

XIV. Potential Changes to I.R.C. § 1031, “Like-Kind Exchanges”

A. Introduction

Internal Revenue Code Section 1031 of the tax code permits real estate investors to defer recognition of gains, and thus avoid paying taxes, on qualifying real property which is exchanged for other qualifying real property of a “like-kind.” Though § 1031 is one-hundred years old, it has increasingly been targeted for elimination or limitation by both Republicans and Democrats in the past ten years. This article will provide an overview of these “like-kind” exchanges under § 1031, explain the ongoing controversy, discuss the possible impacts of eliminating § 1031 altogether, and suggest some alternatives to total elimination.

B. Overview of Like-Kind Exchanges under IRC § 1031

For the purposes of computing an individual’s federal income tax liability, the first step is to determine one’s gross income. Under Internal Revenue Code (IRC or simply, the Code) § 61(a)(3), “gross income means all income from whatever source derived, including ... gains derived from dealings in property.”¹ In other words, the more gross income a taxpayer accumulates, the more federal income taxes that taxpayer will have to pay in a given year unless the Code provides an exemption from tax upon receipt of income. Of course, savvy taxpayers will seek to lower their gross income to the fullest extent possible under the Code. When it is not possible to lower one’s gross income, the next best strategy is to postpone recognizing gross income until a later date. Ideally, savvy taxpayers can postpone recognizing gross income indefinitely until death, which practically means that they avoid paying taxes on that gross income altogether.

Certain key “Nonrecognition Provisions” exist in the Code, including the frequently-used § 1031, involving like-kind exchanges.²

¹ I.R.C. § 61(a)(3).

² See, e.g., Richard M. Lipton, *The “State of the Art” in Like-Kind Exchanges, Revisited*, 91 J. TAX 78 (June 2003) (“Section 1031(a) is frequently used by taxpayers to defer gain on exchanges of real property and other like-kind property swaps.”). The three key Nonrecognition Provisions are: (1) § 1031, having to do with “like-kind” exchanges; (2) § 1033, having to do with

For investors in real property, § 1031 is a highly effective way to postpone recognizing “gains derived from dealings in property”—i.e., gross (taxable) income—until a later date.³ § 1031 generally provides that: “No gain or loss shall be recognized on the exchange of [qualifying] real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of a like-kind which is to be held either for productive use in a trade or business or for investment.”⁴ Like many provisions in the Code, the general rule set forth in § 1031 invites several questions, including: (1) what real property “qualifies” under § 1031; and (2) what does “like-kind” mean in practice?

1. What Is “Qualifying Real Property”?

Qualifying property refers to: (1) real property, (2) held for productive use in a trade or business or for investment, (3) that is exchanged.⁵ Since the enactment of the Tax Cuts and Jobs Act (TCJA),⁶ the property must be real property. Although § 1031 itself does not define “real property,”⁷ property that is “real” generally means “land and anything growing on, attached to, or erected on it,”⁸ and not personal, generally meaning “any movable or intangible thing that is subject to ownership and not classified as real property.”⁹ Prior to the enactment of the TCJA during the Trump Administration, personal and intangible property were eligible for tax deferral under § 1031; however, since January 1, 2018, “exchanges of machinery, equipment, vehicles, artwork, collectibles, patents and other intellectual property and intangible business assets” generally are no longer considered “qualifying property” for the purposes of § 1031.¹⁰ As with most provisions in the Code, exceptions apply. § 1031 may apply to

involuntary or compulsory conversions of property; and (3) § 1041, having to do with the transfer of property between spouses or incident to divorce. I.R.C. §§ 1031, 1033, 1041.

³ See I.R.C. §§ 61(a)(3), 1031.

⁴ I.R.C. § 1031(a)(1) (emphasis added).

⁵ *Id.*

⁶ Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁷ See I.R.C. § 1031.

⁸ *Real Property*, BLACK’S LAW DICTIONARY (5th Pocket ed. 2016).

⁹ *Personal Property*, BLACK’S LAW DICTIONARY (5th Pocket ed. 2016).

¹⁰ *Like-Kind Exchanges—Real Estate Tax Tips*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/like-kind-exchanges-real-estate-tax-tips> (last visited Mar. 1, 2021).

personal or intangible property if the taxpayer “disposed of the exchanged property on or before December 31, 2017, or received replacement property on that date.”¹¹

It might be surprising that President Trump, a real estate investor himself, narrowed the scope of § 1031 during his administration.¹² Prior to the 2016 election and shortly thereafter, a significant number of Republicans and Democrats began serious bipartisan discussions to eliminate or limit § 1031.¹³ President Trump, however, dismissed his fellow Republicans’ suggestions as “too complicated” and subsequently enacted the TCJA.¹⁴ Perhaps eliminating personal and intangible property from the definition of “qualifying property” was a concession to appease Republicans and create other favorable provisions in the TCJA for real estate investors.

