

# BakerHostetler

## Planned Giving Day

Legal Update for Exempt Organizations  
and Their Donors

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# Presenters



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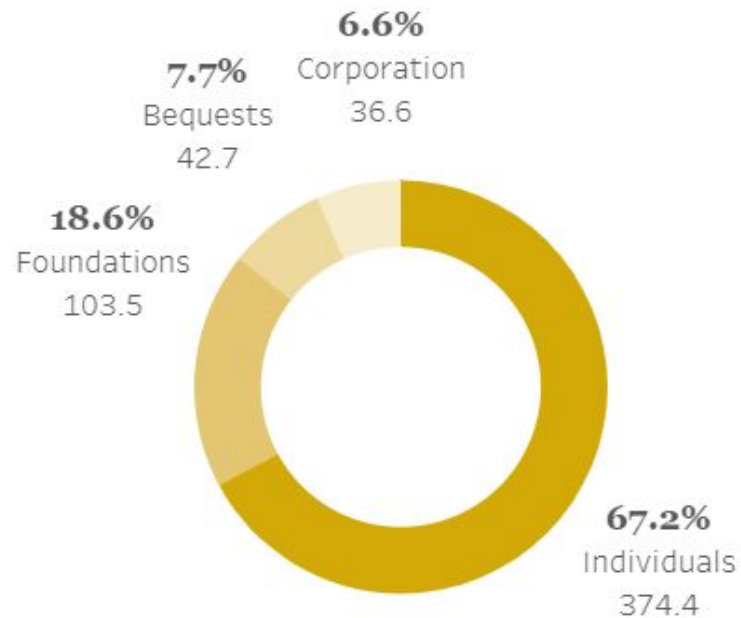
# Agenda

- Recent giving trends
- Future of Race-Based Philanthropy
- Gift Agreements and Restrictions
- DEI and ESG
- Recent (and Coming!) Federal Law Changes
- Political Activity and Political Forecasting
- Corporate Transparency Act
- Case Law Update
- Ohio Legislative Update

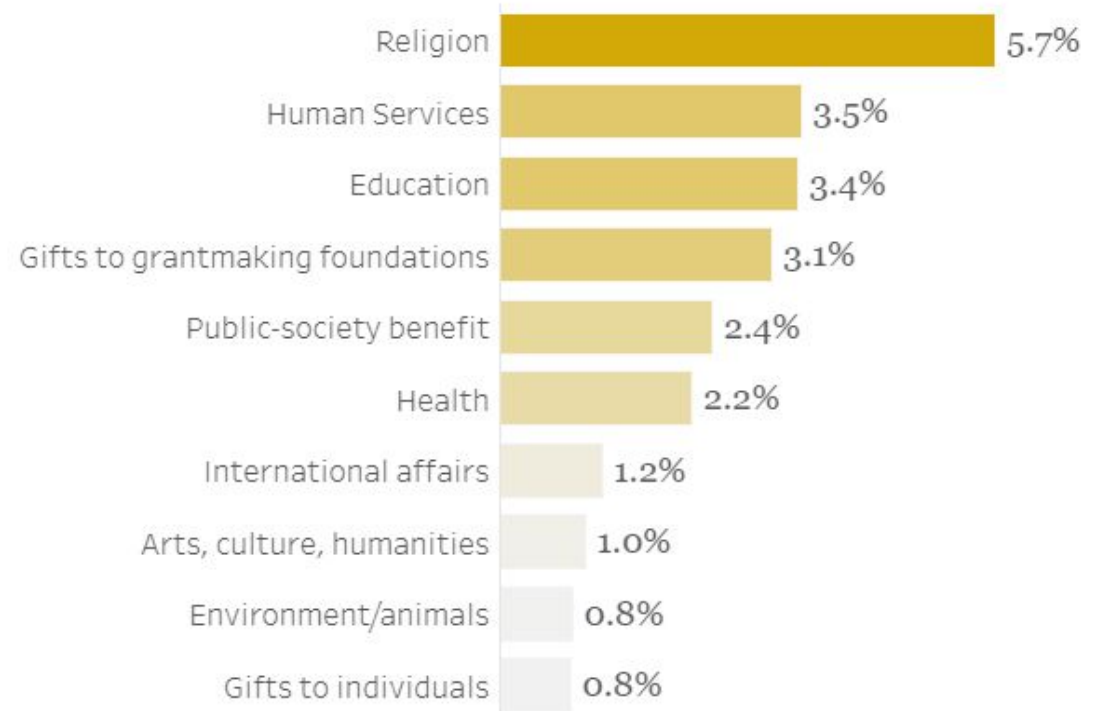


# Giving USA 2024

Contributions by source in billions of U.S. dollars.



