

## ***Considering Carbon: Markets & More***

### **Overview**

An interest in reducing environmental impacts and achieving climate sustainability within the U.S. is growing significantly among both the public and private sectors. As a result, several different entities are considering carbon credit markets to encourage the reduction of greenhouse gases (“GHG”). Generally, these markets offer credits to market participants based on the amount of carbon dioxide they have sequestered in the soil. In turn, these credits are sold to companies in the carbon marketplace. Because of the creation of carbon markets and escalating interest in reducing GHGs, a carbon industry is beginning to emerge.

Meanwhile, agriculture has become a centerpiece of the climate discussion because the agricultural sector is capable of delivering natural climate solutions. Specifically, many agricultural producers across the nation are capable of reducing carbon emissions by undertaking certain “climate-smart” farming practices that sequester carbon. Agriculture’s ability to capture and sequester carbon has prompted the carbon industry to encourage agricultural producers to participate in carbon markets. Several carbon market operators offer market programs to agricultural producers who implement sustainable farming practices in order to boost market participation. Producers engaging in these markets are advancing the goal of climate sustainability, while also receiving a new source of revenue by selling credits on the carbon market.

While carbon market programs are currently operating, there is still some uncertainty surrounding the emerging carbon industry. Much of this uncertainty arises from the lack of information about carbon credit markets. Currently, the industry is operating almost entirely within the private sector because carbon markets are being operated by several different private companies. Because many of these market-operating companies rarely publicize details on business arrangements and how their carbon markets are operated, the industry continues to be complex and unclear.

Even though private market operators are dominating most of the carbon industry, the federal government is becoming involved in the climate policy debate. Specifically, Congress is seeking to develop the carbon industry by implementing practical solutions that reduce GHG emissions, while also generating economic opportunities for other sectors. Because agriculture and forestry sectors mitigate the release of carbon into the atmosphere through natural solutions, Congress has proposed legislation to assist both sectors.

Recently, Congress proposed a bipartisan bill known as the [Growing Climate Solutions Act](#). Overall, this bill enables the United States Department of Agriculture (“USDA”) to regulate certain aspects of the carbon industry, bring more clarity to the carbon marketplace, and expand opportunities for more producers to participate in the carbon industry. In other words, it makes it easier for agricultural producers and foresters to participate in carbon credit markets.

## **Agriculture Developing the Carbon Industry**

As the demand for climate sustainability increases, many different industries are seeking ways to participate in the carbon industry as a climate solution. Industries such as transportation, retail, manufacturing, and automotive are entering the climate policy debate to suggest measures they can implement to reduce GHG emissions. However, some of the climate-smart initiatives proposed by these industries will take time to implement, meaning it may be years before these industries can serve as climate solutions. Because it will likely take some time for other industries to implement carbon-reducing initiatives, both public and private sectors are looking to agriculture as a leader in the carbon industry.

The agricultural industry is the focus of the carbon industry primarily because many producers can offer existing solutions to mitigate climate change. In general, producers can reduce GHG emissions from entering the atmosphere—which mitigates the impacts of climate change—because they can store carbon dioxide in cropland and rangeland soil. Storing carbon into the soil is commonly known as *carbon sequestration*. Producers can sequester carbon when implementing certain [carbon farming](#) practices, such as conservation tillage, planting cover crops, or applying soil amendments to their fields. Accordingly, producers who implement at least some carbon-smart practices will reduce carbon emissions and provide a solution to mitigating climate change.

Another asset agriculture brings to the carbon industry as a current climate solution is that the agricultural industry does not have to collect data or develop new technology to mitigate climate change. This is because researchers have already found carbon-reducing practices, and the industry has created technology to help producers implement these practices. As a result, producers wanting to implement carbon farming practices can begin doing so. In fact, some producers across the nation have already reduced carbon emissions by implementing carbon farming practices within their farming operations.

Lastly, agriculture is a large focus in the carbon industry because there is already a market in place to offer a new source of income to producers, while also advancing climate sustainability. Currently, there are not many economic opportunities available to other industries in the carbon industry. Unlike other industries, agricultural producers have the ability to generate additional income by participating in the carbon credit markets. Because these carbon markets are offering an additional source of income for producers, producers are likely more inclined to participate in mitigating GHG emissions. Therefore, the more producers involved in carbon markets, more carbon is sequestered, and the risks of climate change are reduced.

### **“Considering Carbon” Series**

The carbon industry is still evolving, but it is clear that agriculture is playing a key factor in developing that industry. Because carbon markets have become an increasingly important aspect of the agriculture sector, the National Agriculture Law Center will discuss

various elements of the burgeoning industry in a new series titled “Considering Carbon: Legal Issues for an Emerging Industry.”

Over the next several months, the National Agricultural Law Center will provide resources addressing legal topics and issues that concern agriculture and the carbon industry. Each month, the Center will offer at least one new publication or webinar discussing certain areas of the carbon industry that may have an impact on agriculture. During this series, we will discuss topics such as contracts, insurance, monitoring and enforcement, administrative proposals, and taxation as it relates to agriculture’s role in developing the carbon industry.

To view the Growing Climate Solutions Act of 2021, click [here](#).

To read other blog posts in this series, click [here](#).

## ***Considering Carbon: Overview of Carbon Market Composition***

An interest in reducing environmental impacts and achieving climate sustainability within the U.S. is growing significantly among both the public and private sectors. As a result, several different entities are considering voluntary carbon credit markets to encourage the reduction of greenhouse gases (“GHG”). Generally, these markets offer credits to market participants based on the amount of carbon dioxide they have sequestered in the soil. In turn, these credits are sold to companies in the carbon marketplace. Because of the escalating interest in reducing GHGs, voluntary carbon markets are quickly developing a carbon industry.

Meanwhile, agriculture has become a centerpiece of the climate discussion because the agricultural sector is capable of delivering natural climate solutions. Specifically, many agricultural producers across the nation are capable of reducing carbon emissions by undertaking certain “carbon-smart” farming practices that sequester carbon. Agriculture’s ability to capture and sequester carbon has prompted the carbon industry to encourage agricultural producers to participate in carbon markets.

Currently, several voluntary carbon market operators offer market programs to agricultural producers who implement sustainable farming practices to boost market participation. While these market programs are currently operating, there is still some uncertainty surrounding these markets. Much of this uncertainty arises from the lack of information about carbon credit markets. Voluntary market programs within the U.S. are almost entirely operated by several different private companies, and because these market-operating companies rarely publicize details on business arrangements and how their voluntary carbon markets are operated, the industry continues to be complex and unclear.

Even though there is some uncertainty surrounding the existing voluntary carbon markets, these markets do have a potential to benefit the agricultural industry. Specifically, producers engaging in these markets are advancing the goal of climate sustainability, while also receiving a new source of revenue by selling credits on the voluntary carbon market. Thus, it is important for individuals and entities participating in the agricultural sector to understand the basic characteristics of carbon markets. This article discusses a general overview of the existing carbon market structure, the parties involved in these markets, participation requirements, and how these markets generate a new source of revenue for the agricultural industry.

### **Types of Carbon Markets**

Currently, there are two types of carbon markets within the carbon industry: compliance markets and voluntary markets. Compliance carbon markets (also known as “mandatory markets”) are usually organized by governments to target certain industries or sources that emits GHGs. Typically, the government places caps on GHG emissions, and the industry or source emitters is legally mandated to offset their emissions. In a compliance market, emitters obtain pollution permits or allowances in order to meet the emission cap



limits. These emitters are allowed to trade unused allowances to other emitters or financial intermediaries to make a profit. An example of a compliance market is California's Cap-and-Trade Program.

While compliance markets exist, most carbon markets within the U.S. are voluntary markets. Unlike compliance markets, voluntary markets are instituted by private companies who develop and operate their own marketplace to facilitate transactions of carbon offsets, the act of reducing emissions of carbon dioxide into the atmosphere. Voluntary markets are incentive-based markets that allow individuals and private entities to purchase carbon offsets or credits on a voluntary basis. In other words, the market-operators use their voluntary market to link buyers and sellers of carbon credits.

Overall, voluntary carbon markets are relatively flexible and far less regulated than compliance markets because voluntary markets operate in the private sector. Because voluntary markets are developed by several different private companies, each market can differ from one another. Specifically, each market operator sets their own verification standards, credit registries, participation requirements, and project criteria for their carbon market. While voluntary markets differ, most markets are structured the same and each implement similar operational practices.

### **Voluntary Market Structure**

In general, once private companies establish a voluntary carbon market, they seek participants who have the ability to capture and store carbon dioxide into soils, a process known as *sequestration*. Many agricultural producers have the ability to sequester carbon by implementing certain farming practices. Thus, various markets provide specific market programs for producers to encourage their participation in the carbon market. However, these programs have specific eligibility requirements that producers must satisfy in order to participate in an operator's market.

Producers choosing to participate in a carbon market must implement certain carbon-smart farming practices into their operation. Exercising carbon-smart practices is required to participate in a market because these practices sequester carbon, which is how carbon credits are quantified. The most common practices include crop rotation, cover crops, buffer strips, no-till/reduced-till, livestock grazing, and applying soil amendments to fields.

Producers who implement at least some of these practices will reduce carbon emissions, and depending on the market program, will be eligible to participate in a voluntary market to sell the carbon credits they produce. However, before a producer is enrolled into a market program, they are usually required to provide records and documents to certify they have incorporated carbon-smart practices in their farming operation. The market operator—or a third-party verifying company—reviews the producer's records and verifies the producer's farming practices to ensure the producer is capable of sequestering enough carbon to participate in that market program. If the verification deems the producer eligible to participate, the producer can accept the verification and enroll in the carbon market.

Typically, producers enrolling as a market participant must execute a contract provided by the market operator. The contract will likely contain provisions that allows the market operator to collect certain data from the producer's croplands. Basically, this data is necessary to measure and verify the amount of carbon the producer sequesters. Additionally, the contract will likely require the producer to hire an independent third-party company to verify the amount of carbon they sequestered. Once verified, the market operator issues carbon credits to the producer based on the amount of carbon they sequestered.

Because various different private companies operate their own voluntary carbon market, the data measurement procedures to calculate the amount of sequestered carbon may differ from one market to the next. However, many of these voluntary markets are using similar methods to determine the number of carbon credits a producer earns. Some markets issue carbon credits to producers who simply implement carbon-smart farming practices, but other market operators issue credits based on measured outcomes. These market operators choose to issue carbon credits either on a per-acre or per-metric-ton basis.

Many producers currently enrolled in a voluntary carbon market are likely participating in a market that measures sequestration on a per-acre or per-metric-ton basis. In these outcome-based markets, carbon credits quantify the amount of carbon the producer sequesters. If a producer participates in a market that uses a per-acre method, the producer receives the value of the market operator's carbon credit for each acre carbon was sequestered.

Producers participating in a market that measures carbon sequestration on a per-metric-ton basis, the producer receives carbon credits based on the tonnage amount. In some markets, one metric ton of sequestered carbon equals one carbon credit. Depending on the market's measurement procedures, the third-party verifier determines how many metric tons of carbon dioxide the producer sequesters. Once tonnage is verified, the market operator issues carbon credits to the producer based on the number of metric tons they sequestered.

### **Voluntary Carbon Marketplace**

In general, the voluntary carbon market is driven by numerous individuals and private companies who are taking steps to eliminate GHG emissions. Specifically, several businesses are setting net-zero or climate-neutral targets, but many entities face financial or technological difficulties to reach their goals. In some instances, it is less expensive for companies to pay others to reduce emissions instead of implementing emission-reducing practices within their own business operations. Thus, in order to meet their climate-neutral targets, many companies purchase carbon credits available in the voluntary market to reduce their GHG emissions.

Many voluntary carbon markets facilitate their own carbon marketplace. Private market operators use the marketplace to link buyers and sellers of carbon credits. In other words,

a carbon marketplace provides individuals and business entities the opportunity to purchase carbon credits a producer has generated. In most markets, either the market operator or a third-party broker will sell a producer's credits to a buyer. Once sold, the producer receives the proceeds from the sale.

### **Early Adopters**

One issue surrounding voluntary carbon markets is the idea of additionality. Currently, only some carbon markets provide programs for early-adopting producers, but only for a limited number of years. Many voluntary markets only offer market programs to producers who are implementing new carbon-smart farming practices in their operation. Thus, producers who previously adopted carbon-smart practices have difficulties enrolling in a voluntary carbon market. As voluntary carbon markets continue to develop, more market operators may offer programs for producers that previously incorporated carbon-smart practices in their farming operation.

### **Conclusion**

The development of voluntary carbon markets has the potential to benefit agricultural producers greatly. Producers enrolling to participate in a voluntary market implement carbon-smart farming practices, and these practices have the ability to enhance soil health, crop yields, and sustainability. Additionally, these carbon markets also provide producers a new source of revenue by selling credits in a carbon marketplace.

Although voluntary markets offer potential benefits for participating producers, these markets operate almost entirely in the private sector and are not currently regulated by the federal government. However, Congress recently proposed the [Growing Climate Solutions Act](#), a bill that provides the federal government the ability to assist in the development of voluntary carbon markets. Also, the United States Department of Agriculture recently began judging the feasibility of creating a carbon bank, which would reward producers who implement carbon-smart practices in their farming operation.

Overall, voluntary carbon market operators are currently enrolling producers across the nation to participate in their market programs. However, each voluntary market operates differently from one another, such as enrollment criteria, acreage requirements, credit value, and payment structure. Therefore, before signing a contract to participate in a market program, producers should seek legal advice to determine if enrolling in a carbon market will benefit their farming operation.

To read other blog posts in this series, click [here](#).

## ***Senate Advances Carbon Market Bill***

On April 20, 2021, the Senate unveiled the text of the proposed Growing Climate Solutions Act. The bill, which has been co-sponsored by 20 Democrats and 22 Republicans, is aimed at encouraging the development of voluntary carbon markets. Specifically, the bill would help provide technical assistance for farmers and private forest landowners to get involved in voluntary carbon markets. This is the second version of the Growing Climate Solutions Act, with the first proposed in the previous Congressional session.

### **Background**

The original Growing Climate Solutions Act was first introduced to Congress on June 4, 2020. Like its 2021 counterpart, the goal of the 2020 bill was to make it easier for farmers and foresters to gain entry the voluntary carbon marketplace.

