

## Post-Election Charitable Planning and Hot Philanthropic Topics

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## Agenda

### Overview of Tax Proposals

#### Charitable Giving Strategies

- Cash, Stock or Other Assets
- IRAs
- Charitable Remainder Trusts
- Charitable Lead Annuity Trusts

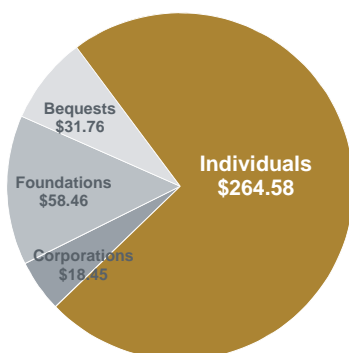
#### Charitable Giving Vehicles

- Private Foundations vs. Donor Advised Funds
- Sustainable, Responsible and Impact (SRI) Investing
- “Charitable” LLCs

## Overview of Tax Proposals

## What Individuals Give

STUDIES ON CHARITABLE GIVING



Largest source of charitable giving is individuals—**\$264.58 billion**

**98.2%** of HNW households give to charity

On average, HNW households **gave 9.1%** of their income to charity

Sources: *Giving USA 2016: The Annual Report on Philanthropy for the Year 2015*, Giving USA Foundation™, researched and written by the Indiana University Lilly Family School of Philanthropy; *The 2010 Study of High Net Worth Philanthropy: Issues Driving Charitable Activities among Affluent Households*, Center on Philanthropy at Indiana University (Nov. 2010).

## Why Individuals Give

### Studies on Charitable Giving

- Social—signaling one’s wealth or status<sup>1</sup>
- Psychological—giving causes happiness<sup>2</sup>
- Economic—tax breaks<sup>3</sup>

<sup>1</sup> Becker, G. S., "Theory of social interaction," *Journal of Political Economy* (1974); Glazer, A., & Konrad, K. A., "A signaling explanation for charity," *American Economic Review* (1996); Griskevicius, V., et al., "Blatant benevolence and conspicuous consumption: When romantic motives elicit strategic costly signals," *Journal of Personality and Social Psychology* (2007).

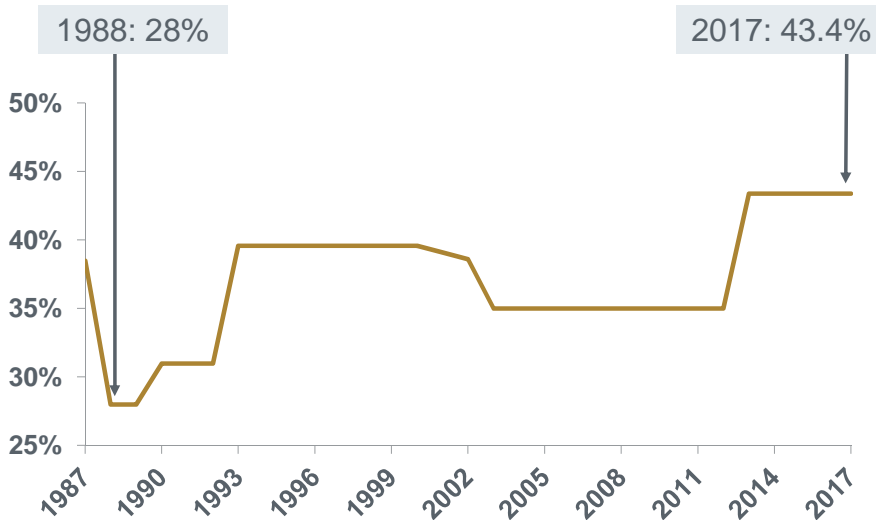
<sup>2</sup> Andreoni, J., "Giving with impure altruism: Application to charity and ricardian equivalence," *The Journal of Political Economy* (1989); Andreoni, J., "Impure altruism and donations to public goods – a theory of warm glow giving," *Economic Journal* (1990); Dunn, E. W., Aknin, L. B., & Norton, M. I., "Spending money on others promotes happiness," *Science* (2008); Harbaugh, W., Mayr U., & Burghart, D., "Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations," *Science*, vol. 316, no. 5831 (2007).

<sup>3</sup> Clotfelter, C. T., "Federal tax policy and charitable giving," Chicago: University of Chicago Press (1985); Clotfelter, C. T., "The economics of giving," in J. W. Barry & B. V. Manno (Eds.), "Giving better, giving smarter", Washington, DC: National Commission on Philanthropy and Civic Renewal (1997); Reece, W. S., & Zieschang, K. D., "Consistent estimation of the impact of tax deductibility on the level of charitable contributions," *Econometrica* (1985).

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## Impact of Recent Tax Reform

### TOP INCOME TAX RATES



Source: Internal Revenue Service  
 The 2017 rates reflect Rev. Proc. 2016-55, the American Taxpayer Relief Act of 2012 and the 3.8% surtax on net investment income under the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010.