Contributions by type of recipient organization in billions of U.S. dollars.



# Race-Based Philanthropy

- The definition of charitable for purposes of Section 501(c)(3) specifically includes:
  - “Relief of the poor and distressed or of the underprivileged”; and
  - “promotion of social welfare by organizations designed...
    - to lessen neighborhood tensions;
    - to eliminate prejudice and discrimination;
    - to defend human and civil rights secured by law.
- Organizations addressing race and racial issues have long been explicitly recognized as charitable
- Organizations addressing economic conditions, often as a proxy for race, have also been recognized as charitable
- Private foundation Treasury Regulations explicitly authorize race-based grantmaking
  - Indeed, a private foundation scholarship program with racial criteria was approved just this year (see IRS Approval Letter 202407006)



# 42 USC §1981

***All persons*** within the jurisdiction of the United States ***shall have the same right*** in every State and Territory ***to make and enforce contracts***, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property ***as is enjoyed by white citizens***, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

# Fearless Fund

- Contract vs. Grant
- Valid Remedial Program vs. Race-Based Exclusion
- Expressive Conduct vs. Discrimination
- Standing / Right to Sue (Injury in Fact vs. “Flopping”)
- What is the “public interest”?

Update: on September 11, 2024, the Fearless Fund settled, ending the Strivers Grant program.

# Race-Based Philanthropy – Other Developments

- Do No Harm v. American Association of University Women (AAUW)
  - Parties agreed to a Joint Stipulation of Dismissal, in which AAUW agreed to no longer consider applicants' race or ethnicity.
    - Quote from AAUW: “While AAUW remains committed to achieving equity for women and girls, we acknowledge that recent Supreme Court decisions have changed how we must fight for equity. Rather than using the considerable resources this lawsuit would have consumed, AAUW has agreed to remove race as a criterion for its Focus Group Professions Fellowship.”
- Do No Harm v. Pfizer Inc.
  - Appeals court affirmed dismissal of reverse discrimination case for lack of standing.
- Law Firm Diversity programs
- Silicon Valley Diversity Programs (e.g., Girls In Tech)
- Do No Harm v. Cleveland Clinic Foundation



# Race-Based Philanthropy – What Now?

- What are we seeing?
- Common questions and concerns
- What to do if you receive a cease and desist letter (or worse)?
- Risk Mitigation Strategies
  - Green light, yellow light, red light



# “Donor Revolt,” Donor Relations, and Gift Agreements

- Concerns over Israel-Gaza war and antisemitism on campuses made news with major cases of long-time donors withdrawing support from organizations
- Harvard College Jewish Alumni Association sent letter on behalf of 1,600 members withdrawing future support for the University
- Ross Stevens withdrew a \$100 million gift to U. Penn in light of its president’s congressional testimony. He had given limited partner units in Stone Ridge Holdings Group and terminated the units “for cause” for violation of its anti-discrimination and anti-harassment policies

# “Donor Revolt,” Donor Relations, and Gift Agreements

- Future Flow of New Gifts:
  - Many smaller dollar donors make annual gifts with no gift agreement and may just stop making future gifts
  - Gifts from charitable trusts might terminate if the Trustee determines the charity no longer matches the charitable purpose
  - Might donors try to terminate pledges if concerned about values?
- Gift Acceptance Considerations:
  - Consider naming rights provisions in gift agreements and allow both the organization and the donor to remove name
  - Include consideration of organization values and donor restrictions in gift acceptance policy

# Impact Investment Activity in a Politically Charged Environment – Decoding ESG, DEI, PRI, MRI, etc.

**-100% IRR**

**MARKET RETURNS**



Grants / Philanthropy	Program-Related Investments (PRI)	Mission-Related Investments (MRI)		Traditional Investing
<p>“We expect only impact returns on our investment. We do not expect to recover our investment”</p>	<p>“We invest in accordance to our charitable purpose. While we can generate a return, that is not the primary goal”</p>	<p><b>Positive Screens</b> “Our investment strategies are driven by our mission”</p>	<p><b>Negative Screens</b> “We do not invest in these sectors because of our mission”</p>	<p>“We have allocated x% of our portfolio to impact but are striving to maximize returns”</p>
<p>Foundations, other non-profits, nongovernmental organizations (NGOs) and government agencies</p>	<p>Foundations and other non-profits who have adopted this term. (Funds come from WITHIN the foundation and NOT the endowment / trust)</p>	<p>Foundation endowments, development finance institutions, fund-of-funds, family offices, investment funds, anyone!</p>		<p>Foundations and endowments, pension funds, family offices, fund-of-funds</p>
<p>Grants and contracts</p>	<p>Equity, debt, forgivable loans</p>	<p>Equity and debt</p>		<p>Equity and debt</p>