Voluntary carbon markets are an emerging phenomenon meant to address the reduction of greenhouse gases (“GHG”) in the atmosphere. In general, these markets encompass transactions of carbon offsets, the act of reducing or sequestering a certain amount of carbon dioxide out of the atmosphere. Offsetting a certain amount of carbon generates a credit which can then be bought or sold on within the voluntary market. Because these carbon markets are voluntary, it is up to the organizations facilitating the markets to set their own standards for market participation, credit registries, and types of projects that will be regarded as reducing carbon or other GHGs.

Because voluntary carbon markets operate in the private sector, they are viewed as being more flexible than required “compliance” carbon markets. Compliance markets, such as the cap-and-trade program adopted by the state of California in 2013, are typically instituted by governments and may target a specific industry or type of GHG emitter. In a compliance market, the government will likely determine the maximum amount of GHG that a source may emit, how credits will be generated, and who may participate in the market. Participation and demand in compliance markets are determined according to regulatory requirements. In a voluntary market, demand is determined according to the participants, and who may participate is less formally regulated. Additionally, because voluntary markets can differ from one another, a potential participant has the option of exploring different markets to determine which would work best for the participant’s needs.

While the flexibility of voluntary carbon markets allows room for experimentation and innovation, it can also create certain obstacles. Access to reliable information about markets, access to qualified assistance to new participants, and lack of standardized quality criteria have become obstacles to getting farmers and private forest landowners involved in carbon markets. The Growing Climate Solutions Act of 2020 was introduced as a potential solution to those issues. Although the Senate Committee on Agriculture, Nutrition, and Forestry held hearings on the 2020 bill, it failed to receive the support needed to become law. This prompted the sponsors of the Growing Climate Solutions Act

to resume negotiations with other Senators in order to draft a new version of the bill. That version was reintroduced to the Senate this week.

### **Growing Climate Solutions Act of 2021**

According to the text of the Growing Climate Solutions Act, its purposes are to facilitate both “the participation of farmers, ranchers, and private forest landowners” in voluntary carbon markets, and the “provision of technical assistance [...] in overcoming barrier to entry,” as well as to establish the Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Certification Program (“the Program”) and an Advisory Council to advise USDA regarding the Program. In other words, the purpose of the bill is to create a certification program under USDA to provide technical assistance to agricultural producers seeking to participate in voluntary carbon markets.

Under the Growing Climate Solutions Act, USDA would have 270 days after the Act becomes law to determine whether establishing the Program would further the goal helping to get farmers and private forest landowners involved in voluntary carbon markets. If USDA determines that establishing the Program would help advance that goal then the Department may proceed. If it finds that establishing the Program would not help advance that goal, then USDA must issue a report detailing its findings.

Once the Program is established, the Growing Climate Solutions Act directs that USDA must create “recognized protocols” for voluntary carbon markets that would ensure “consistency, reliability, effectiveness, efficiency, and transparency” with regards to a variety of procedures including sampling methodologies, account systems, and systems for verification. Additionally, USDA would be required to develop qualifications for “covered entities” under the Program. Those covered entities include both providers of technical assistance to agricultural producers looking to participate in carbon markets, as well as third-party verifiers conducting the verification processes for voluntary carbon markets. In developing both the protocols and qualifications, USDA would be required to give at least 60 days for public notice and comment.

USDA would then be required to maintain a website through which covered entities may receive Program certification. The website would also maintain a list of covered entities so that agricultural producers can easily access information on certified technical assistance providers and third-party verifiers.

Along with the Program, USDA would be required to establish the Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Certification Program Advisory Council (“Advisory Council”). The purpose of the Council would be to review and recommend any appropriate changes to the Program’s protocols and qualifications, and to advise USDA on a number of topics, including current carbon market practices, and ways to reduce barriers to entry. At least 51% of members on the Advisory Council must be representatives from the agricultural industry. Four members will be from the forestry industry, and other members will include professionals familiar with carbon markets, and environmental and agricultural issues.

In addition to information generated by the Advisory Council, USDA would also be required to partner with the Environmental Protection Agency (“EPA”) to conduct an assessment regarding a variety of topics related to carbon markets. That assessment would include information on: the number of entities involved in voluntary carbon markets; overall demand for agriculture or forestry credits; the total number of agriculture or forestry credits that have been generated; barriers to entry; methods for reducing barriers to entry; the current state of monitoring and measuring technologies needed to quantify long-term carbon sequestration; and ways in which USDA can encourage voluntary carbon markets. After creating the initial assessment, USDA and EPA would be required to draft a new one every four years.

Comparing the latest version of the Growing Climate Solutions Act to the version that was introduced in 2020, the main differences involve the Advisory Council, and a new section in the bill titled “Fair Treatment of Farmers.” Under the 2020 bill, the Advisory Council would have had 25 members, only 10 of whom would have been representatives from agriculture. Under the 2021 bill, more than half of committee members are required to be members of the agricultural industry. Additionally, the Fair Treatment of Farmers provision will require USDA to ensure that covered entities act in good faith by providing farmers with realistic cost and revenue estimates. The provision will also require USDA-certified technical assistance providers to help farmers receive a fair distribution of the revenue generated from the sale of carbon credits.

### **What’s Next**

Currently, the Growing Climate Solutions Act has received [broad bipartisan support](#) in Congress, as well as support from various private organizations including the [American Farm Bureau Federation](#), and the [Environmental Defense Fund](#). However, the bill still has a way to go before it becomes law. On April 22, 2021, the Senate is expected to hold a “markup” for the bill, a process that gives senators an opportunity to amend and rewrite proposed legislation. The bill then must pass both the Senate, and the House before it can advance to the President for signing. While it is currently unclear whether the Growing Climate Solutions Act will be enacted, the wide base of support for the bill is encouraging for its supporters. On April 22, the Senate Agriculture Committee unanimously advanced the bill, and further co-sponsors have signed on. As of April 22, the Growing Climate Solutions Act is co-sponsored by 20 Democrats and 22 Republicans. Senators on the Agriculture Committee are hopeful that the bill could be given time on the Senate floor before the August recess.

To read the Growing Climate Solutions Act of 2021, click [here](#).

To read the Growing Climate Solutions Act of 2020, click [here](#).



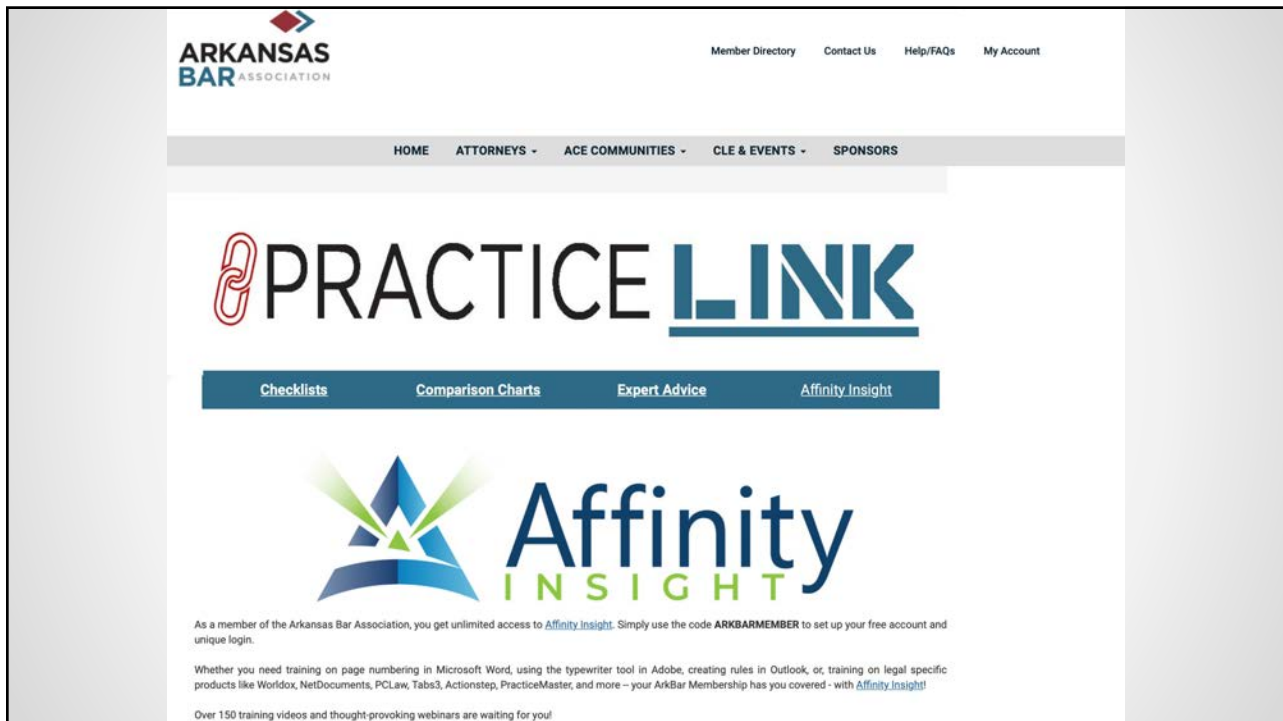
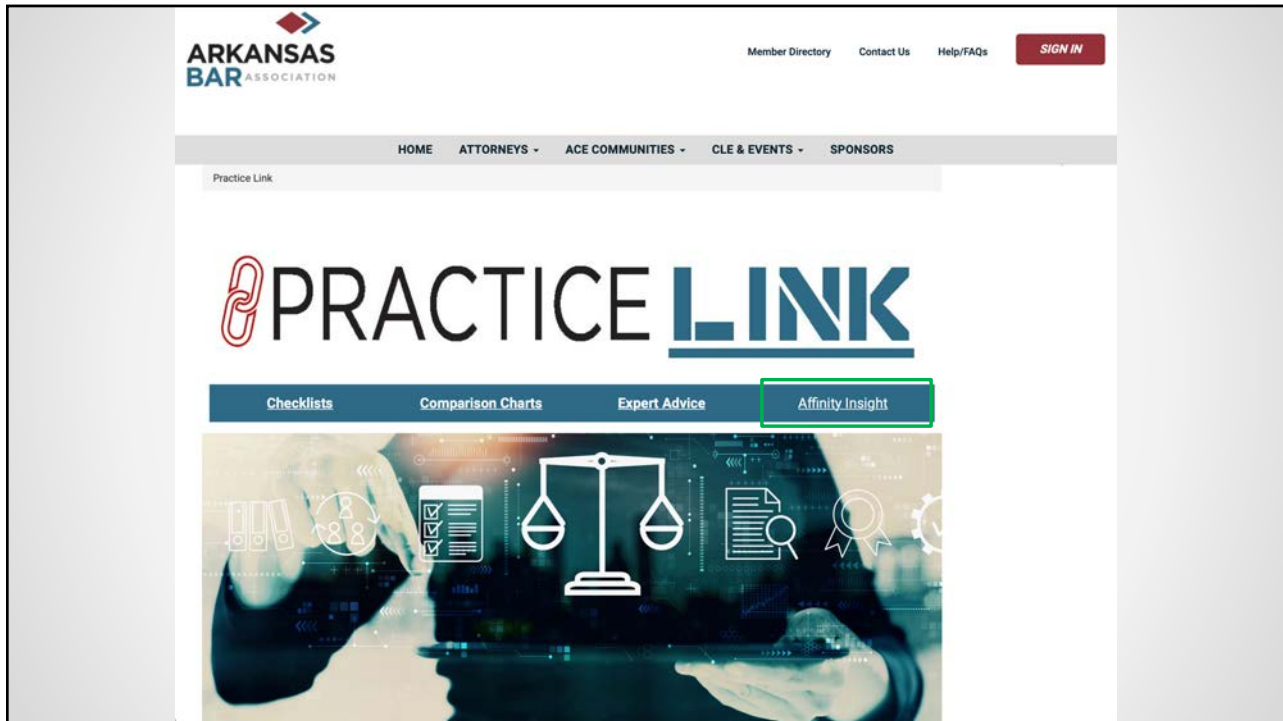
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# Let's Go Phishing

SMART BUSINESS STRATEGIES FOR THE LEGAL WORLD.

# Introductions

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# What is Affinity Insight?



Word	
Word - Automation	25 minutes
Word - Basics	66 minutes
Word - Compare, Track Changes, and Metadata	26 minutes
Word - Creating Labels with Mail Merge Wizard	15 minutes
Word - Default Formatting	4 minutes
Word - Default Formatting and View Options	24 minutes
Word - Default Setting Changes	6 minutes
Word - Document Assembly	52 minutes
Word - File Information	5 minutes
Word - File Menu	5 minutes
Word - File Types	3 minutes
Word - Keyboard Shortcuts	3 minutes
Word - Mail Merge	47 minutes
Word - Manipulating and Proofing Text	21 minutes

**From:** Password Update <[ednasim@mws.sg](mailto:ednasim@mws.sg)>  
**Sent:** Thursday, January 21, 2021 8:03 AM  
**To:** Paul Keith <[pwk@gibsonandkeith.com](mailto:pwk@gibsonandkeith.com)>  
**Subject:** keep or change password

**OUTLOOK**  
 Urgent notice: Password expiration  
 Date: Thursday, January 21, 2021  
 please use the link to To prevent log out of [pwk@gibsonandkeith.com](mailto:pwk@gibsonandkeith.com)

[Keep current Password](#)

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**Laura Trantham**  
**Ronnie Ford, Guardian on behalf of Larry Ford v Myrl V. ...**  
Please see the attached. Thank you, Laura Trantham  
Legal Assistant to Paul W. Keith 4:51 PM

**Laura Trantham**  
**Service on Heather Franks**  
Mr. Hedrick: We are a law firm in Monticello and have used  
your services in the past. Ms. Kaitlyn Carrico recommended 4:49 PM

**Karen Hutchins**  
**FW: BOT Agenda**  
Paul, attached is a very rough draft of possible topics for  
the Board of Trustees. I need to send a draft out by Friday. 4:36 PM

**The New Yorker**  
**Daily Humor: Back to School for Trump**  
A bonus daily cartoon, by John Cuneo. 4:34 PM

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**Monik Nmonikf** <nmonik2fnyoe9ab1y@outlook.com>  
To 4:25 PM

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**Order Confirmed**  
**Product- Apple Macbook**  
**Product ID -XRD8587**  
**Total Amount Paid- \$1526.04**

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Call microsoft our support partners immediately at 1-888-519-5346.**

## Hacking group publishes 'full dump' of law firm's data; another responds to cybersecurity incident

BY DEBRA CASSENS WEISS

FEBRUARY 12, 2020, 10:09 AM CST

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Two law firms are grappling with the effects of recent cyber intrusions.