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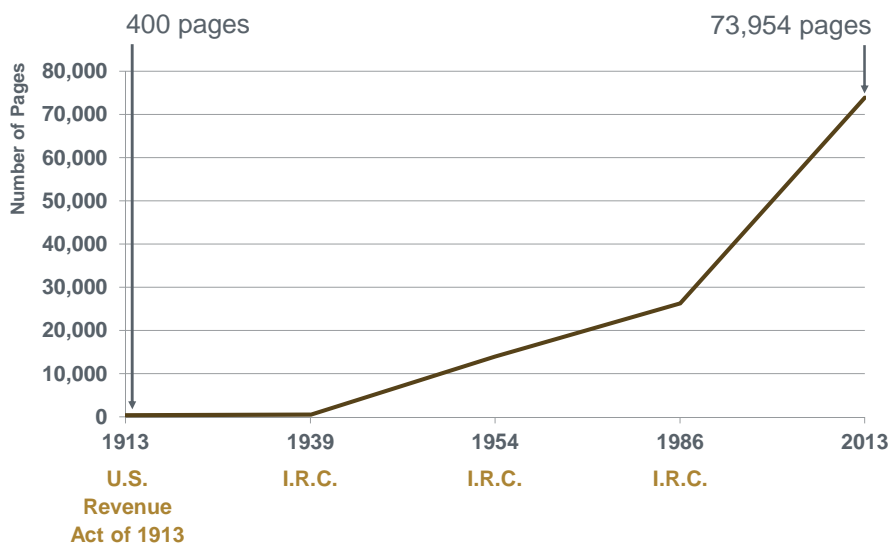
## Income and Income Taxes

Income Category	AGI	Percent of All Income	Percent of Income Taxes Paid
Top 1%	>428,712	19.0	37.8
Top 5%	>179,759	34.4	58.6
Top 10%	>127,694	45.9	69.8
Top 25%	>74,954	68.1	86.3
Top 50%	>36,840	88.5	97.2
Bottom 50%	<36,840	11.5	2.8

Source: Internal Revenue Service, 2013 tax return data

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## Are We Due for a New Tax Code?



Source: CCH Inc. Number of pages in the CCH Standard Federal Tax Reporter, including the tax code, regulations and rulings.

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## Washington, D.C., Tax Proposals

### Charitable Contribution Tax Deductions

- President Trump Proposal
  - Cap on ALL itemized deductions—\$100,000 for single and \$200,000 for joint filers
  - Contributions to private foundations—“...contributions of appreciated assets into a private charity established by the decedent or decedent’s relatives will be disallowed.”
- Paul Ryan Proposal
  - Eliminate ALL itemized deductions—except charitable and mortgage interest
- House Proposal
  - Restrict charitable tax deductions only to extent total gifts exceed 2% of AGI

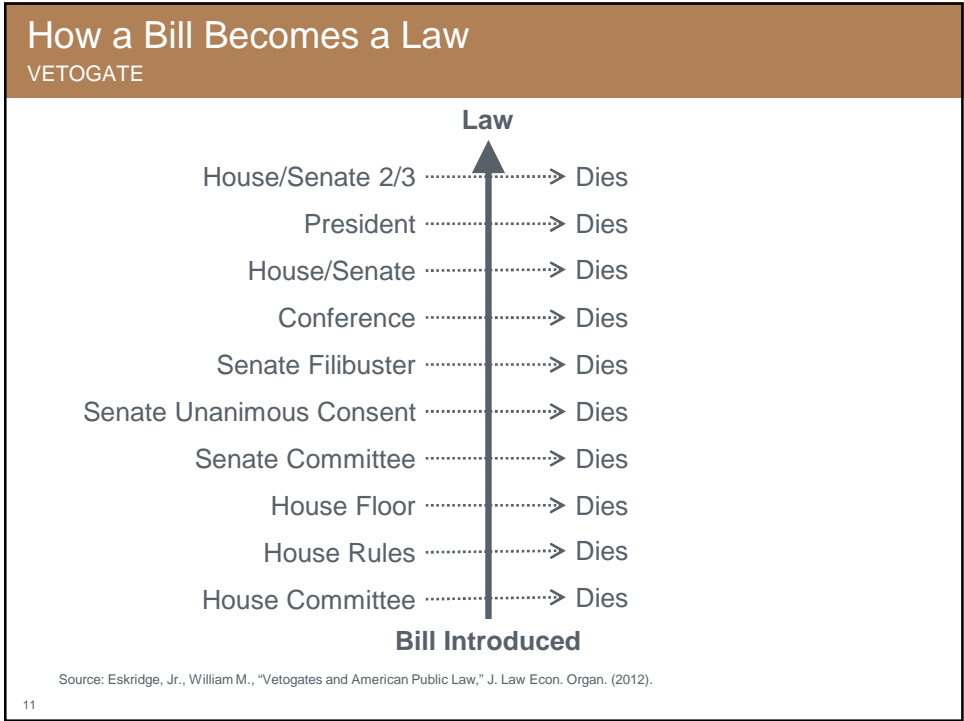
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## President Trump’s Tax Proposal