Source: ABA Virtual 2021 - The Future of Impact Investment Funds

# Program-Related Investments (PRI)

- This type of investment may be used to achieve the 5% payout in grants that private foundations are required to make each year.
- No significant investment purpose. The main motivation for the investment is not the financial payout but the charitable purpose.
- Primary exempt purpose:
  - “significantly furthers” exempt activities.
  - “but for” test (wouldn’t make investment otherwise).
- No political purpose.
- Acceptable for a PRI to not generate a return as these types of investments are exempted from prudent investor standards.
- Often, PRIs will take the form of a below-market loan, but they are not limited to this type of investment.



# Mission-Related Investments (MRI)

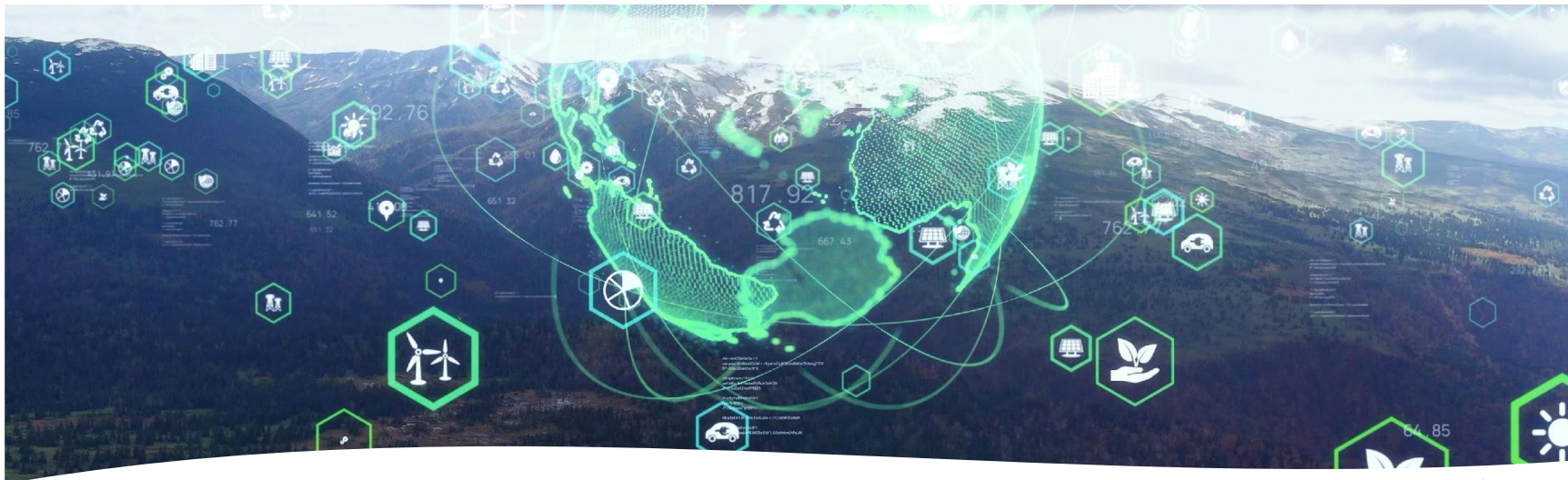
- Unlike PRIs, MRIs cannot be applied to the foundation's annual payout requirement.
- The purpose of an MRI is both to contribute to the foundation's charitable mission and to achieve an effective financial return.
- Prudent investor standards apply to these types of investments, but the investment need not offer the highest rate of return so long as ordinary business care is exercised at the time the investment is made.



# Mission-Related Investment (MRI)

## Examples

- Examples of MRIs could include:
  - Purchase of equity in a company creating jobs in economically disadvantaged communities,
  - Loan to an organization distributing essential resources in developing countries
  - Investment in an alternative energy company





# Socially Responsible Investments (SRI)

- Socially responsible investments involve screening the organization's investments to ensure that they do not contravene the organization's mission.
- Investing activities where ethics or beliefs—irrespective of their likelihood to lead to profit or protect value — play a role in investing decision.
- For example, an organization may wish to invest only in clean energy companies or to avoid investments in big tobacco.
- Prudent investment standards apply to this type of investment.