The 11-lawyer Texas law firm Baker Wotring had its data exposed by hackers, including fee agreements and diaries from personal injury cases, [Law.com](#) reports.

A second firm, Wilson Elser Moskowitz Edelman & Dicker, responded to suspicious activity on its network by taking it offline, [Law360](#) reports. A law firm press release [is here](#).

Wilson Elser said lawyers are accessing emails through a remote system, its phone system is working, and its offices are open. There is no indication, at this point, that any client data has been compromised, the firm said in the Feb. 10 statement.

Baker Wotring's data, on the other hand, was exposed in what the hacking group Maze called a "full dump," according to [Law.com](#). Maze hacks into targets and seizes their data, then seeks to expose it unless a ransom is paid.

Baker Wotring is one of at least five law firms targeted by Maze since last month.

In past incidents, Maze has sought a ransom in the range of \$1 million to \$2 million.

Image from Shutterstock.com.

# Meet the Hacker Groups Snatching Law Firms' Client Data

These ransomware and hacking groups are hitting law firms where it really hurts: client data backups.

By Victoria Hudgins | May 21, 2020 at 10:15 AM



In nearly six months, at least seven law firms have been infiltrated by ransomware, according to media reports. Of the attacks, hacker groups Maze and REvil have taken responsibility for them all.

## Law Firms Mentioned

Dykema Gossett

## Legaltech News Top Stories

Despite Budget Cuts, Courts Can't Imagine Life Without Zoom

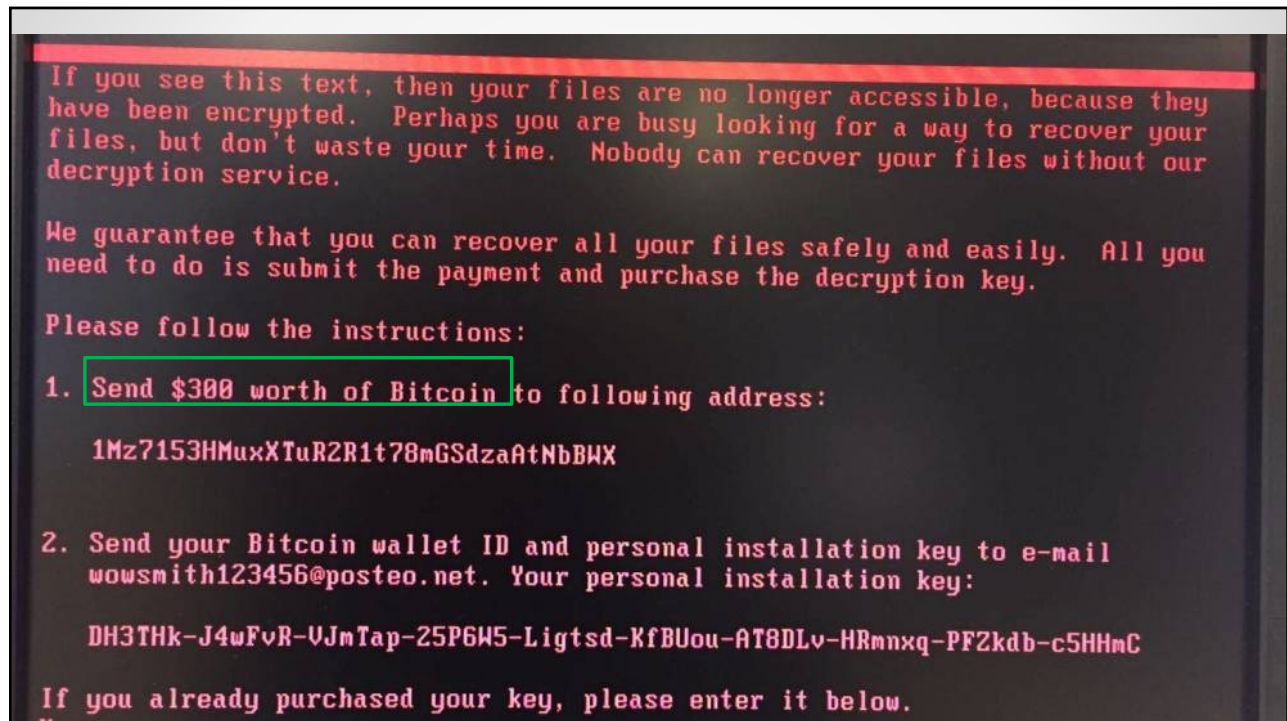
Recent CCPA Amendment Brings Welcome Clarifications, But Also New Obligations Around De-identified Patient Data

ADR Organizations Are Creating New IT Roles for Virtual Proceedings

What's driving eDiscovery 6 years





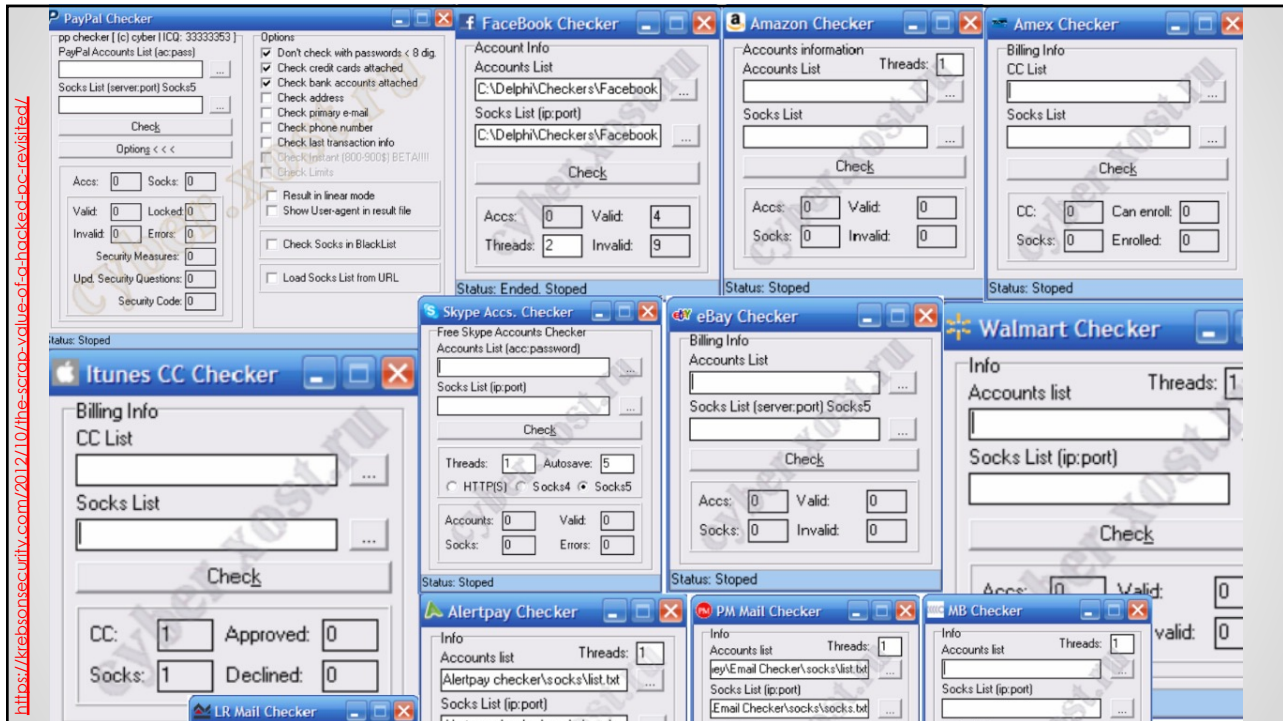


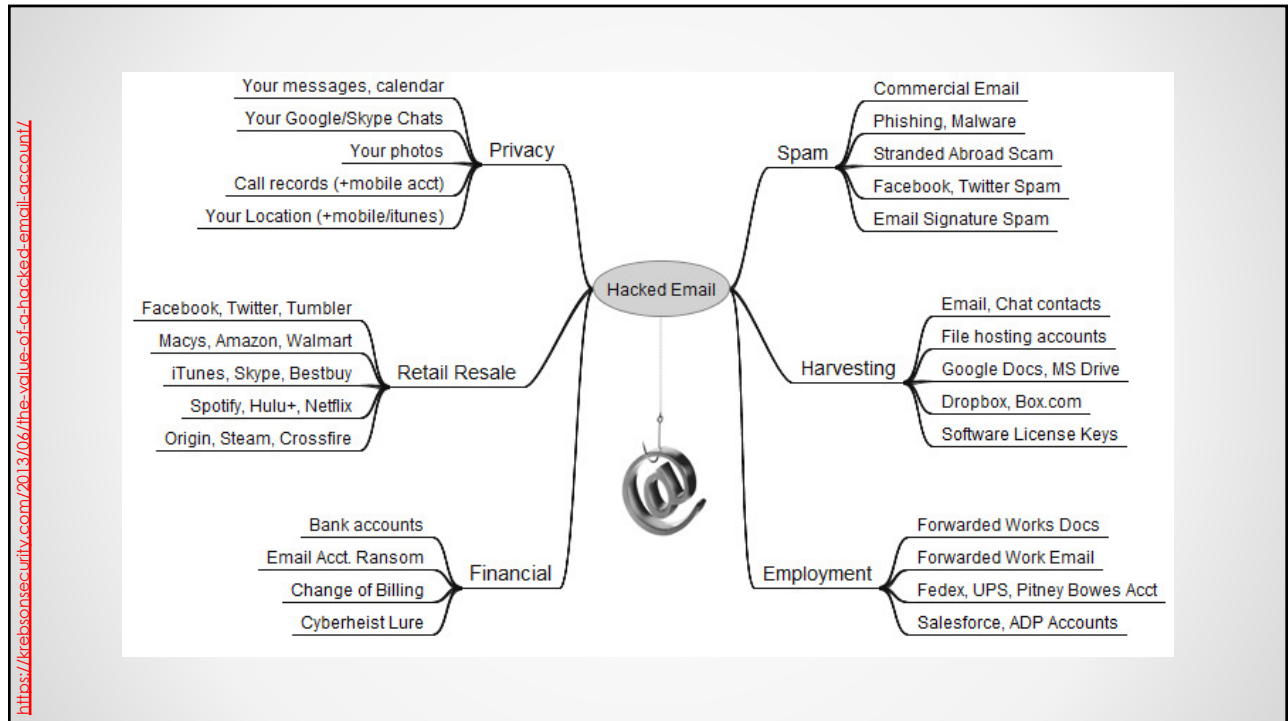
## Types of Phishing

- Spear Phishing
- Whaling
- Catphishing (aka Catfishing)
- Clone Phishing
- Voice Phishing
- SMS Phishing

## Why Go Phishing?

- Money to be Made!
- People Are Gullible!
- Pandemic Makes for Easier Marks!







## The Water We Swim In

**(a)** A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). *Model Rules of Professional Conduct R. 1.6*

## The Water We Swim In

**(a)** A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). *Ark. R. Prof. Conduct R. 1.6*

**(c)** A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. *Ark. R. Prof. Conduct R. 1.6(c)*

## The Water We Swim In

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## The Water We Swim In

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *Ark. R. Prof. Conduct R. 1.6, Comment 18*

## The Water We Swim In

The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. *Ark. R. Prof. Conduct 1.6 Comment 18.*

## The Water We Swim In

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). *Ark. R. Prof. Conduct 1.6 Comment 18.*

## The Water We Swim In

- A. The likelihood of disclosure if additional safeguards are not employed,
- B. The cost of employing additional safeguards,
- C. The difficulty of implementing the safeguards, and
- D. The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

*Ark. R. Prof. Conduct 1.6 Comment 18.*

## The Water We Swim In

Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. *Ark. R. Prof. Conduct 1.6 Comment 18.*

## The Water We Swim In

**(a)** A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct. remedial action.

*Ark. R. Prof. Conduct Rule 5.1.*

## The Water We Swim In

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has the direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*Ark. R. Prof. Conduct Rule 5.3.*

## The Water We Swim In

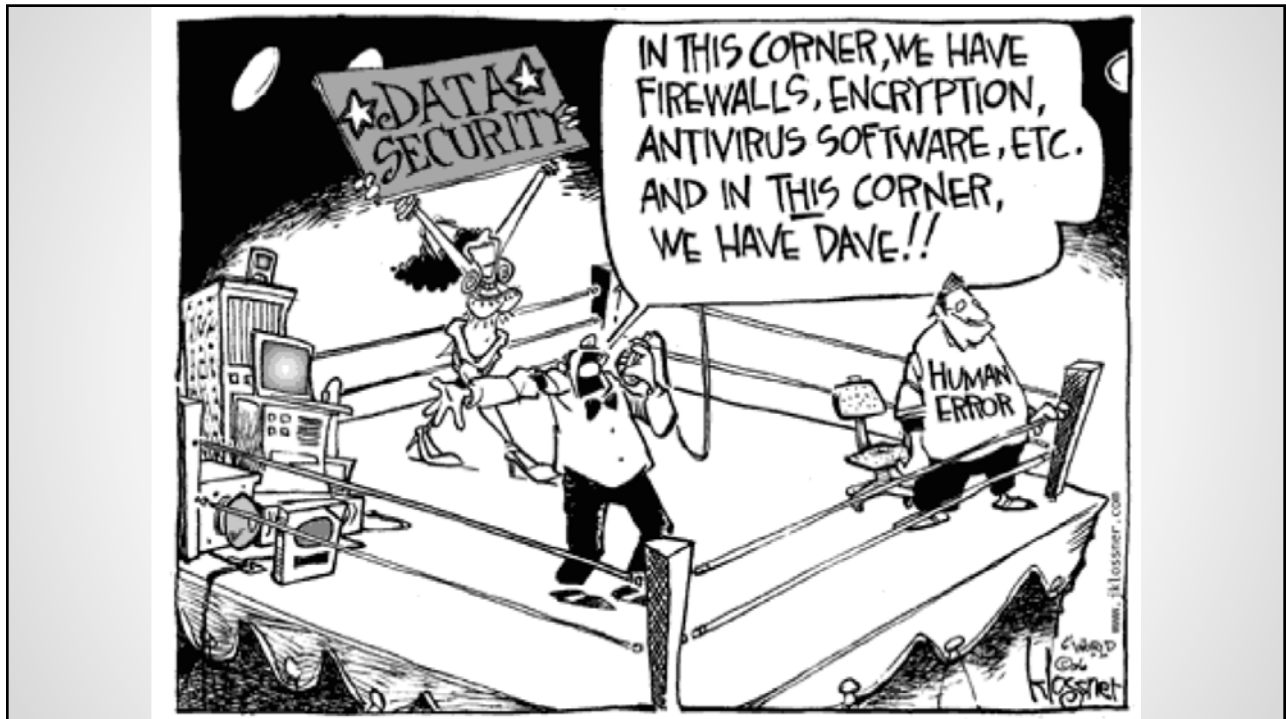
[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. **A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.** The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. *Ark. R. Prof. Conduct Rule 5.3, Comment 2.*

## The Water We Swim In

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. **When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.** *Ark. R. Prof. Conduct Rule 5.3, Comment 3.*

# Prevention

Photo by Kelly Sikkema on Unsplash



https://abovethelaw.com/2020/07/the-simple-practice-receptive-keeping-your-computer-safe/?f=1

# Ignore Suspicious Emails

**From:** Debbie >  
**Sent:** Monday, July 27, 2020 5:56 PM  
**To:** John  
**Subject:** A suspicious email

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi John,

I got the below email that appears to be from you. Of course, we don't click on any links like that, so if this was really meant for me, if you could pdf what you would like for me to see and send it to me, that would be great. If you did not send this email, please let me know, and you should share this email with your IT department. Thanks!!