“People can say it’s a tax plan. It’s really a tax proposal...  
I’m not under the illusion that that’s going to pass.”  
—Donald Trump on NBC’s  
“Meet the Press” (May 8, 2016)

“In my plan, they’re going down. But by the time it’s  
negotiated, they’ll go up... By the time it gets negotiated, it’s  
going to be a different plan... But from a practical  
standpoint, it’s going to get renegotiated.”  
—Donald Trump on ABC’s  
“This Week” (May 8, 2016)

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## Charitable Giving Strategies

## Written Acknowledgments and Qualified Appraisals

INTERNAL REVENUE CODE SECTION 170 AND RELATED TREASURY REGULATIONS

### Gifts of \$250 or More

- “Contemporaneous Written Acknowledgement”<sup>\*</sup>
  - Must state whether or not you received something in return (e.g., goods or services)
  - Must receive acknowledgment by the earlier of: (i) date the Federal income tax return for the year of the contribution is filed; or (ii) due date (including extensions) of the return

### Gifts of More Than \$5,000

- “Qualified Appraisal”<sup>\*\*\*</sup> (limited exceptions—e.g., publicly traded securities)
  - Summary or actual appraisal must be attached to the Federal income tax return for the year of contribution

<sup>\*</sup> See *Durden v. Commissioner*, T.C. Memo 2012-140 (Receipt from charity lacked statement of goods/services provided, and second receipt was not contemporaneous).

<sup>\*\*</sup> See *Gemperle v. Commissioner*, T.C. Memo 2016-1 (Failure to include qualified appraisal for façade easement resulted in denial of deduction and penalties with no grounds for mitigation of the penalties by reason of acting with reasonable cause and in good faith); *Mohamed v. Commissioner*, T.C. Memo 2012-152 (No deduction for failure to comply with the substantiation requirements of Treas. Reg. §1.170-13) and *Evenchik v. Commissioner*, T.C. Memo 2013-34 (No deduction for donated shares of a corporation when appraisal was for two apartment building owned by the corporation).

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## Asset Options

STOCK VS. CASH

	SELL STOCK AND DONATE CASH	DONATE STOCK
VALUE OF STOCK	\$250,000	\$250,000
TAXES ON CAPITAL GAINS	(\$50,000)	\$0
CHARITABLE DEDUCTION	\$200,000	\$250,000
AMOUNT TO CHARITY	\$200,000	\$250,000

### Donating Stock

- Saves taxpayer \$50k in capital gains taxes
- Provides taxpayer with an additional \$50k charitable deduction
- Provides charity with an additional \$50k

<sup>14</sup> Assumes stock with \$166,667 long-term capital gain, and 30% blended tax rate on capital gains (federal and state).

## Charitable Planning with IRAs

TAX BENEFIT OF NAMING CHARITY AS IRA BENEFICIARY

	Stock to Charity and IRA to Child		IRA to Charity and Stock to Child	
	Charity	Child	Charity	Child
<b>Stock</b>	\$500,000	--	--	\$500,000
<b>IRA</b>	--	\$500,000	\$500,000	--
<b>Total Bequest</b>	\$500,000	\$500,000	\$500,000	\$500,000
<b>Less Income Tax on IRA</b>	--	(\$225,000)*	--	--
<b>NET BEQUEST</b>	\$500,000	\$275,000	\$500,000	\$500,000**

\*Assumes a blended ordinary income tax rate of 45% (federal and state).

\*\*Note that the child's shares of stock also receive a step-up in basis when the decedent dies.

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## Charitable IRA Rollover

PROTECTING AMERICANS FROM TAX HIKES (PATH) ACT, 12/18/2015

### Qualified Charitable Distribution

- "Permanent" extension
- Required minimum age of 70½
- Up to \$100k per year
- Can satisfy required minimum distribution (RMD)
- Excluded from gross income, but no charitable deduction
- Must be paid directly to public charity
  - No donor advised funds
  - No supporting organizations
  - No non-operating private foundations (unless conduit rules apply)

Note that H.R. 4907 "Grow Philanthropy Act" introduced by House Ways & Means Committee and S. 2750 "Charities Helping Americans Regularly Throughout the Year" ("Charity Act") introduced by Senate Finance Committee would strike existing prohibition for IRA distributions to donor advised funds.