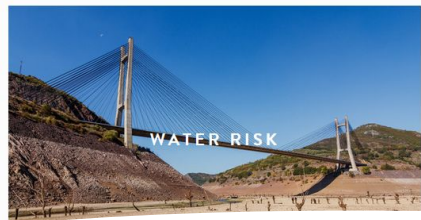


Image Source:  
[www.AsYouSow.com](http://www.AsYouSow.com)

# IRS Guidance

- IRS released [Notice 2015-62](#), Investments Made for Charitable Purposes, on September 15, 2015.
  - According to the IRS, Notice 2015-62 “confirms that under section 4944 of the Internal Revenue Code, private foundation managers may consider the relationship between a particular investment and the foundation’s charitable purpose when exercising ordinary business care and prudence in deciding whether to make the investment.”
  - This notice gives private foundations guidance about how they can make mission-related investments with reasonable business care without violating the jeopardizing investments laws.
- [PLR 202041009](#)
  - The private letter ruling released on October 9, 2020, denied federal tax exemption under section 501(c)(3) of the Internal Revenue Code to a nonprofit organization that structured and managed double-bottom-line impact investment funds.
  - The IRS concluded that managing double-bottom-line investment funds that seek social or environmental impact, as well as market or near-market financial returns for investors, is not a charitable activity.

# Federal Law Update

# Donor Advised Fund Realities

According to recent study from Donor Advised Fund Research Collaborative:

- 49% of all DAFs hold \$50,000 or less
- 40% of gifts into DAFs are in the \$10,000-\$50,000 range
- 54% of DAFs granted out at least half their assets within three years
- Only 7% have assets of \$1,000,000 or more
- Payout percentages by DAF size:
  - \$100,000 - \$1,000,000 = 17%
  - \$1,000,000 - \$10,000,000 = 11%
  - \$10,000,000+ = 9%
- Less than 4% of grants were truly anonymous



# New Donor Advised Fund Regulations

- Concerns:
  - Mandatory minimum payout?
  - Disallowing DAF gifts as public support?
  - Limit on duration?
- Published November 14, 2023
- Public Comment Period ended on February 15, 2024
- Actually largely definitional in nature

# Regs on What a Donor Advised Fund is Not

- What is not a Donor Advised Fund?
  - A fund with multiple donors where no donor or donor-advisor has reasonable expectation of advisory privileges
  - An account that makes distributions solely to a single public charity (other than “disqualified supporting organizations”) or government entity for public purposes
  - A scholarship fund established by a 501(c)(4)
- A disqualified supporting organization is a “non-functionally-integrated” supporting organization

# Who is a Donor or Donor Advisor?

- What is not a Donor?
  - A public charity (other than “disqualified supporting organization”) or government unit is not a Donor
  - If only public charities have advisory privileges, it is not a DAF, even if there are other donors
  - Private foundations and disqualified supporting organizations can be donors because they can satisfy minimum payouts with gifts to DAFs
- What is a Donor Advisor?
  - Person appointed or designated by donor with advisory privileges over distribution or investment of assets in DAF
  - Investment advisor who provides investment management services with respect to both DAF assets and Donor’s personal assets is a “Donor Advisor”

# Advisory Privileges

- What are Advisory Privileges?
  - A Donor is deemed to have advisory privileges unless facts and circumstances show otherwise
  - Sponsoring organization allows non-binding recommendations on distributions and/or asset management
  - Written agreement between donor and charity concerning advisory privileges
  - Charity's marketing material indicates it will accept advice regarding distributions and/or investment
  - Sponsoring organization solicits advice
- Not if donor makes restricted gift but retains no discretion on use of gift subject to restrictions



# Donor or Designee as One Member of Advisory Committee

- What about serving on Advisory Committees?
  - A Donor is deemed to have advisory privileges unless facts and circumstances show otherwise
  - Two safe harbors:
    - Donor appointed to advisory committee and:
      - Appointed due to objective criteria related to expertise in field related to fund
      - Committee has 3 or more individuals, no more than 1/3 are related persons with respect to each other
      - Appointee is not a significant contributor to the fund at appointment
    - Donor's designee appointed to advisory committee and:
      - Appointed due to objective criteria related to expertise in field related to fund
      - Committee has 3 or more individuals, and a majority is not recommended by donor
      - Recommended person is not related to donor

