section 501(c)(4); and
   d. The exemption from gift tax of gifts to section 501(c)(4), (5), and (6) (social welfare, labor, agricultural, horticultural, and business league, etc.) organizations.

In related provisions of more general application, the PATH Act codifies a "taxpayer bill of rights" which provides:

a. Taxpayers who have been the subject adverse IRS actions, to learn the IRS's reaction, such as whether the case is being investigated or referred to the Justice Department for prosecution;
b. For the termination of an IRS employee who performs, delays, or fails to take any official action for personal gain or political purposes.
c. It is hard to say how these changes will encourage charitable giving, but they will provide modest assurances to all taxpayers and their advisors.

2. **Administrative Guidance**

a. Notice 2015-62 clarifies the circumstances in which certain investments for mixed charitable and income purposes will not be treated as investments that jeopardize charitable purposes under Code §4944. Section 4944(c) exempts "program-related investments," defined as "investments, the primary purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(B), and no significant purpose of which is the production of income or the appreciation of property." Some investments, however, often called "mission-related investments," are intended to produce both a social benefit and an investment return and therefore do not meet the definition of a program-related investment. Notice 2015-62 provides that such an investment will not be considered a jeopardizing investment if, in making the investment, the foundation's managers exercise ordinary business care and prudence. The notice specifically acknowledges that the managers may include in their evaluation of an investment "all relevant facts and circumstances, including the relationship between a particular investment and the foundation's charitable purposes." The Notice concludes that "a private foundation will not be subject to tax under section 4944 if foundation managers who have exercised ordinary business care and prudence make an investment that furthers the foundation's charitable purposes at an expected rate of return that is less than what the foundation might obtain from an investment that is unrelated to its charitable purposes."

b. In Notice 2016-189 (Jan. 8, 2016), the IRS responded to mounting criticism by withdrawing the regulations it proposed last September (Prop. Reg. §1.170A-13(f)(18), 80 Fed. Reg. 55802 (Sept. 17, 2015)), that would have allowed charities to collect donors' Social Security numbers and to report directly the contributions by donors, as an alternative to the "contemporaneous written acknowledgement" requirement for substantiating contribution deductions of $250 or more. The protests from both individuals and charities expressed concerns that the new rules, which were optional, would eventually become mandatory, and that taxpayer privacy would be jeopardized by charities collecting Social Security numbers.

c. Notice 2016-9 (January 19, 2016), the IRS has provided interim guidance on new §506—added by the PATH Act—which requires new and certain existing social welfare organizations to notify IRS of their intent to operate under §501(c)(4). Section 501(c)(4) organizations will have 60 days from date of upcoming temporary regulations to issue the notice required under new §506. 501(c)(4) organizations should wait to submit until the regulations are issued and no penalty under §6652(c)(4) will be imposed. Generally, the §506 notification requirement applies to 501(c)(4) organizations established after December 18, 2015, and to those organizations that had not applied for this status using Form 1024. Existing organizations now have until June 15, 2016 to submit the §506 notification.

3. **Case Law:** Additionally, a judicial development may simplify and enhance the charitable contribution deduction for certain contributions of appreciated property by trusts. *Green v. United States*, 116 AFTR 2d 2015-6668 (W.D. Okla. Nov. 4, 2015), involved charitable donations of appreciated real estate in 2004 by The David and Barbara Green 1993 Dynasty Trust, which owned a 99 percent limited partnership interest in Hob-Lob Limited Partnership, which in turn owned or operated many Hobby Lobby stores. The trust deducted the adjusted basis of the properties it donated to charitable entities on its 2004 federal income return and then amended the return exactly three years later to deduct the full fair market value of the properties. The IRS disallowed the refund, stating that "[t]he charitable contribution deduction for the real

property donated in 2004 is limited to the basis of the real property contributed."

The District Court granted summary judgment to the trust. Citing opinions of other courts, it stated that "[t]he purpose of Congress in enacting [charitable contribution provisions] was to encourage charitable gifts" and that "statutes regarding charitable deductions … are not matters of legislative grace, but rather 'expression[s] of public policy.'" As such, "[p]rovisions regarding charitable deductions should … be liberally construed in favor of the taxpayer." The Government argued that section 642(c) limits the deduction to "any amount of the gross income … paid." The court was persuaded by the fact that the properties had been bought with gross income. The Government also argued that gross income does not include unrealized appreciation, but the court found no provision which limited the charitable deduction to only the basis of the donated property in Code §642(c).

We shall see whether the Government decides to appeal, and if so, what the U.S. Court of Appeals for the 10th Circuit does about this issue.