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## Legacy IRA Act

H.R. 5171 (May 6, 2016)

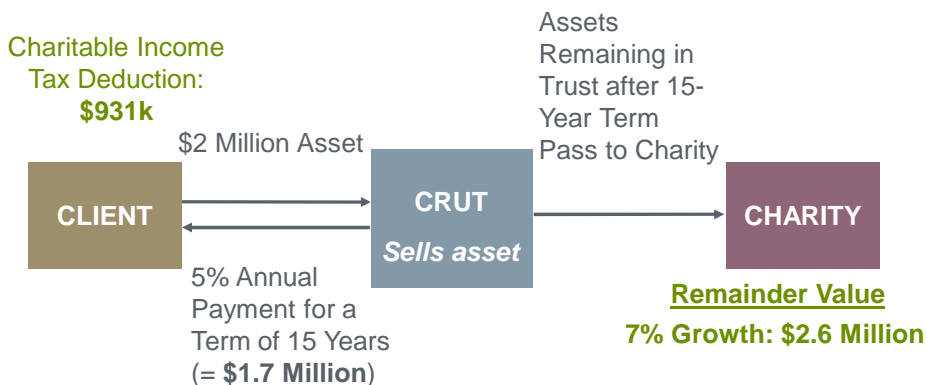
### Life Income Rollover

- Pending legislation
- Required minimum age of 65 for life income rollovers
- Up to \$400k per year
  - Total for life income rollover and current IRA rollover
- Can satisfy required minimum distribution (RMD)
- Paid to one or two-life charitable gift annuity, charitable remainder annuity trust (CRAT), or charitable remainder unitrust (CRUT)
- Annuity may pay to IRA owner or owner and spouse
- Minimum 5% payout

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## Charitable Remainder Unitrust (CRUT)

STRATEGY FOR APPRECIATED ASSETS



Assumes 7% return (4.2% growth and 2.8% income) and most favorable IRC § 7520 rate of 2.6% for most recent three months as of April 2017. Rev. Rul. 2017-08.

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## Charitable Remainder Annuity Trusts (CRATs)

### Fixed Dollar Annual Payment (CRAT) vs. Unitrust (CRUT)

- One or two-life CRATs
  - Previously, not possible under age 74 due to low interest rate environment
  - Probability of exhaustion test—greater than 5% probability all assets will be paid out

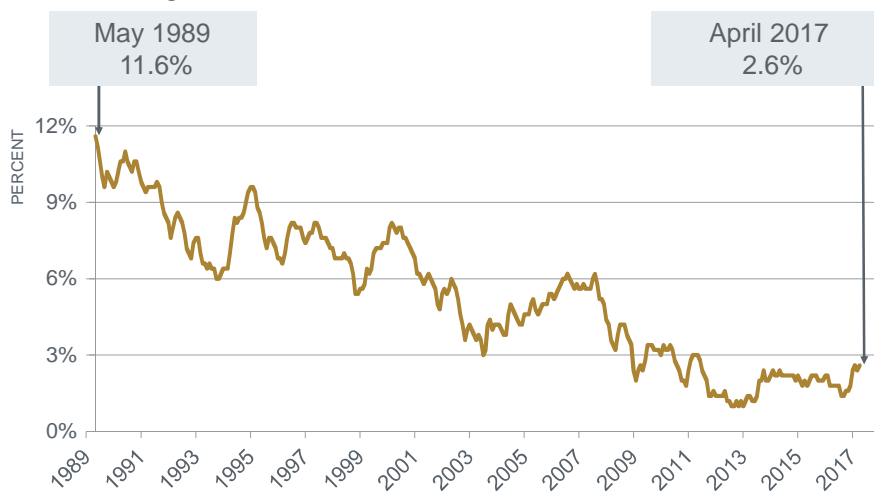
### IRS Revenue Procedure 2016-42 (Aug. 9, 2016)

- Safe harbor provision
  - Early termination if CRAT's assets fall below 10% of initial value multiplied by discount factor
  - Not triggered if investments outperform § 7520 rate (1.4% in Sep. 2016)

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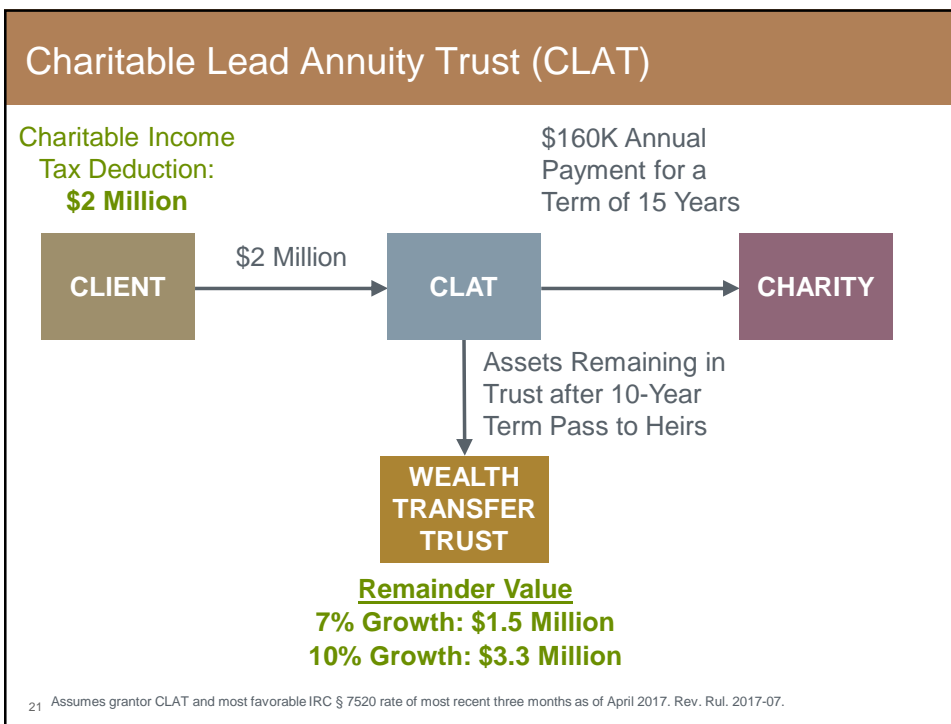
## Low Interest Rate Environment