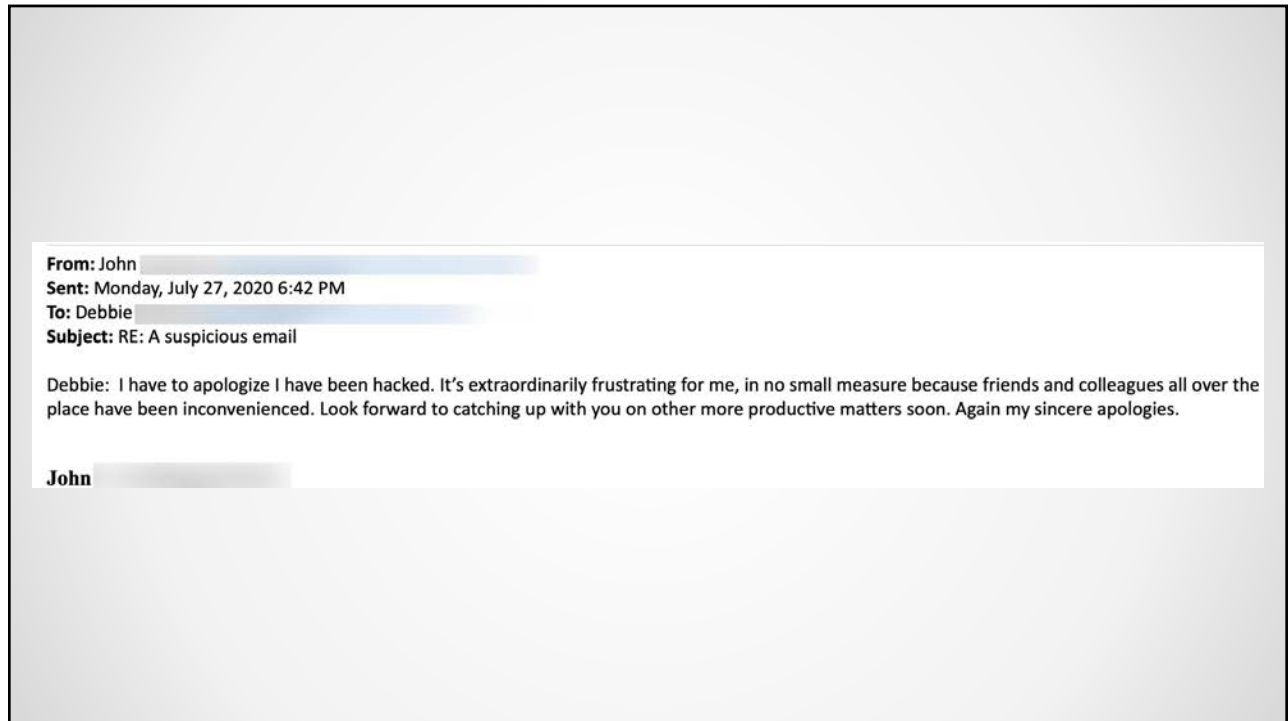
I shared an invitation and proposal for your review and collaboration via One Note.

Please review below and don't hesitate to ask me any questions .

Thank you and take care  
**John**

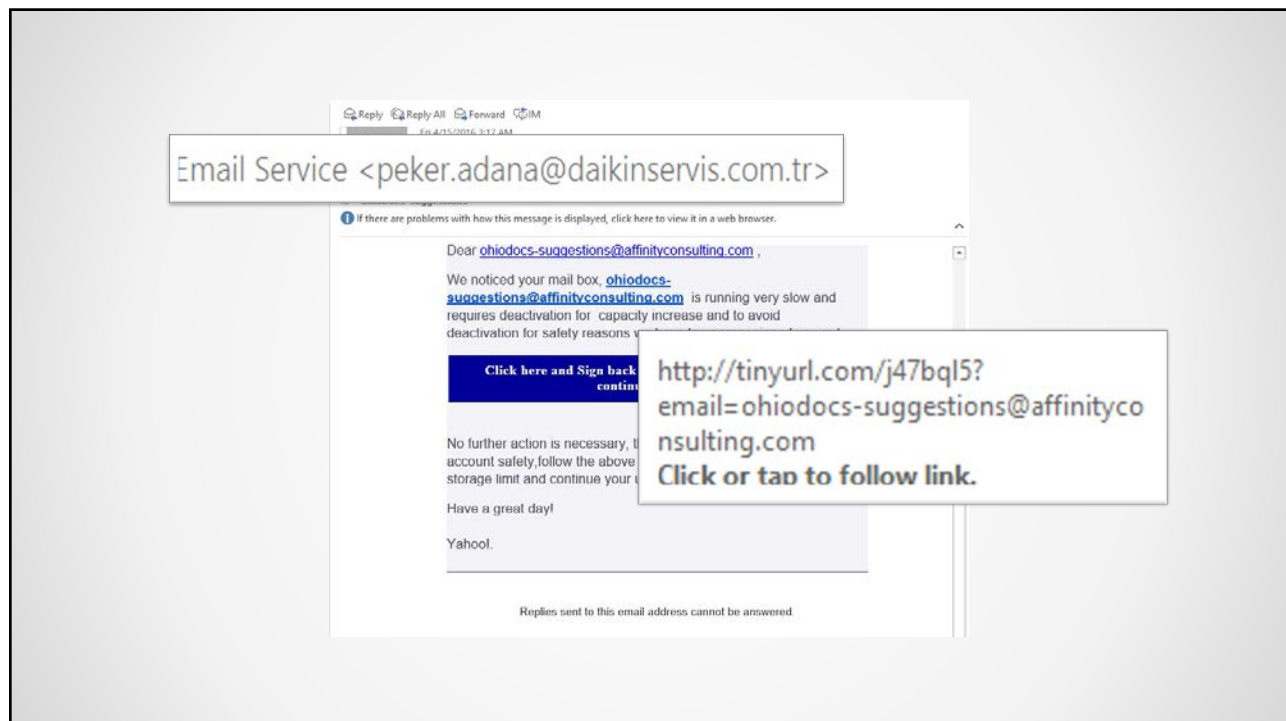
File Name Contained  
Sender's Company Name

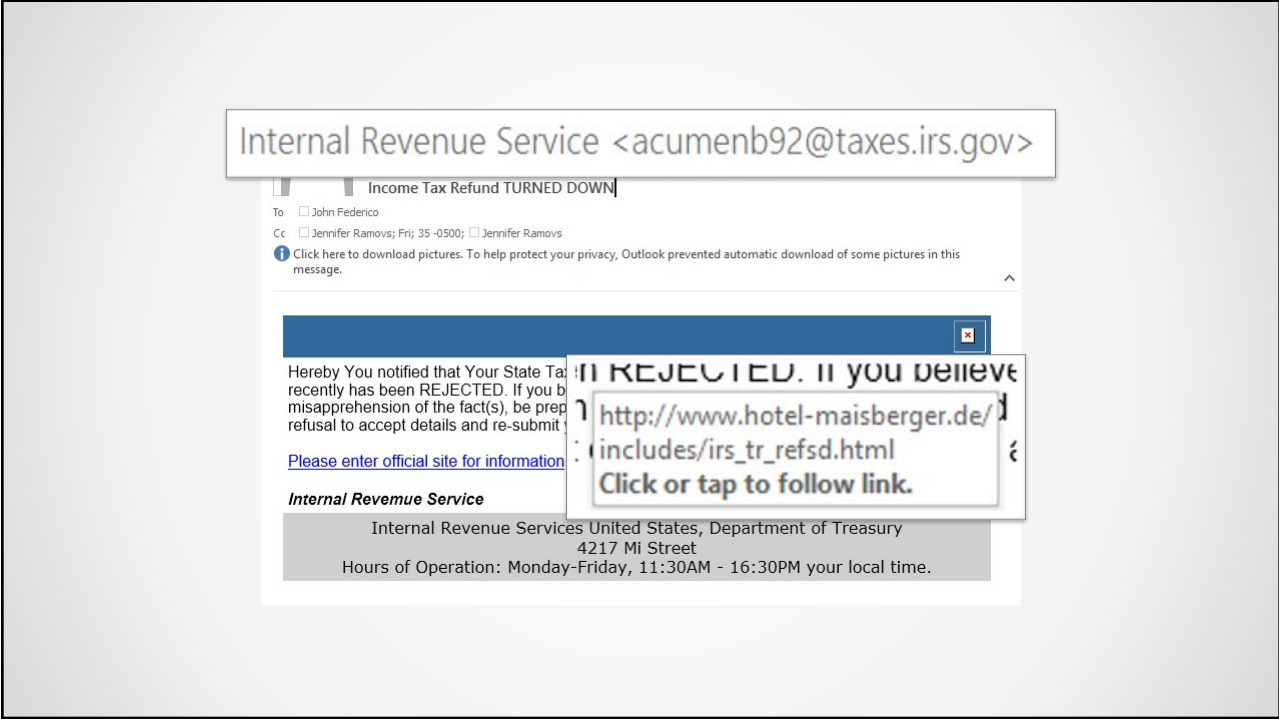
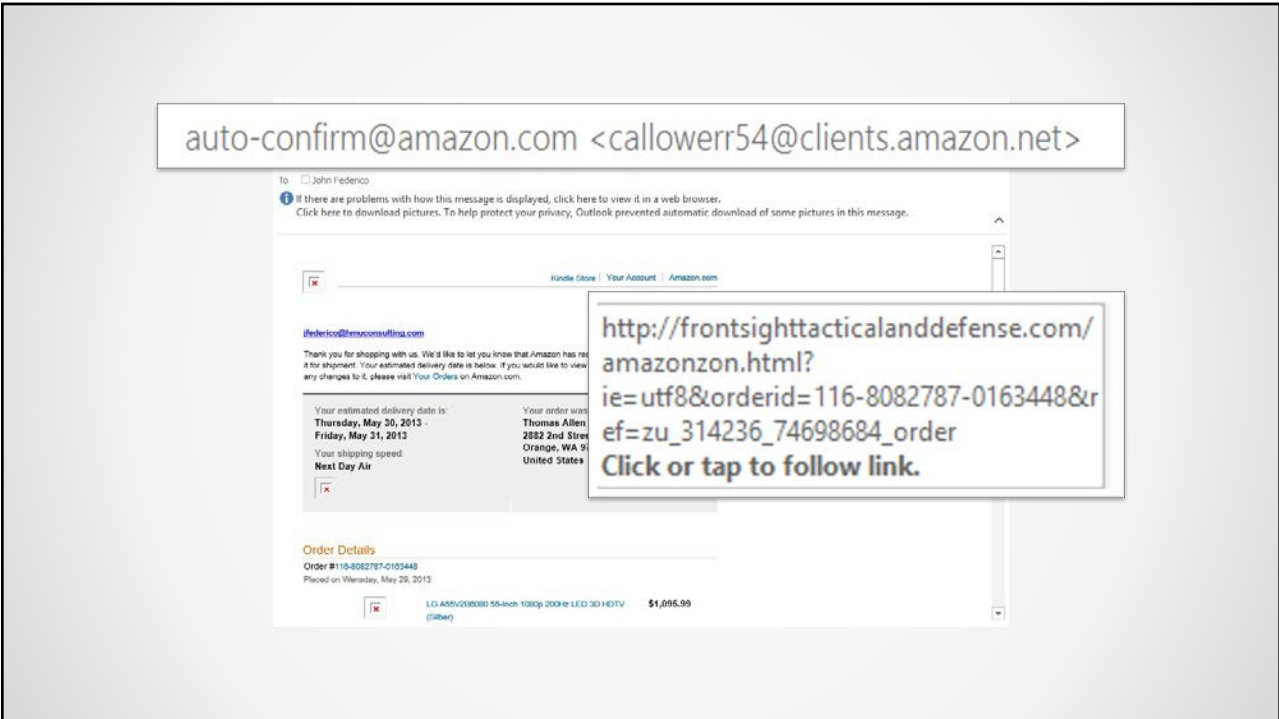




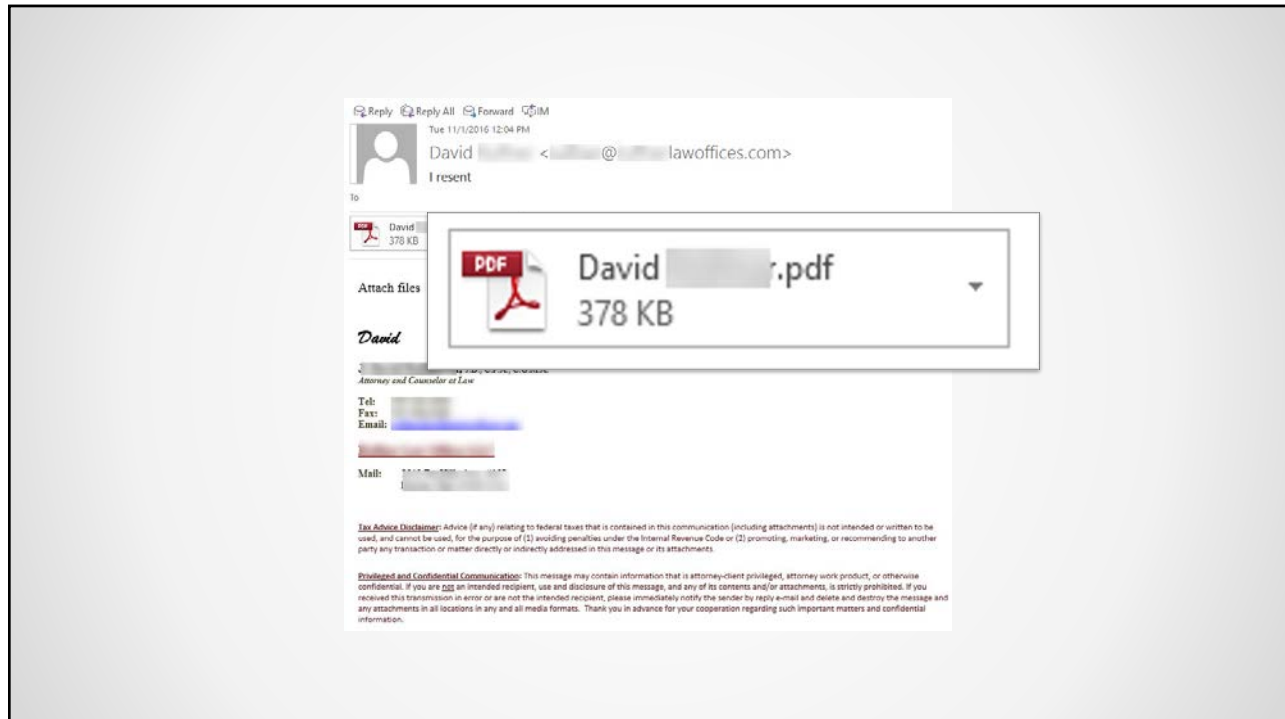
# Three Rules

1. Does the email address look right?
2. Hover (but don't click) over the link and check the URL address. Is it correct?
3. Should I have expected an email from this person or business on this account?