# What's Not To Like?

- If personal financial advisor also manages DAF portfolio, advisor becomes a “Donor Advisor” and fees paid to him or her are subject to a 25% excise tax and return by advisor
- Clarify that donor’s ability to modify restrictions on a restricted gift to a public charity does not create a DAF
- Clarify that donor’s ability to advise on investment or use of fund that must be used by the public charity itself is not a DAF
- Extend 501(c)(4) scholarship program exception to include 501(c)(5) and 501(c)(6)
- Provide that payments for services that are not prohibited benefit or excess benefit are not “distributions” from a DAF
- Application could begin on the first year ending after the final regs are announced, not beginning

# Qualified Charitable Distributions

A Qualified Charitable Distribution is a direct distribution of up to \$100,000 to charity from an IRA (not 401(k)) for donors age 70½ and up without being included in the donor's income.

- **\$105,000** in 2024, indexed for inflation thereafter
- Can be done by both spouses, if both have adequate IRA assets to do so
- Avoids percentage deduction limitations
- Gives tax benefits even if donor does not itemize
- Counts toward required minimum distributions for donors who do not need/want the income
- Excludes income from Ohio income tax

# Secure 2.0, Charitable Remainder Trusts, and Charitable Gift Annuities

- IRA owners (not 401(k) or 403(b)) over age 70.5 may make a one-time transfer of \$50,000 to fund
  - Charitable Gift Annuity; or
  - Charitable Remainder Trust
- Transfer will be excluded from Donor's taxable income
- Transfer cannot be co-mingled with other funds donated to the charity
- Beneficiary can only be Donor and/or Donor's spouse, so they may be able to jointly make a \$100,000 contribution
- Generally not highly valuable at current dollar amounts and limitations, but may be expanded in the future

# Sunset of Tax Cuts and Jobs Act

- The Tax Cuts and Jobs Act of 2017 contained a 9-year sunset. Unless Congress acts to change the law before then, the following tax law changes occur automatically on 1/1/2026:
  - Top marginal rate returns to 39.6%
  - Standard deduction cut in half (currently \$14,600 single, \$29,200 married filing jointly)
  - Limit on State And Local Tax (“SALT”) deduction at \$10,000 is repealed
  - Estate tax exemption cut in half from current \$13,610,000 per person (\$27,200,000 per couple) to ~\$7,000,000 and \$14,000,000

# A Brief Note on the Corporate Transparency Act

- What is the Corporate Transparency Act?
  - Effective 1/1/2024; requires the provision of “beneficial owner” information to “FinCEN”
  - Tax-exempt entities are generally exempt from the definition of reporting company for CTA purposes
  - Wholly-owned and wholly-controlled subsidiaries are also exempt
  - What about newly formed entities?



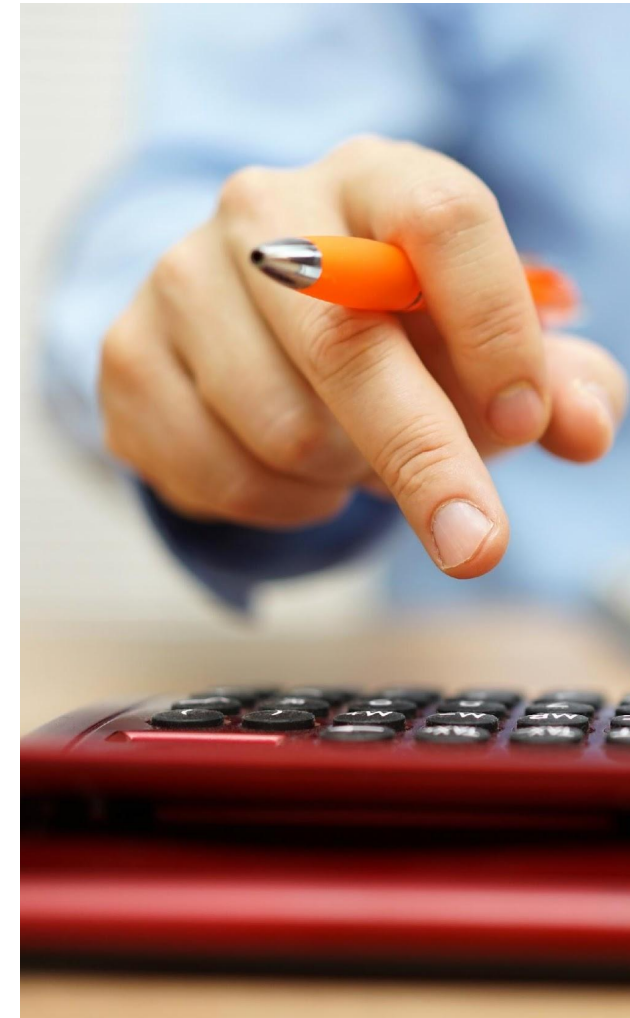
# Political Activity – A Reminder on the Basics