### Historical § 7520 Rates



April 2017 rates, Rev.Rul. 2017-08.

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## Charitable Giving Vehicles

## Private Foundation vs. Donor Advised Fund

COMPARING TWO PHILANTHROPIC VEHICLES

	Private Foundation	Donor Advised Fund
<b>Tax Deductibility</b>	<ul style="list-style-type: none"> <li>• Cash—up to 30% of AGI</li> <li>• Appreciated and closely held stock—up to 20% of AGI</li> </ul>	<ul style="list-style-type: none"> <li>• Cash—up to 50% of AGI</li> <li>• Appreciated and closely held stock—up to 30% of AGI</li> </ul>
<b>Minimum Payout Requirements</b>	<ul style="list-style-type: none"> <li>• 5% annually</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
<b>Investment Flexibility</b>	<ul style="list-style-type: none"> <li>• Divest excess business holdings within five years or pay excise tax</li> </ul>	<ul style="list-style-type: none"> <li>• Donor chooses among investment options offered by DAF</li> </ul>
<b>Grant Making Support</b>	<ul style="list-style-type: none"> <li>• Create and handle due diligence and monitoring structure</li> </ul>	<ul style="list-style-type: none"> <li>• Professional staff of DAF handles due diligence</li> </ul>
<b>Administration</b>	<ul style="list-style-type: none"> <li>• Legal/accounting fees; filing fees; and annual tax return</li> </ul>	<ul style="list-style-type: none"> <li>• DAF handles all administration</li> </ul>
<b>Excise Taxes</b>	<ul style="list-style-type: none"> <li>• 1% to 2% of investment income annually</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
<b>Liability and Risk Insurance</b>	<ul style="list-style-type: none"> <li>• Must be purchased</li> </ul>	<ul style="list-style-type: none"> <li>• Provided by DAF</li> </ul>
<b>Start-Up Costs</b>	<ul style="list-style-type: none"> <li>• Legal fees and other start-up costs can be substantial</li> </ul>	<ul style="list-style-type: none"> <li>• Typically none</li> </ul>
<b>Valuation of Gifts</b>	<ul style="list-style-type: none"> <li>• FMV for cash/publicly traded stock; cost basis for closely held stock/real property</li> </ul>	<ul style="list-style-type: none"> <li>• Fair market value</li> </ul>
<b>Privacy</b>	<ul style="list-style-type: none"> <li>• No</li> </ul>	<ul style="list-style-type: none"> <li>• Yes</li> </ul>

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## Reform Proposals

### Private Foundations—1% or 2% Two-Tier Investment Tax

- 1% – *Camp Proposal (February 26, 2014)*
- 1.4% – *Senate Finance Committee Staff Reform Options for Discussion (June 13, 2013)*
- 1.35% – *Administration’s FY 2014 Revenue Proposals (April 2013)*

### Donor Advised Funds—No Mandatory Distribution Requirement

- “premature to recommend a distribution requirement... at this point” – *Department of Treasury Study (December 5, 2011)*
- “there is likely to be substantial variation in payout rates at the individual level across all sponsoring organization” – *Congressional Research Service Study (July 11, 2012)*
- Five year payout requirement and 20% excise tax for failure – *Camp Proposal (February 26, 2014)*

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## Sustainable, Responsible and Impact (SRI) Investing

DON'T IGNORE THE OTHER 95%

### Program Related Investment (PRI)

- Final Regulations (Apr. 25, 2016) allow private foundation investments for both charitable purposes and financial returns

### Environmental, Social, Governance (ESG)

- Positive screen for investment analysis and decision making

### Impact Investing (II)

- Direct private investment to generate measurable financial and social impact, such as community development, food security or health improvements

### Responsible Investment (RI)

- Sustainable, ethical or “green” investments that consider both financial returns and social good