## Additional Tips

- Don't share your computer with anyone.
- Don't work in a public area.
- Don't go to strange websites.
- Do purchase malware protection.

## (Brian) Krebs on Security



<https://krebsonsecurity.com/about/>

## Kreb's 3 Basic Rules for Online Safety

<https://krebsonsecurity.com/2011/05/krebs-3-basic-rules-for-online-safety/>

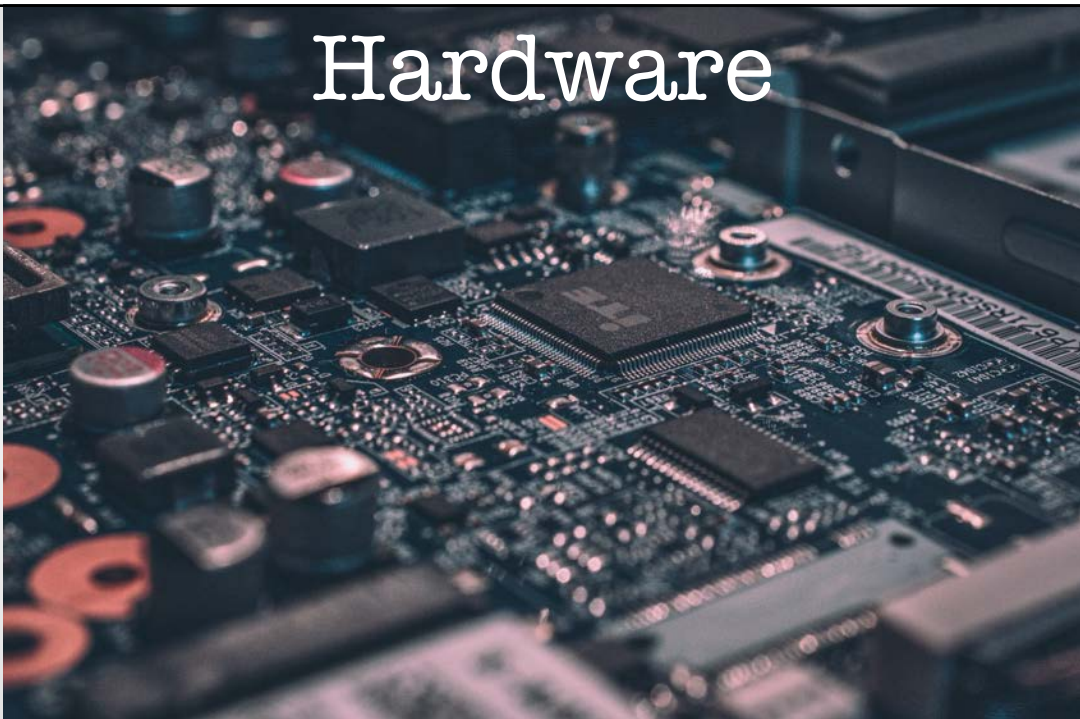


## Three Rules

1. If you didn't go looking for it, don't install it!
2. If you installed it, update it.
3. If you no longer need it, remove it.

<https://krebsonsecurity.com/2011/05/krebs-3-basic-rules-for-online-safety/>

## Hardware



# Notebook Locks



<https://www.kenningson.com/products/tech/locks/secure/secure-product/secure-scissors-locks>

# Asset / Recovery Tags



PACKS LUGGAGE KEYS MOBILE TOUCH-AID

English

## ReturnMe Packs

Protect more of your items with ReturnMe packs, which bundle many of our most popular recovery tags while offering you valuable savings.



Gadget Pack - \$19.99



Starter Pack - \$19.99



Travel Pack - \$59.99



<https://returnme.com>



# 3M Privacy Screens

[https://www.3m.com/3M/en\\_US/ecommerce/us/en/3m/ecommerce?PLN=500285&L=1087&SL=11017&SZ=55&L392452454](https://www.3m.com/3M/en_US/ecommerce/us/en/3m/ecommerce?PLN=500285&L=1087&SL=11017&SZ=55&L392452454)

250 Results

**Filter Results By**

**Product Family**

- Framed Black Privacy (13)
- Gold Privacy (37)
- High Clarity Privacy Filter (26)
- Black Privacy (167)
- Anti-Glare (3)
- Ultra-Clear (5)


**Device Type**

- Monitors (94)
- Laptops (60)
- Tablets (16)
- Smartphones (21)

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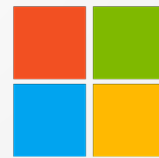
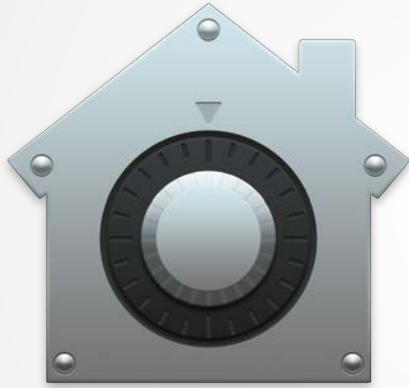
Feedback

# Free "Find My"

<https://support.apple.com/exlore/findmy> AND <https://www.google.com/android/find/>

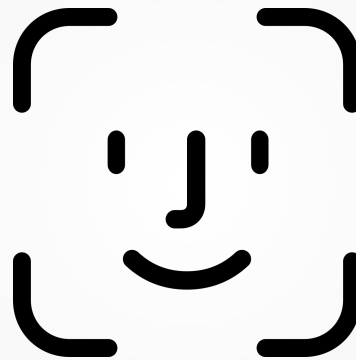


# Drive Encryption



<https://support.apple.com/en-us/HT204837> AND <https://docs.microsoft.com/en-us/windows/security/information-protection/biometrics/enable-bitlocker>

# Laptops with Built-In Security





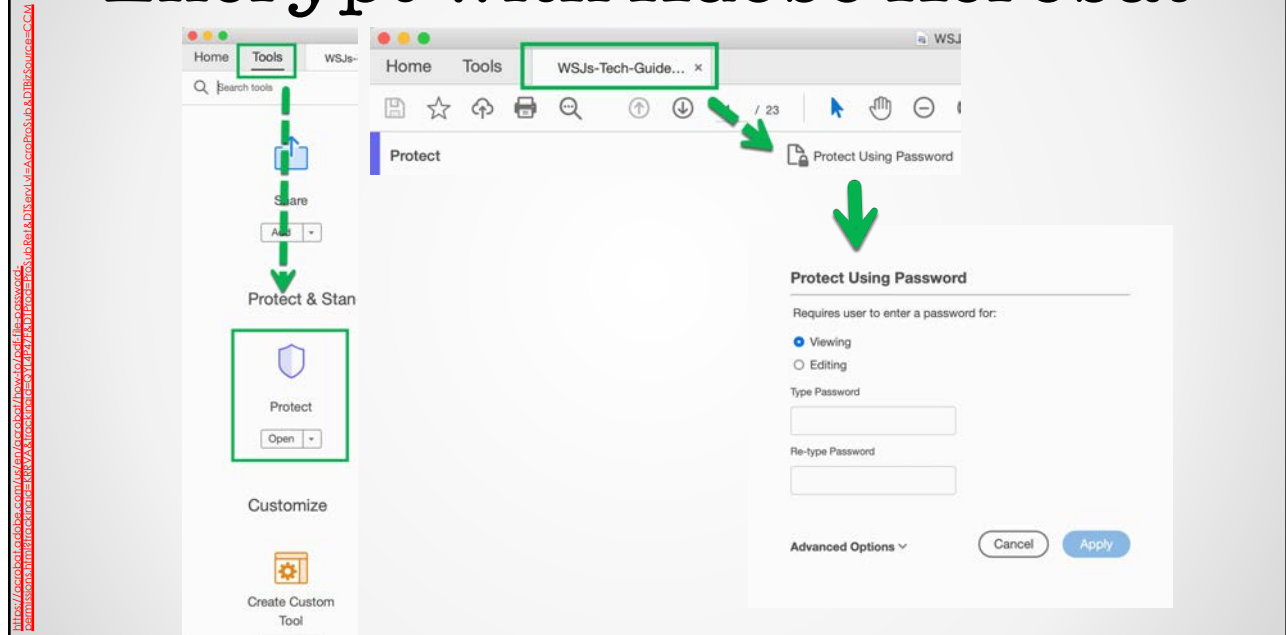
## Encrypt with Microsoft Word

<https://support.microsoft.com/en-us/topic/protect-a-document-with-a-password-03924eac-340c-4e40-a241-38e837d6976f?ui=en&rs=en&ad=US&os=Windows>

The screenshot shows the Microsoft Word ribbon with the 'Info' tab selected. The ribbon includes options for Home, New, Open, Info, Save, Save As, Save as Adobe PDF, Save As Nuance PDF, Print, Share, Export, and Transform. The 'Info' tab is expanded to show the following options:

- Protect Document** (Control what types of changes people can make to this document)
- Always Open Read-Only** (Prevent accidental changes by asking readers to opt-in to editing.)
- Encrypt with Password** (Password-protect this document)
- Restrict Editing** (Control the types of changes others can make)
- Restrict Access** (Grant people access while removing their ability to edit, copy, or print.)
- Add a Digital Signature** (Ensure the integrity of the document by adding an invisible digital signature)
- Mark as Final** (Let readers know the document is final.)

# Encrypt with Adobe Acrobat



# PDF Files are Editable

Not Changeable...  
Only if You Lock Them.

Permissions

Restrict editing and printing of the document. A password will be required in order to change these permission settings.

Change Permissions Password: [Password Field]

Printing Allowed: [None]

Changes Allowed: [Commenting, filling in form fields, and signing existing signature fields]

Enable copying of text, images, and other content

Enable text access for screen reader devices for the visually impaired



## 3-2-1 Backup Rules

1. No Excuses – Every Day
2. Should be Unattended
3. Check the Log
4. Off-Site Storage
5. Run Test Restores
6. Have a Secondary Method

1 Off-Site

2 Media Type

3 Backups

**CARBONITE**<sup>®</sup>  
an **opentext**™ company

<https://www.carbonite.com/backup-software/buy-carbonite-safe>

	1 TO 3 COMPUTERS FROM	UP TO 25 COMPUTERS FROM	COMPUTERS + SERVERS FROM
	<b>\$6 / MONTH</b> billed annually	<b>\$24 / MONTH</b> billed annually	<b>\$50 / MONTH</b> billed annually
	<a href="#">Buy now</a>	<a href="#">Buy now</a>	<a href="#">Buy now</a>
<b>Features</b>			
Automatic cloud backup	✓	✓	✓
Award-winning support, 7 days/week	✓	✓	✓
External Hard Drive backup	Optional	✓	✓
Remote file access to computer files	✓	✓	✓
Encryption	128-bit	128-bit	128 or 256-bit
FERPA, GLBA & HIPAA support		✓	✓
Centralized management & admin controls		✓	✓
Image Backup and Bare Metal Restore			✓
Backup for databases & applications			✓
	<a href="#">Start home trial</a>	<a href="#">Start business trial</a>	<a href="#">Start business trial</a>

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Simple Pricing, Unlimited Data  
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Packed Full of Goodies

Recommended by **THE VERGE** **Microsoft**

<https://www.backblaze.com/backup-pricing.html>

1Password  
LastPass

<https://1password.com> AND <https://www.lastpass.com>

## Password Managers

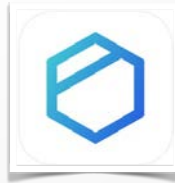
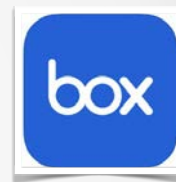
- Too many passwords and logons to track
- Strong passwords
- Use different passwords for different services
- Holds credit cards
- Holds any kind of personal info



## Don't Share Files via Email

<https://abovethelaw.com/2020/07/the-simple-practice-rexponsive-keeping-your-computer-safe/?f1>

Pick a Cloud, Any Cloud to Share





## Encrypt Your Cloud



**boxcryptor**



**Sookasa**

<https://www.boxcryptor.com/en/> AND <https://www.sookasa.com/>

## Best to Track File Sharing



<https://www.sharefile.com/>

# Wireless Encryption



# VPN

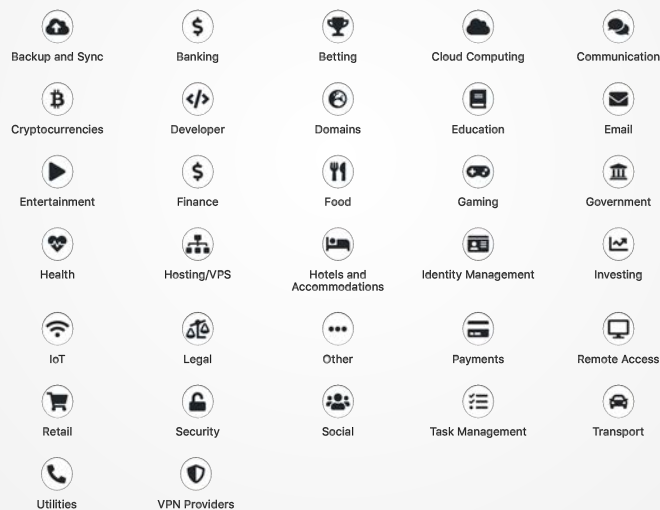


## 2-Factor Authentication

- Requires 2 authentication factors to verify identity
  - **Knowledge** factors – something you know
  - **Possession** factors – ID card, security token or smartphone
  - **Inherence** factors – biometrics

## 2-Factor Authentication

(<https://2fa.directory/>)



## In Conclusion

1. Does the email address look right?
2. Hover (but don't click) over the link and check the URL address. Is it correct?
3. Should I have expected an email from this person or business on this account?