- Some legislative lobbying permitted (either “no substantial part” or a specific dollar amount if 501(h) election)
  - What is lobbying?
- NO political campaign intervention activity
  - What is campaign intervention activity?
  - But respect the rights of staff and volunteers to speak in their personal capacity



# What's Next? Trump Vance Transfer Tax Policy Proposals

- Reported to want to extend current provisions beyond the sunset
  - \$13,610,000 per person continuing to grow with inflation
  - 40% estate tax rate on amounts above the exemption
  - Annual exclusion gifts of \$18,000 per year to unlimited number of recipients
  - GST exempt trusts of unlimited duration
  - “Grantor trusts” not included in taxable estate
  - Valuation discounts for lack of control and lack of marketability





# What's Next? Harris/Walz

## Transfer Tax Policy Proposals

- Reported to have embraced the American Housing and Economic Mobility Act, which included:
  - Reduce exemption to 2009 level of \$3,500,000 per person (\$7,000,000 per couple)
  - 55% rate up to \$13,000,000; 60% on the next \$80,000,000, then 65% above \$93,000,000, with a 10% surtax at \$1,000,000,000.
  - Limit annual exclusion to \$10,000 (down from \$18,000) and only 2 recipients
  - Impose a time limit on GST exemption
  - Include “grantor trusts” in taxable estate
  - Eliminate valuation discounts

# What's Next? Changes Coming to Foundations?

- JD Vance has publicly opposed large private foundations as “social justice hedge funds” and large “war chests” for liberal causes.
- He introduced legislation calling for a 35% excise tax (instead of 1.4%) on university endowments over \$10 billion
- In a 2021 Op-Ed piece he advocated requiring charities with an endowment of greater than \$100 million to spend 20% per year or lose tax-exempt status.
- If Vance becomes VP and there is a populist spirit that opposes concentrations of wealth in the room as we look at significant tax law revisions in late 2025, could we see major changes for major charities?

# Case Update: Brooks v Commissioner

## 4<sup>th</sup> Cir No. 23-1314

### July 15, 2024

- Taxpayers purchased 85 acres of vacant land in Georgia for \$1,350,000; split into 44 and 41 acre parcels, donated a conservation easement on the 41 acre parcel, and claimed a deduction of \$5,100,000.
- Taxpayers reserved various rights on the easement property including constructing paddocks for horse boarding, constructing a barn, and installing underground and overhead utilities
- Deduction disallowed and 40% misstatement penalty:
  - No contemporaneous written acknowledgement – Deed did not satisfy this requirement
  - Failed to provide appropriate documentation of the baseline condition of the property
  - Overstated basis as full value of property, not the 41-acre parcel and overstated value of property at over \$5,000,000 based on speculation about future zoning changes

# Scott Gerami and Florida A&M University: Gift too Good to Be True

- Business owner Scott Gerami announced \$237.7 million gift to Florida A&M at commencement speech on May 4<sup>th</sup>.
- Significant concerns about the gift arose soon thereafter:
  - Gift was in 15 million shares of Batterson Farms, Gerami's privately held company
  - Gift value based on \$15.85 per share, but FAMU did not have it independently valued
  - Advancement officer and president signed nondisclosure agreements keeping gift secret from chairs foundation and university boards
  - Did not disclose gift for fear it would “jeopardize this transformational donation”

# Oconee Landing Property LLC v. Commissioner, T.C. 11814-19 (Feb. 21, 2024)

- Partnership donates conservation easement in 2015 on 355 acres of land in Greene County, Georgia
- Deduction of \$20.67 million based on value of the land at \$59,718 per acre at the time of the donation
- Deduction denied due to lack of qualified appraisal
  - Appraisers met the conditions of qualified appraisers but
  - Court found there was an advance agreement with the appraiser to over-value the property
  - Court determined value of deduction was \$4.97, so value of \$20.67 exceeded by more than 400% and 40% gross valuation misstatement penalty applied



# Miscellaneous State Updates

- HB 301 – effective 10/24/24
- The latest on private enforcement of gift agreements
- Update on “Moritz” Legislation

# Questions



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