Second, the property must be “held for productive use in a trade or business or for investment.”¹⁵ In other words, the property being exchanged cannot be used primarily for personal use, such as a primary residence, second home, or vacation home.¹⁶ However, Revenue Procedure 2008-16 provides a “safe harbor under which the Internal Revenue Service (Service) will not challenge whether a property that is rented to others but also occasionally used by the owners for personal purposes qualifies as property that may be

¹¹ *Id.*

¹² See Peter J. Reilly, *Why President Trump’s Rich Friends Might Have Been Mad about the Tax Act*, FORBES (Mar. 21, 2018), <https://www.forbes.com/sites/peterjreilly/2018/03/21/why-president-trumps-rich-friends-might-have-been-mad-about-the-tax-act/> (discussing friendly provisions for real estate investors in the TCJA, such as a 20% 199A deduction for investors with sufficient amounts of depreciable property, permissive REIT dividend rules, and expensing provisions in § 168(k) permitting investors to immediately write-off a significant percentages of acquisitions in certain circumstances).

¹³ See, e.g., Mike DeBonis, *In Address, Paul Ryan Pledges a “Complete Alternative” to the Democratic Agenda*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/12/03/paul-ryan-sets-his-agenda-make-america-confident-again/>.

¹⁴ Richard Rubin & Peter Nicholas, *Donald Trump Warns on House Republican Tax Plan*, WALL ST. J. (Jan. 1, 2017), <https://www.wsj.com/articles/trump-warns-on-house-republican-tax-plan-1484613766>.

¹⁵ I.R.C. § 1031(a)(1).

¹⁶ I.R.S. Fact Sheet FS-2008-18 Fact Sheet from the IRS, *Like-Kind Exchanges under IRC Section 1031* (Feb. 2008).

exchanged in a like-kind exchange under section 1031 of the Code.”¹⁷ For a second or vacation home to qualify, the taxpayer seeking to exchange the property must, “own the vacation home for twenty-four months immediately after the exchange, and for each of those two 12-month periods the Exchanger must: (1) rent the unit at fair market rental for fourteen or more days, and (2) restrict personal use to the greater of fourteen days or ten percent of the number of days it was rented at fair market rental within that 12-month period.”¹⁸ In comparison, “property held for personal use with the mere hope or expectation of gain [does not] establish investment intent for a vacation home used only for the personal enjoyment of the taxpayer and his family and friends.”¹⁹ However, the average homeowner would likely be happy to hear that taxpayers do not need to use § 1031 to dodge recognizing gross income on the sale of a primary residence. Another provision in the Code, § 121, explicitly permits single and married taxpayers to exclude a maximum of \$250,000 and \$500,000 of gains, respectively, on the sale of their main home.²⁰ Real estate investors and those with primary residences worth more than \$250,000 and \$500,000, however, cannot fully receive beneficial tax treatment under § 121, if at all, and thus need to look to § 1031 to defer recognition of gross income following a sale or other disposition of their real property.

The final requirement for qualifying property is that it must be “exchanged,” and not “sold.” § 1031(a)(2) states that nonrecognition of gain or loss from like-kind exchanges “shall not apply to any exchange of real property *held primarily for sale*.”²¹ A “sale” refers to property transferred in consideration of a definite monetary price, whereas an “exchange” refers to property “transferred in return for other property without the intervention of money.”²² As discussed

¹⁷ *Internal Revenue Bulletin: 2008-10*, I.R.S. (Mar. 10, 2008), https://www.irs.gov/irb/2008-10_IRB.

¹⁸ Investment Property Exchange Services, Inc., *Do Vacation and Second Homes Qualify?—Revenue Procedure 2008-16*, IPX 1031 EXCHANGE TOPICS (2020), <https://www.ipx1031.com/do-vacation-and-second-homes-qualify/>.

¹⁹ *Id.* (citing *Moore v. Comm’r*, 93 T.C.M. (CCH) 1275 (T.C. 2007)).

²⁰ *See* I.R.C. § 121.

²¹ I.R.C. § 1031(a)(2) (emphasis added).