### Socially Responsible Investing (SRI)

- Negative screening of the investment universe, such as excluding “sin” stocks

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## “Charitable” LLC

### Not a Public Charity, Private Foundation or Charitable Trust

- LLC **not** subject to mandatory distributions or prohibitions on self-dealing, excess business holdings, jeopardy investments and taxable expenditures (e.g., lobbying/political activities)
- LLC **not** subject to attorney general oversight
- LLC tax returns **not** subject to public disclosure
- Assets **not** permanently restricted for charitable purposes; can be used for any permissible purpose under state law
- LLC **not** exempt from federal income tax; taxed as “pass-through” to owners
- **No** charitable income tax deduction from funding; future benefit if LLC donates to charity

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## Chan Zuckerberg Initiative LLC

“By using an LLC instead of a traditional foundation, we receive  
***no tax benefit from transferring***  
 our shares to the Chan Zuckerberg Initiative.” [emphasis added]

—Mark Zuckerberg  
 Facebook Founder  
 December 3, 2015

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## Chan Zuckerberg Initiative LLC

*Bloomberg*, “Four Reasons the Facebook Fortune Is Going Into an LLC,” Suzanne Woolley (12/2/2015).

*Huffington Post*, “How Zuckerberg’s LLC Could Be More Effective Than Charity,” Eleanor Goldberg (12/4/2015).

*Newsweek*, “Zuckerberg Clarifies Why His \$45 Billion Charity Is an LLC,” Seung Lee (12/3/15).

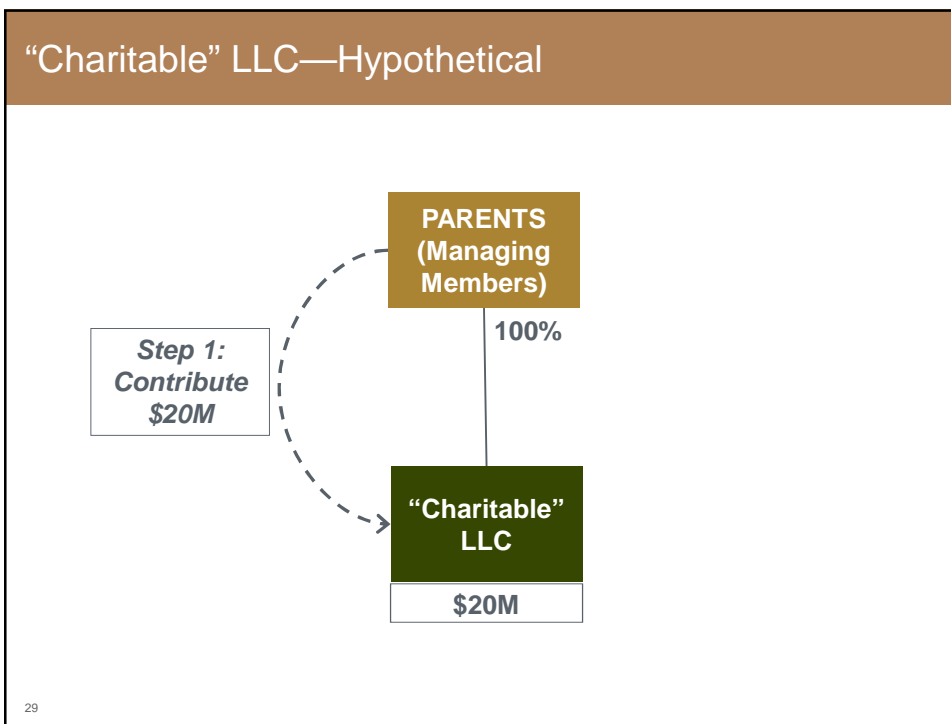
*The New Yorker*, “Mark Zuckerberg and the Rise of Philanthrocapitalism,” John Cassidy (12/2/2015).

*The New York Times*, “Zuckerberg’s Philanthropy Uses L.L.C. for More Control,” Natasha Singer and Mike Isaac (12/3/15).