# QUESTIONS?



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## A Look at the American Families Plan

📅 May 5, 2021 | 👤 Kristine A. Tidgren

As President Biden wrapped up his first 100 days, he rolled out the last of three proposals forming the backbone of his tax and spending policies, the “Build Back Better” plan. With his COVID-19 relief plan—the American Rescue Plan—signed into law, his focus now turns to the latter two proposals, a physical infrastructure plan and a “human infrastructure” plan. Significant tax increases would fund each proposal, the first mostly impacting corporations and the second directly impacting individuals. This post focuses on the latter proposal, the American Families Plan, which would dramatically transform estate and business transition planning for agricultural producers, ranchers, and rural landowners across the country.

### Background

On March 11, 2021, President Biden signed the \$1.9 trillion **American Rescue Plan** into law. Congress passed this legislative package, described as providing COVID-19 relief to businesses and families, through the budget reconciliation process with a vote of 50-49 in the Senate (one Senator did not vote) and 220–211 in the House.

On the heels of this legislative victory, the White House proposed the \$2.4 trillion **American Jobs Plan** [↗](#) on March 31. This “infrastructure” plan would allocate money for projects such as fixing highways, rebuilding bridges, upgrading ports, incentivizing clean energy, and protecting the right of workers to unionize. The wide-reaching American Jobs Plan—currently no more than a fact sheet—would pay for its proposed benefits through changes to the corporate and global tax system. Dubbed the “Made in America Tax Plan,” the proposed tax changes include raising the corporate income tax rate from 21 percent to 28 percent, increasing the global intangible low-taxed income tax rate to 21 percent, imposing a minimum tax on corporate book income, and substantially increasing IRS enforcement of corporate tax provisions.



## The American Families Plan – An Overview

Nearly one month later, on April 28, President Biden unveiled the \$1.8 trillion **American Families Plan** [↗](#). Although detail is again restricted to a bulleted fact sheet, the Plan proposes to “grow the middle class, expand the benefits of economic growth to all Americans, and leave the United States more competitive.” The Plan calls for two years of free community college, free universal preschool, direct support for families with children, paid family and medical leave, and much more (read about the promised benefits in the [Plan](#) [↗](#)). It purports to pay for its broad swath of benefits by significantly changing the tax code, particularly with respect to the way capital gain is taxed. The plan promises a “tax code with fewer loopholes for the wealthy and more opportunity for low- and middle-income Americans.” The Plan states that it would focus on the highest income Americans to raise approximately \$1.5 trillion across a decade. It proposes to accomplish this through three new strategies: (1) increasing IRS enforcement activities, (2) restoring the top individual tax bracket to what it was before the Tax Cuts and Jobs Act of 2017 (TCJA), and (3) dramatically transforming the tax treatment of appreciated property at death, gift, or sale.

The American Families Plan is significant because of the extent to which it would transform the current law. Although details matter (and we lack detail), we review the high-level proposal, as released, keeping in mind that the ultimate impact of any future legislation will depend upon the legislative text. One month before the release of the American Families Plan, Senators Van Hollen, Booker, Sanders, Whitehouse, and Warren released the Step Act of 2021,<sup>[1]</sup> which included a [discussion draft](#) [↗](#) of sample legislative text. Many of the provisions in the American Families Plan appear modeled after language in the Step Act, although differences exist, even at a high level.<sup>[2]</sup> This post reviews the provisions proposed in the American Families Plan (Plan). Where relevant, it references language included in the proposed Step Act.

### Eliminate the Preferential Capital Gain Tax Rates for Taxpayers with > \$1 million in Income



The Plan proposes to subject long-term capital gain to ordinary income tax rates where overall income (including gain) exceeds \$1 million.

## Extend the Application of the Net Investment Income Tax

The plan also appears to propose that all income over \$400,000<sup>[3]</sup> (not otherwise subject to FICA or self-employment tax) would be subject to the 3.8 percent net investment income tax (Medicare) tax.<sup>[4]</sup> In other words, the “net investment” income tax (NIIT) would apparently be extended to non-investment income above this threshold as well.

## Increase the Top Individual Tax Rate

The Plan proposes to restore the 39.6 percent individual tax rate that was in effect before the TCJA. For tax years beginning in 2018, the TCJA lowered the top tax rate from 39.6 percent to 37 percent. This would also mean that capital gain for those earning more than \$1 million would be taxed at a top rate of 39.6 percent, plus the 3.8 percent Medicare tax, for a top federal rate of 43.4 percent

**Note:** The Plan states that it would restore the “top tax bracket” to what it was in 2017. It does not give further detail, but this could include lowering the income threshold impacted by the higher top tax rate as well. In conjunction with lowering the top tax rate to 37 percent, the TCJA also raised the income threshold to which the top tax rate applied. In 2018, for example, the 37 percent tax rate applied to income over \$500,000 for single taxpayers and \$600,000 for married filing jointly. Without the TCJA changes in 2018, a 39.6 percent tax rate would have applied to income over \$426,700 for single taxpayers and \$480,050 for MFJ.

## Treat Property Transfers at Death As a Sale


The proposal would treat **the transfer of appreciated property at death as a sale**, meaning that unrealized capital gain in the hands of the decedent would be taxed at the time of transfer. In other words, passing appreciated property to a child through a will or trust at death would trigger a hefty tax bill, presumably on the final return of the decedent. The bill would be especially high given the proposal’s other provisions that would increase the top tax rate, subject gains to ordinary income tax rates where income is more than \$1 million, and apply the NIIT to the sale of business assets, like farmland.

The proposal states that each person would be allowed to exclude up to \$1 million in gain from taxation. Married people would each get their own exemption, which is presumably portable, meaning that a couple could exempt \$2 million in gain from tax. The proposal would also preserve the current rule excluding up to \$250,000 in gain from taxation for the sale of a personal residence (\$500,000 for married filing jointly)<sup>[5]</sup> and apply it to death transfers as well, meaning that a married couple could potentially exempt up to \$2.5 million in gain from

taxation at death.

**Note:** Although not spelled out clearly in the high-level overview, it appears that basis would continue to be adjusted (usually stepped up) for assets transferred at death. Those assets with unrealized gain of \$1 million or less would receive a tax-free step up, and the basis of those assets with gain above that amount would be stepped up in conjunction with the payment of the tax. It also appears that these new realization provisions apply only to capital gain, although further details are needed.

### *Protection for Family-Owned Businesses and Farms*

The proposal states that the “reform will be designed with protections so that family-owned businesses and farms will not have to pay taxes when given to heirs who continue to run the business,” but no further detail on this protection is given. Such protections are important because most farm assets are non-liquid and much land has appreciated significantly in value such acquisition. Significant income tax liability at transfer could require a sale of assets to pay the tax. A separate [press release from USDA](#)  explains that the Plan would **defer any tax liability on family farms as long as the farm remains family-owned and operated**. It appears this means that farm property transferred to family members who continue to *actively* farm the property would receive a carryover basis in the hands of the recipient to the extent the unrealized gain exceeds \$1 million per person.

The Plan does not discuss the definition of “family owned and operated,” the impact of lapses in farming activity, or the application of recapture and penalties in the event the property is no longer used in a family farming operation. The language suggests an exemption with definitions perhaps similar to the current special use valuation under IRC § 2032A; however, the rules for this provision, enacted in 1976, are complex and the penalties for missteps are great. And there is no suggestion there would be a 10-year limit under the family business exemption proposed by the American Families Plan. While the proposed exemption would presumably defer the recognition of tax while a family member was actively farming the property, it would appear to provide no protection to ongoing rental or business relationships with non-family members, such as neighbors or beginning farmers. Nor would it appear to recognize that for many multi-generational farmers, their *family* “retirement plan” is not a tax-advantaged 401K or IRA, but a section of farmland. Generational farms may have transitional periods where farmland is rented to others, rather than actively farmed by a family member. The owners of these farms are not wealthy speculators or investors, but heirs to a family legacy. Where the basis of a small to moderate-sized farm is very low because of a transfer through a life estate or a purchase or gift early in a farming career, steep transition taxes could exceed the reasonable ability of heirs to cash flow a loan to pay the tax. This would lessen the chances that any one of these heirs could hold onto the family property and hasten the transfer of these parcels to wealthy investors.

### *What About Gifts?*

The Plan does not specifically discuss lifetime gifts. Presumably, however, the same or similar general rules (with perhaps lower exemptions) would apply to lifetime gifts. Without a complementary rule, property could be serially gifted to younger family members in an attempt to avoid the recognition of gain at death.

## Limit Section 1031 Exchange Deferral to \$500,000 in Gain

The proposal would end the application of IRC § 1031 like-kind exchange tax deferral rules for gains greater than \$500,000.

## Increase IRS Enforcement Activities: “Revitalize enforcement to make the wealthy pay what they owe”

The Plan states that it would generate \$700 billion over 10 years by devoting more money to IRS enforcement and increasing information reporting requirements. These increased audit activities would be targeted toward those Americans with “actual income” of \$400,000 or more. The Plan would also “require financial institutions to report information on account flows so that earnings from investments and business activity are subject to reporting more like wages already are.”

## Other Changes

The proposal also states that it would eliminate carried interest and extend the excess business loss limitation rules originally implemented by the TCJA.

## Impact of the American Families Plan on Agriculture

We now provide a high level discussion of the above provisions, first by reviewing current law and then by applying several simple examples to demonstrate (at a very basic level) how the proposals could change the current landscape.

## Lifetime Sale – Appreciated Assets

Under current law, taxpayers must pay a tax upon the sale of appreciated assets during their lifetime. This tax is calculated based upon whether the gain is short-term capital gain, which generally arises when the asset is held for one year or less, or long-term capital gain, which usually arises when the asset is held for more than one year. Current law affords a preferential rate schedule for long-term capital gain. Short-term capital gain is generally taxed as ordinary income. In either case, the gain is calculated based upon the difference between the owner’s basis (generally cost plus improvements) and the sales price. As shown in the chart below, the top long-term capital gains tax rate is presently 20 percent.

## Tax Rates - 2021

Ordinary Income Tax Rates				Long-Term Gain			
Single		MFJ		Single	MFJ		
0	9950	0	19,900	10%	0	0	
9951	40,525	19,901	81,050	12%	40,400	80,800	0%
40,526	86,375	81,051	172,750	22%	40,401	80,801	
86,376	164,925	172,751	329,850	24%			
164,926	209,425	329,851	418,850	32%			
209,426	523,600	418,851	628,300	35%	445,850	501,600	15%
523601+		628,301+		37%	445,851	501,601	20%

Present law also imposes a net investment income tax (NIIT) on the gain arising from the sale of **investment** assets. This 3.8 percent tax is imposed upon taxpayers with net investment income and modified adjusted gross income above the following threshold levels:

Filing Status	Threshold Amount
Married filing jointly	\$250,000
Married filing separately	\$125,000
Single	\$200,000
Head of household (with qualifying person)	\$200,000
Qualifying widow(er) with dependent child	\$250,000

Also called the “Medicare” tax, Congress instituted the NIIT in 2013 to help pay for the Affordable Care Act. In addition, capital gain is often subject to taxation at the state level.

### *Current Law Example*

Harris and Harriet are retiring farmers who accumulated 1,000 acres of farmland during their lifetime. They acquired 500 acres in 1974 at a cost basis of \$550/acre. They acquired the additional 500 acres in 1987 for \$800 an acre. If Harris and Harriet sell their farmland in 2021 for \$7,200/acre, they will have taxable long-term gain of \$6,525 per acre or \$6,525,000. At current rates, assuming other income is offset by the standard deduction, this sale would result in tax of approximately **\$1,267,800 (17.6 percent of the sales price)**.<sup>[6]</sup> Because Harris and Harriet are farmers, their land is a business asset, and they are not subject to the NIIT. In Iowa, they would also be allowed a capital gains tax deduction because they had farmed the land they owned for at least five of the last 10 years.<sup>[7]</sup>

This result would change if Harris and Harriet had begun cash renting their land 10 years before retiring.

In that case, the sale would also trigger the 3.8 percent NIIT and an Iowa tax on the capital gain. This would mean an additional \$238,450 in NIIT and approximately \$556,000 in Iowa tax, for a total tax bill of **\$2,062,250 (28.6 percent of the sales price)**.

#### *Impact of the American Families Plan?*

In the first example, where Harris and Harriet continued to farm, the American Families Plan would more than double their tax liability from **\$1,267,800 to approximately \$2,594,700 (36 percent of total sales price)**. This increase would flow from the taxation of most of the gain at a new higher ordinary income tax rate and the imposition of the 3.8 percent Medicare tax on the gain above \$400,000. If Harris and Harriet were not farming, they would also owe approximately \$556,000 in Iowa tax, for a total tax bill of **\$3,150,700 (43.8 percent of sales price)**.

## Lifetime Sale – Depreciated Assets

Some business assets that do not appreciate in value nonetheless trigger tax at sale under law requiring the **recapture** of depreciation and expensing benefits. See IRC § 1245. The sale of *depreciable* personal property, for example, triggers an *ordinary* income tax on the difference between the original cost basis and any depreciation or expensing taken against the cost of those assets.<sup>[8]</sup> This tax recaptures the tax benefit received by the taxpayer through accelerated cost recovery. Although the gain is taxed as ordinary income, it is not subject to self-employment tax.