²² *Bloomington Coca-Cola Bottling Co. v. Commissioner*, 189 F.2d 14, 16 (7th Cir. 1951) (holding that the taxpayer’s disposition of an old bottling plant constituted a “sale” and not an “exchange” of property because the transaction primarily involved the disposition of the plant for consideration of \$8000).

below, however, § 1031 can apply even if exchanges are not *solely* in kind.²³

2. What Is “Like-Kind” Property?

Under § 1031, properties being exchanged must be of a “like-kind,” which refers to “the nature or character of the property and not to its grade or quality.”²⁴ “Grade or quality” refers to the type of property, such as a farm, apartment building, etc.²⁵ This permissive definition of “like-kind” means that most real property—improved or unimproved, urban or rural—may be of a like-kind.²⁶ The Regulations provide a helpful example of how fluid this rule is: “A taxpayer who is not a dealer in real estate [who] exchanges city real estate for a ranch or farm, or exchanges a leasehold of a fee with 30 years or more to run for real estate, or exchanges improved real estate for unimproved real estate,” qualifies for the nonrecognition rule.²⁷

Thus far, § 1031 has proven to be a highly permissive rule,²⁸ and even permits nonrecognition of gains and losses from exchanges “not solely in-kind.”²⁹ To demonstrate the extent of § 1031, a brief explanation of how gains are calculated under the Code for the purposes of recognizing gross income is helpful. § 1001(a) states that “the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain.”³⁰ § 1012 explains that “basis” refers to what the taxpayer invested in the property, typically what they paid for the property.³¹ § 1001(b) explains that “amount realized” refers to “the sum of any money received plus the fair market value of the property (other than money) received.”³² In other words, the amount realized *minus* basis *equals* gain, which is used to calculate gross income for federal income tax purposes.

²³ I.R.C. § 1031(b)–(c).

²⁴ Reg. § 1.1031(b) (defining “like-kind”).

²⁵ See Reg. § 1.1031(c) (providing examples of exchanges of property of a “like kind”).

²⁶ See *id.*

²⁷ Reg. § 1.1031(c).

²⁸ See *id.* (citing a wide variety of examples of exchanges of “like-kind” property).

²⁹ I.R.C. § 1031(b)–(c).

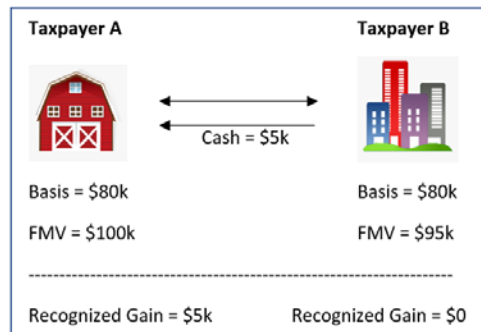
³⁰ I.R.C. § 1001(a).

³¹ I.R.C. § 1012(a).

³² I.R.C. § 1001(b).

<p style="text-align: center;">Amount Realized (what you received)</p> <p>– Basis (what you paid)</p> <p>-----</p> <p>= Gain (what you usually pay taxes on)</p>

To put this in the context of § 1031, if property received in a like-kind exchange includes both like-kind property *and* other property or money (called “boot”³³), then gains and losses realized with respect to the property exchanged will only be recognized to the extent of the boot.³⁴ For example, Taxpayer A has a farm with a basis of \$80,000 and a fair market value of \$100,000, and Taxpayer B has city real estate with a basis of \$80,000 and a fair market value of \$95,000. Taxpayer B then transfers their city real estate (with a fair market value of \$95,000) *plus* \$5,000 in cash, for a total \$100,000 in consideration to Taxpayer A in exchange for Taxpayer A’s farm (with a fair market value of \$100,000). This seems like a fair trade—both Taxpayer A and B have exchanged properties with a total of \$100 thousand fair market value. Without § 1031, Taxpayer A would typically recognize \$20,000 in gain (i.e., the \$100k consideration minus the \$80 thousand they paid for the farm). However, with § 1031, Taxpayer A will only recognize a gain of \$5,000, or the boot, in this like-kind exchange.³⁵ In other words, Taxpayer A would only have to *pay taxes* on \$5,000 in this transaction thanks to § 1031.³⁶



³³ American Bar Association, *Exchanges under Code Section 1031*, REAL ESTATE FAQs, https://www.americanbar.org/groups/real_property_trust_estate/resources/real_estate_index/section-1031/ (“boot is gain realized in an exchange”).