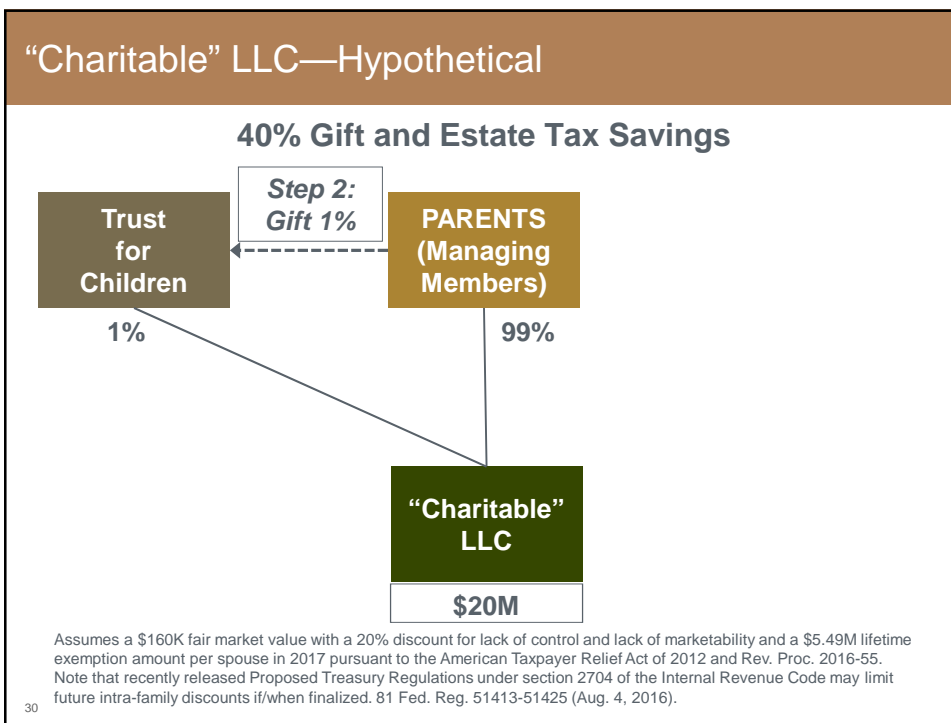
*The Wall Street Journal*, “Ending Philanthropy as We Know It,” Leslie Lenkowsky (12/2/2015).

*USA Today*, “Why Chan Zuckerberg Initiative Is an LLC,” Jessica Guynn (12/4/2015).

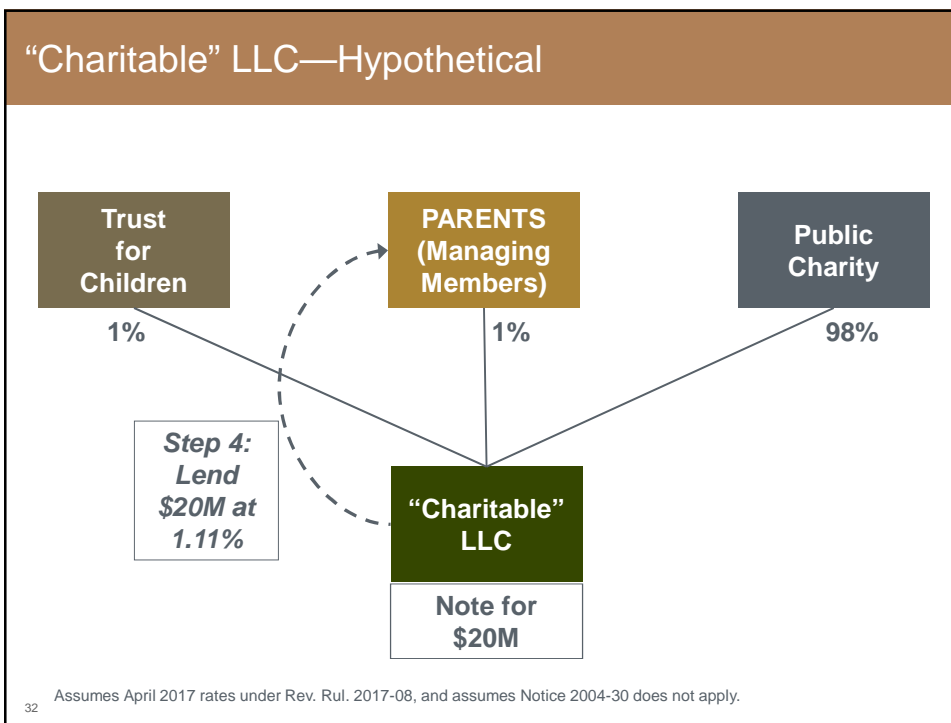
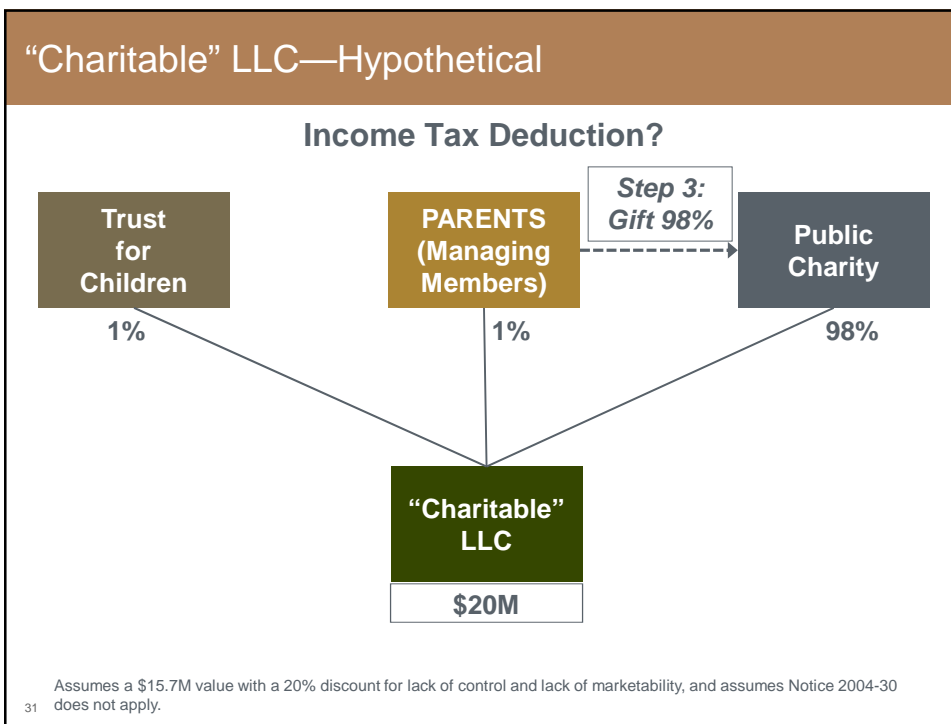
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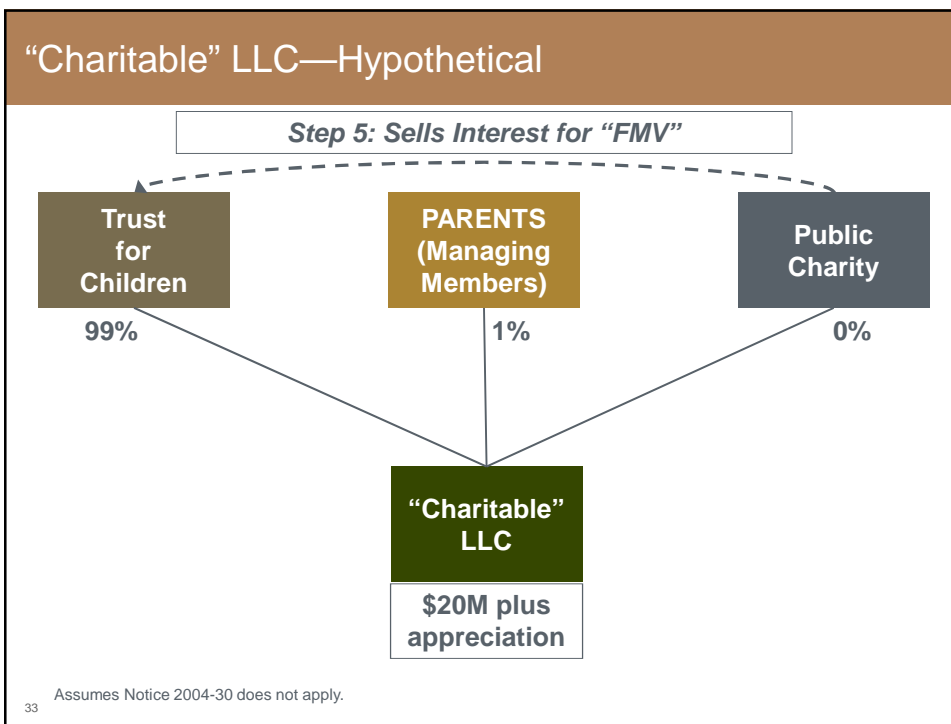
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THANK YOU!