#### *Current Law Example*

Harris and Harriet also own farm equipment that they have fully expensed. If they sell the equipment for \$675,000 in 2021, they must pay ordinary income tax on the proceeds of the sale to recapture depreciation and expense deductions taken in prior tax years.

#### *Impact of the American Families Plan?*

Under the Plan, a portion of this income would likely be taxed at a higher top tax rate of 39.6, the amount taxed at the higher rate would depend upon any bracket adjustments made by the plan. \$275,000 of the income (even in the absence of additional income), would potentially be subject to the 3.8 percent Medicare tax under the new rules for taxing non-investment income (additional \$10,450).

## Lifetime Sale – Business Inventory

The tax treatment of assets grown or raised by a farmer is different. Any business inventory sold by the farmer is subject to ordinary income tax and self-employment tax.

### *Current Law Example*

Harris and Harriet own a grain bin full of corn they grew and stored while they were farming. If they sell the corn for \$700,000 in 2021, they will owe ordinary income tax and self-employment tax on the proceeds of the sale.

### *Impact of the American Families Plan?*

Under the Plan, a portion of this income would be taxed at a higher top tax rate of 39.6 percent (the income brackets for the new tax rates are unclear).

## Gifts at Death – All Assets

Under current law, property transferred at death receives a basis adjustment in the hands of the recipient.<sup>[9]</sup> Generally, the basis in the hands of the recipient will equal the fair market value<sup>[10]</sup> of the property at the date of the death or six months thereafter. This is usually referred to as a “step up” in basis, although it can be a “step down” as well.

The tax free step-up in basis rule has been explicit in the tax code since at least 1921.<sup>[11]</sup> Although sometimes explained as a tool to prevent the double taxation of assets subject to the estate tax, the basis adjustment and the estate tax have never been expressly synced. The step-up in basis, for example, applies even when estate property is exempt from a transfer tax. This was as true in 1921 as it is 100 years later.

For much of its long history, the tax-free step up in basis has been attacked by some as conceptual error in need of revision.<sup>[12]</sup> Even so, efforts to change the deep-seated rule have met great opposition. A 1976 law<sup>[13]</sup>—which would have changed the step-up-in-basis to a carryover basis rule (similar to the current rule for lifetime gifts)—was later repealed *retroactively* without effect.<sup>[14]</sup> Opponents argued that a carryover basis rule at death would be unwieldy and unfair. Common concerns included the difficulty of obtaining basis records from the deceased and the burden of tracking historical basis across generations. Without these records, opponents argued that beneficiaries later selling assets would be subject to unfair tax burdens because rules would require them to treat an undocumented basis as zero.

Another alternative to the step-up in basis—on occasion proposed, but to this point never gaining traction in Congress—is that of treating death and gift as income realization events. In other words, as in some form now proposed by the American Families Plan, unrealized gain at death would be taxed to the decedent as though the property had been sold. Likewise, donors would be taxed on unrealized gain at the time of making a gift. These proposals, when raised in the past, have met with even more resistance than the carryover basis. Although some believe this approach would be the most logical and would promote income equality, others argue the rule would be fraught with unworkable administrative challenges and unfair burdens. The difficulties would be similar to



those inherent in the carryover basis rule, but magnified by the immediate imposition of tax liability in the absence of income to fulfill the obligation. In particular, the fate of small businesses and family farms faced with large tax bills at transfer and the difficulty inherent in carving out equitable and workable exceptions has prevented this approach from gaining much acceptance in the past.

### *Current Law Example*

Assume for simplicity that all of the assets discussed in the previous example were owned by Harris alone (pretend Harriet never existed) and that Harris died in 2021. When Harris' daughter Jordan inherits these assets, her basis is adjusted to be equal to the value of the assets on the date of Harris' death.

- Land – 1,000 acres at \$7,200 / acre basis
- Machinery – \$675,000 basis
- Corn - \$500,000 basis

If Jordan immediately sold the assets after inheriting them, she would owe no tax.

### *Impact of the American Families Plan?*

The American Families Plan would treat the transfer of Harris' farmland at death as a sale of the property. If Jordan is not actively farming, this would trigger the taxation of \$5,525,000 gain (\$6,525,000 total capital gain minus \$1,000,000 exemption), resulting in a tax bill of approximately **\$2.19 million** (or **30 percent of the sales price**). The basis in the farmland would step up to \$7,200,000 (because of the \$1 million exemption and the payment of the tax). Jordan may have to sell a portion of the land to pay the tax.

If Jordan is actively farming, the family may receive an exemption to defer the tax liability on the previously unrealized gain. The tax would presumably become due at any point where the land was no longer actively farmed by a family member, perhaps with interest. If Jordan takes advantage of the active farming deferral, the basis in the farmland would step up by \$1,000,000 (pursuant to the \$1 million exemption), but no further basis adjustment would be made.

It is unclear how the American Families Plan would treat the machinery and grain at death since it speaks only of "capital gain."<sup>[15]</sup> Would the transfer of these assets receive a step-up in basis outside of the \$1 million exemption? These are key details the high-level proposal does not discuss.

## **Lifetime Gift – All Assets**

Property transferred by gift is treated differently. The gift does not trigger income tax liability, but the recipient of the gift takes the property with the same basis the property had in the hands of the donor. This "carryover basis"

rule has been in place under IRC § 1015 since 1921. Before that time, owners of appreciated property could escape the capital gains tax by transferring the property to someone else because the basis of gifted property was set at fair market value in the hands of the donee. The gift tax was introduced in 1924.

### *Current Law Example*

If Harris gifted all of his assets to his adult daughter Jordan in 2021, Jordan's basis in the assets would be the same as that of Harris:

- Land – 500 acres at \$550/acre and 500 acres at \$800/acre
- Machinery – 0 Basis
- Corn – 0 Basis

If Jordan were to sell the assets received from Harris, she would be liable to pay tax on the gain. As a recipient of gifted depreciated property (the machinery), she would be liable to pay the recapture tax. If Jordan is not a farmer, however, the grain would be a capital asset in Jordan's hands, instead of inventory. As such, if Jordan held the grain for more than one year (including the time it was held by her parents), the gain from the sale of the corn would be subject to the preferential long-term capital gains tax rate and no self-employment tax. Gain from the sale of the land would be subject to the long-term capital gains tax rates whether the land is held by Jordan as a business asset or a capital asset.

### *Impact of the American Families Plan?*

It is unclear how the American Families Plan would treat the gifting of assets. It is likely, however, that it would be subject to the income realization rules proposed for death transfers. Without this consistency, taxpayers would be incentivized to transfer property during their lifetimes to much younger relatives instead of passing it to beneficiaries at death.

The more detailed [Step Act proposal](#) <sup>[16]</sup> would treat property transferred by gift as sold for purposes of realizing gain. The Step Act has proposed only a \$100,000 gain exemption for lifetime gifts. The \$100,000 exemption would offset a higher \$1,000,000 exemption for unrealized gain transferred at death. Under this approach, it appears basis would step up at transfer since the tax would be paid. If this is the approach taken by the American Families Plan, the transfer to Jordan would presumably be taxed in a similar way to that of the sale detailed above. It is unclear whether the active farming exemption would apply to defer the tax due upon a gift transaction.

## Lifetime Exchange – Real Property

Under current law, gain or loss on the exchange of *real* property held for productive use in a trade or business or

for investment is *deferred*, as long as that property is exchanged for like-kind real property also used in a business or held for investment. IRC § 1031(a). This means that appreciated real property, such as a farm field or an office building, can be exchanged for other real property of equal or greater value without incurring any tax liability. The basis of the relinquished property is carried over to the replacement property, and the gain is not recognized until a later sale. The policy behind the like-kind exchange—which has, in some form, been part of the tax law for more than 100 years—is that owners who exchange property for similar property haven’t changed their economic position. Without this deferral, the tax obligation would reduce the money available to invest in their replacement property, reduce the ability of real property owners to improve property, and disrupt property markets. Farmers frequently use this tool to make their operations more efficient. It allows them, for example, to acquire contiguous, more geographically efficient parcels as they become available or to reshuffle ownership of multiple parcels owned with others as tenants in common. Critics argue that the impact of section 1031, coupled with the step up in basis rules described above, forever forgives billions of dollars of gain and leads to greater wealth inequality.

Although the Tax Cuts and Jobs Act eliminated like-kind deferral treatment for the exchange of personal property (farmers, for example, must now recognize gain on the trade-in value of a tractor), section 1031 for real property survived.

#### *Current Law Example*

Martin, who farms in western Iowa wants to move to eastern Iowa to be closer to family. His 500-acre farm, a lifetime gift from his grandfather, has a basis of \$600/acre. Martin has found a farm in eastern Iowa of equal value. Using a section 1031 exchange, current law allows Martin to sell his farm in western Iowa and reinvest the proceeds into the farm in eastern Iowa without incurring tax liability. Martin’s basis in his new 500-acre farm (worth the same for simplicity), is \$600/acre.

Assuming land now worth \$7,500/acre, if Martin sold his farm in western Iowa without using § 1031, he would incur approximately \$690,000 in tax liability, limiting his ability to reinvest in a similar property.

#### *Impact of the American Families Plan?*

The American Families Plan would significantly restrict Martin’s options. The Plan would allow him to defer only \$500,000 in gain under IRC § 1031. As such, he would be required to realize \$2,950,000 in gain upon the exchange. Furthermore, \$1,950,000 of this gain would be subject to ordinary income tax rates (\$772,200) and \$2,550,000 would be subject to the Medicare tax (\$96,900). In total, Martin would owe an estimated \$1,065,100 in tax on the \$3,750,000 “exchange” (or 28.4 percent of the sales price).

## Review of Estate and Gift Tax under Current Law

In addition to triggering income tax consequences, some asset transfers are subject to estate and gift tax consequences. In 2021, however, these latter taxes impact very few Americans. Under current law, a tax is imposed on the value of property transferred at death and via lifetime gift.<sup>[17]</sup> IRC §§ 2001, 2501. A unified credit, however, provides that no tax liability will be imposed unless the sum of lifetime taxable gifts and property transferred at death exceeds the “basic exclusion amount.” In 2021, this basic exclusion amount is \$11.7 million per person. Married couples may receive the benefit of a double exclusion because at the death of the first spouse, “portability” grants the surviving spouse the option to preserve the deceased spouse’s unused exclusion as well. IRC § 2010(c)(4). Although estate and gift tax rates are graduated, transfers in excess of the exemption are currently taxed at 40 percent because the present exemption exceeds the top rate threshold, which is \$1 million.<sup>[18]</sup> In other words, for estates subject to the estate and gift tax, the tax rate is steep.

In addition to the lifetime exclusion amount, current law allows an annual exclusion for lifetime gifts of \$15,000 per year. This means that a person can gift up to \$15,000 per year to as many people as they wish without incurring a gift tax obligation. IRC § 2503(b)(1). Gifts over \$15,000 to a single recipient in any year require the donor to file a Form 709, Gift Tax Return. Gift tax is only due, however, if the giver has exceeded their basic exclusion amount with the sum of their lifetime gifts.

The estate tax basic exclusion amount<sup>[19]</sup> has increased dramatically during the past several decades:

- 2005 \$1.5 million
- 2005 \$1.5 million
- 2006 \$2 million
- 2007 \$2 million
- 2008 \$2 million
- 2009 \$3.5 million
- 2010 \$5 million (or no estate tax with carryover basis)
- 2011 \$5 million
- 2012 \$5.12 million
- 2013 \$5.25 million
- 2014 \$5.34 million
- 2015 \$5.43 million
- 2016 \$5.45 million
- 2017 \$5.49 million
- 2018 \$11.18 million
- 2019 \$11.4 million
- 2020 \$11.58 million
- 2021 \$11.7 million

At current exemption levels, very few estates owe estate tax. The Tax Policy Center has estimated that only .1 percent of the 2.8 million people expected to have died in 2020 will owe any estate tax.<sup>[20]</sup> USDA-ERS recently

estimated that of the approximately 31,000 principal farm operators expected to have died in 2020, 189 (0.6 percent) will be required to file an estate tax return, and only 50 (0.16 percent) will owe Federal estate taxes.<sup>[21]</sup> Absent intervention from Congress, the basic exclusion is set to go back to \$5 million, indexed for inflation, in 2026.

### *Current Law Example*

If Jordan from the last example died in 2021 with an estate valued at \$8,375,000, no estate tax would be due because her basic exclusion amount exceeds the value of her estate. If, however, Jordan had been allowed only a \$3.5 million exemption (as was in place in 2009), her estate would be subject to \$1.95 million in estate tax.

### *Impact of the American Families Plan?*

The American Families Plan does not propose to change the current estate and gift tax exemptions or tax rates. On March 25, 2021, Senator Bernie Sanders introduced the “[99.5 Percent Act](#).” This proposal would lower the basic exclusion to \$3.5 million (\$1 million for lifetime gifts) and increase the highest estate tax rate from 40 percent to 65 percent.

## What’s Ahead?

It is difficult to predict the likelihood that significant changes such as those proposed by the American Families Plan<sup>[22]</sup> will become law. It is also unclear when these proposals would go into effect. Such legislation, however, could potentially be effective from the date of passage or even retroactive to the beginning of the current tax year to prevent last-minute planning in anticipation of changes. The Senate parliamentarian has paved the way for further use of budget reconciliation during this session. This means that a final vote of 51-50 (with Vice President Harris casting a deciding vote) would likely be sufficient for passage. There appears to be much impetus to enact substantial tax reform before the 2022 election. The outcome will likely depend greatly upon the will of several moderate Democratic Senators. We will be watching developments closely.

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[1] ‘Sensible Taxation and Equity Promotion Act of 2021’.

[2] For example, the Step Act does not include a special exemption for family owned businesses and farms.

[3] It is not clear if this oft-cited \$400,000 threshold is a shortcut for the highest single tax bracket or whether

there would be a new threshold for some of these rules (as there has been for the net investment income tax).

[4] See IRC § 1411.

[5] See IRC § 121 (rule requires taxpayers to have lived in the home 2 out of the last 5 years)

[6] The farmland would be property used in a trade or business under IRC § 1231.

[7] Iowa Admin. Code 701-40.38(1).

[8] The sale of IRC § 1250 property is subject to different rules.

[9] IRC § 1014(a).

[10] Some business and farm assets are subject to optional special use valuation rules under IRC §2032A.

[11] Revenue Act of 1921, Pub. L. No. 67-98.