³⁴ I.R.C. § 1031(b)–(c).

³⁵ See Reg. § 1.1031(b)–(b) (providing examples of application of § 1031).

³⁶ See *id.*

Performed on a large scale, § 1031 exchanges are worth much more than \$5,000 to real estate investors who have perfected § 1031 exchanges as an indefinite strategy to avoid taxes during real estate transactions.³⁷

C. Controversy

As discussed above, both personal and real property qualified for tax deferral under § 1031 before the 2018 TCJA; today, § 1031 only applies to real property.³⁸ However, critics of § 1031 say that the TCJA did not go far enough, arguing that modern applications of the statute are far removed from Congress's original legislative intent.³⁹ Enacted 100 years ago in 1921, Congress made clear that § 1031 served two primary purposes: (1) to avoid taxing ongoing investments in property unfairly; and (2) to encourage property owners to actively reinvest tax-deferred gains into the economy.⁴⁰ Proponents of § 1031 disagree, arguing that the policy reasons which led Congress to enact the statute in the first place still apply today.⁴¹

As for the first purpose, Congress sought to “permit taxpayers to maintain investments in property without being taxed on theoretical (i.e., “paper”) gains and losses during the course of a continuous investment.”⁴² This is in line with the general principle that the federal government should not tax unrealized income for liquidity, valuation,

³⁷ Bloomberg Tax, *TAX INSIGHT: The Impact of TJCA on Cost Segregation and Like-Kind Exchange*, *DAILY TAX REPORT* (Apr. 1, 2019), <https://news.bloombergtax.com/daily-tax-report/insight-tax-insight-the-impact-of-tcja-on-cost-segregation-and-like-kind-exchange> (describing potential impacts of the TCJA, and explaining that, “An experienced advisor will know how to navigate these complexities and provide guidance for those looking to utilize this sophisticated tax strategy.”).

³⁸ *See id.*

³⁹ Mackay, Caswell & Callahan, *The Near Death of the 1031 Exchange*, *BLOG* (Mar. 13, 2018), <https://www.mcc4tax.com/1031-exchange/>.

⁴⁰ Federation of Exchange Accommodators, *Legislative History of IRC Section 1031* (last visited Apr. 5, 2021), <https://www.1031taxreform.com/1031history/>.

⁴¹ *See id.* (“Section 1031 and its tax policy underpinnings are still very relevant today, having withstood the test of time from 1921 to the present.”)

⁴² *Id.*

and compliance purposes.⁴³ An investor might not have the cash on hand to pay taxes on theoretical gains that are still tied up in ongoing investments, it is inequitable to speculate as to the value of an asset in the middle of an ongoing investment, and taxing unrealized gains might lead unhappy taxpayers to illegally underreport their gross income.⁴⁴ This is the same rationale cited by the federal government for waiting to tax gains on stocks or bonds held as investments until the taxpayer sells those investments.⁴⁵ As for the second purpose, Congress sought to “encourage the exchange of property, thus promoting transactional activity as dictated by prudent business decisions based upon changing circumstances.”⁴⁶ Allowing investors to defer paying taxes on like-kind exchanges alleviated burdens on their net worth and cash flow, enabling them to reinvest in the economy.⁴⁷

However, times have changed since 1921. § 1031 was traditionally used by farmers when purchasing and selling farmland, or “clarify[ing] property lines between neighboring farmers.”⁴⁸ Gradually, investors began to recognize the lucrative potential of § 1031 and used the statute as a device to defer and dodge taxes indefinitely, thus creating more wealth.⁴⁹ Strategic § 1031 exchanges are “projected to save investors \$51 billion between 2019 and 2023, according to Congress’s Joint Committee on Taxation.”⁵⁰ During the 2016 election cycle, President Trump discussed using the tax code to his advantage in his property developments.⁵¹ His son-in-law, Jared Kushner, has also benefited from this strategy, buying a New Jersey apartment complex in 2017 with funds from a property sale in Ohio using a like-

⁴³ See, e.g., Erik M. Jensen, *Uneasy Justification for Special Treatment of Like-Kind Exchanges*, 4 AM. J. TAX POL’Y 193, 197–202 (1985) (describing the “justifications for nonrecognition treatment”).

⁴⁴ See *id.*

⁴⁵ See *id.* at 198.

⁴⁶ *Legislative History of IRC Section 1031*, *supra* note 34.

⁴⁷ *Id.*

⁴⁸ *The Near Death of the 1031 Exchange*, *supra* note 33.