## Appendix

## Biography

**Justin T. Miller, J.D., LL.M., TEP, AEP®, CFP®**  
National Wealth Strategist

As a national wealth strategist at BNY Mellon, Justin Miller works collaboratively with other advisors to provide comprehensive wealth planning advice to clients and their families. He also is an adjunct professor at Golden Gate University School of Law, a Fellow of The American College of Trust and Estate Counsel (ACTEC), and a sought-after speaker on tax, estate and charitable planning topics for conferences throughout the country, including events hosted by the AAML, ABA, ACTEC, CalCPA, Golden Gate University, NACGP, Santa Clara University, Stanford University, the State Bars of California, Georgia, Nevada, Texas and Washington, STEP, UCLA, the University of Notre Dame, Vistage International, and YPO. In addition, he has published numerous articles in publications such as the *American Journal of Family Law*, *California Tax Lawyer*, *California Trusts and Estates Quarterly*, *State Tax Notes*, *Tax Notes* and *Trusts & Estates*, and he is frequently quoted as an industry expert in the media.

Mr. Miller has served as an executive committee member of the State Bar of California Taxation Section, an executive committee member of the Los Angeles County Bar Association Taxation Section, the chair of the Century City Bar Association Taxation Section, and the editor-in-chief of the *California Tax Lawyer*. Prior to joining BNY Mellon, he was an attorney at a major law firm, where he advised wealthy families, senior corporate executives and closely-held business owners regarding tax-efficient estate and business succession planning, trust law and management and asset preservation.

Mr. Miller received a master of laws in taxation and a juris doctor from New York University School of Law and a bachelor's degree, with honors, from the University of California at Berkeley.

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