[12] For a detailed history of this provision, see Lawrence Zelenak, *Figuring Out the Tax: Congress, Treasury, and the Design of the Early Modern Income Tax*, Cambridge University press, 2017/2018.

[13] See Tax Reform Act of 1976, Pub. L. No. 94-455.

[14] See Pub. L. No. 96-223 (1980).

[15] The Step Act proposal explicitly excludes tangible personal property used in a business from the “sale on death” rule.

[16] This legislative proposal was released by Senators Chris Van Hollen, Cory Booker, Bernie Sanders, Sheldon Whitehouse, and Elizabeth Warren on March 29, 2021.

[17] This article does not discuss the general skipping tax, which is beyond the scope of this discussion.

[18] The executor of an estate required to pay estate tax must file a Form 706 and pay the tax due within nine months of the date of death. An executor must also file a Form 706 if they wish to elect portability on behalf of the surviving spouse.

[19] The gift tax and estate tax did not share an exclusion until 2011.

[20] See <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax> ↗

[21] See <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax> ↗

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## "Green Book" Details President's Tax Reform Proposals

📅 June 2, 2021 | 👤 Kristine A. Tidgren

On May 28, 2021, the Treasury Department released the "[Green Book](#)," a description of revenue proposals within President Biden's fiscal year 2022 budget. This document includes a wish list of tax changes the Administration says would "raise revenue, improve tax administration, and make the tax system more equitable and efficient." The proposals are an opening bid for potential tax reform in the months to come, providing a bit more detail on the President's Build Back Better agenda, namely the American Jobs Plan and the American Families Plan. We discussed the [potential impact of the American Families Plan in a previous post](#) (including some basic examples). Here we review key provisions detailed in the Green Book, recognizing that any final legislation will likely look quite different from the proposed provisions.

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## General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals

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### Increase the Top Individual Tax Rate

For tax years **beginning in 2022**, the proposal would restore the 39.6 percent individual tax rate that was in effect before the Tax Cuts and Jobs Act (TCJA) and lower the income thresholds to which it applies. For tax years beginning in 2018 through 2025, the TCJA lowered the top tax rate from 39.6 percent to 37 percent. It also raised the income thresholds at which the highest rate was triggered. The Green Book explains that "this change would

raise revenue while increasing the progressivity of the tax system.”

Under the proposal, joint filers would reach the 39.6 percent top tax rate in 2022 with \$509,301 of income. Under current law, joint filers reach the highest tax rate of 37 percent with \$628,301 of income. This chart shows how the top rate would change in 2022 under the President’s proposal.

### Top Tax Rate Increase

	2021 (37 percent)	2022 (39.6 percent)
MFJ	\$628,301	\$509,301
Single	\$523,601	\$452,701
HOH	\$523,601	\$481,001
MFS	\$314,151	\$254,651

## Eliminate the Preferential Capital Gain Tax Rates for Taxpayers with > \$1 million in Income

*After the date of the announcement (which was April 28, 2021)*, the proposal would subject long-term capital gain to **ordinary income tax rates** where overall income (including gain) exceeds \$1 million. The highest tax rate would apply to all income (including capital gain) that exceeds \$1 million (\$500,000 for married filing separately), indexed for inflation after 2022. The Green Book explains, “Reforms to the taxation of capital gains and qualified dividends will reduce economic disparities among Americans and raise needed revenue.”

Currently, long-term capital gain is taxed at the highest rate of 20 percent. Gain subject to the net investment income tax (NIIT) (see below) is taxed at a top federal rate of 23.8 percent. This rate is only reached for joint filers with income of \$501,601 or more. Most long-term capital gain is taxed at a 15 percent rate. Under the proposal, all income above a new income cutoff of \$1,000,000 would be taxed at the highest rate of 37 percent in 2021 and 39.6 percent in 2022 and beyond.

## Tax Rates - 2021

Ordinary Income Tax Rates					Long-Term Gain		New Proposal	
Single		MFJ			Single	MFJ		
0	9950	0	19,900	10%	0	0		
9951	40,525	19,901	81,050	12%	40,400	80,800	0%	0%
40,526	86,375	81,051	172,750	22%	40,401	80,801		
86,376	164,925	172,751	329,850	24%				
164,926	209,425	329,851	418,850	32%				
209,426	523,600	418,851	628,300	35%	445,850	501,600	15%	15%
523601+		628,301+		37%	445,851	501,601	20%	20%
					1,000,000	1,000,000	37%*	

\*In 2022, this rate would jump to 39.6.

The Green Book provides the following example:

A taxpayer with \$900,000 in labor income and \$200,000 in preferential capital income would have \$100,000 of capital income taxed at the current preferential tax rate and \$100,000 taxed at ordinary income tax rates.

As explained below, the proposal would also impose a 3.8 percent NIIT on this gain, increasing the top 2022 tax rate for long-term capital gain to 43.4 percent.

## Extend the Application of the Net Investment Income Tax and SECA

### Current Law

Presently, the 3.8 percent NIIT, which was implemented with the Affordable Care Act, applies to net investment income higher than \$200,000 for singles and \$250,000 for MFJ. Net investment income includes:

- Most interest, dividends, rents, annuities, and royalties
- Income derived from a trade or business in which the taxpayer does not materially participate
- Income from a business of trading in financial instruments or commodities
- Net gain from the disposition of property other than property held in a trade or business in which the taxpayer materially participates

Although called the “Medicare tax,” money generated from the NIIT is paid into the general fund.

Wages and self-employment earnings are subject to employment taxes under either the Federal Insurance

Contributions Act (FICA) or the Self-Employment Contributions Act (SECA). FICA and SECA tax applies at a rate of 12.4 percent for social security (capped at \$142,800 in 2021) and at a rate of 2.9 percent for Medicare on all employment earnings (no cap). The Affordable Care Act imposed an additional 0.9 percent Medicare tax on self-employment earnings and wages of high-income taxpayers, above the same NIIT thresholds of \$200,000 for single and head of household filers and \$250,000 for joint filers. This ensures that a 3.8 percent Medicare tax applies to earnings as well.

The Green Book explains that while general partners and sole proprietors pay SECA tax on earnings from their businesses, S corporation owner-employees pay employment tax only on their “reasonable compensation” and limited partners pay employment tax only on any employee earnings. LLC members often pay little or no SECA tax at all. The Green Book urges that “different treatment is unfair, inefficient, distorts choice of organizational form, and provides tax planning opportunities for business owners, particularly those with high incomes, to avoid paying their fair share of taxes.”

## Proposal

The proposal would seek to ensure that anyone earning more than \$400,000 would be subject to the 3.8 percent Medicare tax. The \$400,000 income limit is a threshold the President has used to define “wealthy.” The imposition of this new tax would be accomplished in several ways.

- Making the application of SECA to partnership and LLC income more consistent for high-income taxpayers
- Applying SECA to the ordinary business income of high-income non-passive S corporation owners
- Ensuring that all trade or business income of high-income taxpayers is subject to the 3.8 percent Medicare tax, either the NIIT or SECA tax
- Redirecting NIIT funds to the Hospital Insurance Trust Fund

### *Making the application of SECA to partnership and LLC income more consistent for high-income taxpayers*

The proposal suggests that limited partners and LLC members who *materially participate or provide service* to their businesses would be subject to SECA tax on their distributive shares of partnership or LLC income to the extent that their overall business and employee income exceeds \$400,000. Material participation standards would apply consistently to these limited partners and LLC members. Exemptions from SECA tax for rents, dividends, capital gains, and certain retired partner income would continue to apply.

### *Applying SECA to the ordinary business income of high-income non-passive S corporation owners*

Likewise, the proposal states that S corporation owners who materially participate in the trade or business would be subject to SECA taxes on their distributive shares of the business’s income to the extent that their overall business and employee income exceeds \$400,000. Current exemptions from SECA tax for rents, dividends, and capital gains would continue to apply.

*Ensuring that all trade or business income of high-income taxpayers is subject to the 3.8 percent Medicare tax, either the NIIT or SECA tax*

For taxpayers with more than \$400,000 in adjusted gross income, the proposal would change the definition of net investment income to include “gross income and gain from any trades or businesses that is not otherwise subject to employment taxes.” This would, for example, apply the 3.8 percent Medicare tax to any high earner income missed by the above SECA expansion. This would appear to include IRC § 1231 gain and self-rental income. The 3.8 percent tax would appear to apply to IRC §§ 1245 and 1250 gain as well, whether through a SECA enhancement or a NIIT expansion.

*Redirect NIIT funds to the Hospital Insurance Trust Fund*

The proposal would redirect the “Medicare tax” from the general fund, as directed by the Affordable Care Act, to the Hospital Insurance Trust Fund, where the SECA and FICA Medicare tax is paid.

## Treat Property Transfers at Death or Gift as Realization Events

**Beginning in 2022**, the AFP would treat the **transfer of appreciated property at death or by gift as a sale**, meaning that unrealized capital gain would be taxed at the time of death or gift. This would be a new tax, never before imposed in the U.S. As described in the Green Book, dying with or gifting appreciated property would trigger taxable income to the decedent on the federal gift or estate tax return or on a separate capital gains return.

**Note:** This proposal is in conjunction with provisions that would **increase the top tax rate**, subject gains to **ordinary income tax rates where income is more than \$1 million**, and **apply the NIIT to gain from the sale of business assets, like farmland, if overall adjusted gross income is more than \$400,000**.

## Transfers to Spouses and Charities

Although transfers to a spouse or charity would be exempt from the new tax recognition rules, the proposal states that these transfers would be completed with a *carryover basis*. Thus, capital gain would be recognized when the surviving spouse disposes of the asset or dies, and appreciated property transferred to charity would no longer result in a charitable deduction based upon fair market value. Likewise, the transfer of appreciated assets to a split-interest trust would generate a taxable capital gain, with an exclusion allowed only for the charity’s share of the gain based on the **charity’s share of the value**. This means that transfers of appreciated property to charitable remainder trusts would be largely taxable.

## Transfers of Tangible Personal Property

The proposal states that it would exclude from recognition any gain on “tangible personal property such as household furnishings and personal effects (excluding collectibles).” It is unclear from this statement whether all tangible personal property, such as depreciated business equipment, would be covered by this exclusion.

## Exemptions

Each person would be allowed to exclude **up to \$1 million (indexed for inflation) in gain from recognition at death or at the time of gift**. Spouses would each get their own exemption, which would be **portable**, meaning that a couple could exempt \$2 million in gain from tax. Additionally, the proposal would exempt \$250,000 in gain from the sale of a personal residence (\$500,000 for married filing jointly). The current exclusion for capital gain on certain small business stock would also apply.

## Basis

The proposal states that if property is transferred at death, the recipient’s basis in the property would be the FMV of that property at the decedent’s death.

**Example:** Decedent transfers a \$5 million parcel of land with \$3 million in appreciation (\$2 million basis) at death. The heir receives the land with a \$5 million basis. Tax is due on \$2 million of gain after the \$1 million exemption.

If property is transferred by gift, the recipient would receive a *carryover basis*, to the extent that the \$1 million exclusion applies. In other words, if a gift triggers a transfer tax, the basis would adjust to FMV only for that portion of the property subject to the tax.

**Example:** Donor gift a \$5 million parcel of land with \$3 million in appreciation (\$2 million basis). Here the donee receives the land with a \$4 million basis. Tax is due on \$2 million of gain.

## Interaction with the Estate Tax

Note that this tax is not an estate tax based upon the value of the estate. It is a tax on unrealized gain. The current estate tax would continue to apply if the value of the estate exceeds the basic exclusion amount (currently \$11.7 million). The proposal states, however, that the new tax would be deductible from the estate value. The Green Book does not contain any estate tax proposals, but current law would reduce the current basic exclusion by 50 percent in 2026.

## Special Provisions for Trusts, Partnerships and Other Non-Corporate Entities

The proposal also states that gain on unrealized appreciation would be recognized by a trust, partnership, or other non-corporate entity (presumably an LLC) that is the owner of property if that property has not been the subject of a recognition event **within the prior 90 years**, with such testing period beginning on January 1, 1940. Under this proposal, the first possible recognition event for any taxpayer would be **December 31, 2030** (90 years from January 1, 1940).

#### *No Valuation Discounts for Minority Interests*

The proposal states that transfers would be defined under the gift and estate tax provisions and would be valued using the methodologies used for gift or estate tax purposes. A transferred partial interest would be its proportional share of the fair market value of the entire property. This means that the proposal would disallow valuation discounts for minority interests.

#### *Transfers into and out of Trusts, Partnerships, and Non-Corporate Entities Would Be Recognition Events*

The proposal states that transferring property into and receiving distributions in kind from, a trust, partnership, or other non-corporate entity (LLC)—other than a grantor trust that is deemed to be wholly owned and revocable by the donor—would be recognition events. While this provision is likely intended to prevent recognition avoidance schemes, this proposal would fundamentally transform partnership taxation.

## Deferral of Tax for Family-Owned and Operated Businesses

The proposal states that payment of tax on the appreciation of **certain family owned and operated businesses** would *not be due* until the interest in the business is sold or the business ceases to be **family owned and operated**. No further details are provided on this key, yet difficult, exception. It is likely that in conjunction with deferral liens would be imposed on the property to secure the unpaid tax.

## 15-Year Payment Plan

The proposal provides a 15-year fixed-rate *payment plan* for the tax on appreciated assets transferred at death, except for liquid assets, such as publicly traded stock, and family owned and operated businesses that elect a tax deferral.

## Other Provisions

The proposal includes several other details:

- The full cost of appraisals of appreciated assets would be deductible.
- Liens could be imposed for unpaid tax.



- Underpayment of an estimated tax penalty would be waived if underpayment is due to death.
- New rules would seek consistency in valuation for transfer and income tax purposes.
- New rules and safe harbors for determining the basis of assets in cases where complete records are unavailable would be created.
- New reporting requirements for all transfers of appreciated property including value and basis information would be imposed.

## Limit the Section 1031 Exchange

The proposal would limit the IRC § 1031 like-kind exchange deferral to \$500,000 in gain (\$1 million for a married couple) *per year*. The Green Book states that this proposal would raise revenue while increasing the progressivity of the tax system. This provision would apply to exchanges **completed** after the 2021 tax year.

## Increase the Corporate Tax Rate

The proposal would raise the corporate tax rate from 21 percent to 28 percent, for tax years beginning in 2022. Before 2018, the corporate tax rate was 35 percent. It is not clear whether any increased corporate tax rate would be graduated (like the pre-2018 rate).

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