⁴⁹ *Id.*

⁵⁰ Patrick Clark, John Gittelsohn & Noah Buhayar, *Biden Attacks \$50 Billion Real Estate Tax Break in Jab at Trump*, BLOOMBERG (July 21, 2020), <https://www.bloomberg.com/news/articles/2020-07-21/biden-takes-aim-at-50-billion-tax-break-in-shot-at-trump>.

⁵¹ *Id.* (“During a televised presidential debate in 2016 with Hillary Clinton, Trump said he used depreciation to reduce taxes. ‘I love depreciation,’ he said.”).

kind exchange.⁵² Critical tax experts state that the rule has evolved into a government subsidy for wealthy real estate investors, who have become too “comfortable with the idea that they don’t pay taxes.”⁵³ Nevertheless, proponents of the rule argue that § 1031 remains highly relevant, continues to benefit “a broad spectrum of taxpayers, and stimulat[es] the U.S. economy.”⁵⁴

D. Possible Impacts of Eliminating § 1031

Proponents of eliminating § 1031 argue that wealthy real estate investors should not be getting tax breaks while revenues from taxing like-kind exchanges could be better spent on average Americans’ needs.⁵⁵ During the 2020 presidential election, the Biden campaign announced “The Biden Plan for Mobilizing American Talent and Heart to Create a 21st Century Caregiving and Education Workforce,” which outlined plans to bolster America’s underfunded early care and education (ECE) system.⁵⁶ Specifically, the plan would expand access to a broad array of medical services and providers, ensure access to affordable and high-quality child care, offer universal preschool for toddlers aged three and four, build appropriate child care facilities, and treat caregivers and educators with the respect and dignity that they need and deserve.⁵⁷ The Biden campaign stated that its ECE initiatives, which would cost \$775 billion over ten years, could be “paid for by rolling back unproductive and unequal tax breaks for real estate investors with incomes over \$400,000 and taking steps to increase tax compliance for high-income earners.”⁵⁸ Though the plan does not specifically cite § 1031, campaign officials stated that they would target like-kind exchanges, leading experts to suspect that § 1031 may be scaled back, if not eliminated entirely, during the Biden administration if President Biden implements this plan.⁵⁹

⁵² *Id.*

⁵³ *Id.* (quoting Steve Wamhoff, director of federal tax policy at the left-leaning Institute on Taxation and Economic Policy).

⁵⁴ *Legislative History of IRC Section 1031*, *supra* note 34.

⁵⁵ *See id.*

⁵⁶ *The Biden Plan for Mobilizing American Talent and Heart to Create a 21st Century Caregiving and Education Workforce*, BIDEN HARRIS CAMPAIGN (2020), <https://joebiden.com/caregiving/>.

⁵⁷ *See generally id.*

⁵⁸ *Id.* (emphasis added).

⁵⁹ Samantha Duran & Joaquin Martinez, *Looking Ahead to the Biden Administration—What the Commercial Real Estate Community Needs to*

Not everyone agrees that eliminating § 1031 would be as profitable to the government as Biden hopes, nor that the statute is merely an unnecessary tax break for wealthy real estate investors. Real estate industry advocates resolutely defend § 1031 as a valuable tool to create new investments and jobs, and further stipulate that the vast majority of § 1031 exchanges are conducted in “strict compliance” with the Code.⁶⁰ Examining the impact of tax deferral through like-kind exchanges on investment in the real estate market, Real Estate and Finance Professors David C. Ling and Milena Petrova argue that the possible revenue generated by eliminating § 1031 is overstated, while the benefits to investors, local real estate markets, and economic activity is overlooked.⁶¹ Although Ling and Petrova cite a number of impressive empirical studies in their article,⁶² it is worth noting that their research was funded by The Real Estate Research Consortium, which is heavily sponsored by dozens of organizations such as the American Hotel & Lodging Association, the Commercial Real Estate Finance Council, and the Commercial Real Estate Development Association.⁶³ Although Ling and Petrova are not alone⁶⁴ in concluding that the present value of tax losses caused by § 1031 is relatively small while the harm of eliminating the statute is relatively large, § 1031 has a significant lobbying base which is eager to “effectively spread [the] message that IRC § 1031 is a valuable economic stimulant facilitated by an industry comprised of responsible, knowledgeable professionals.”⁶⁵ Whether or not the expected revenue to be generated

Know, JD SUPRA (Jan. 21, 2020), <https://www.jdsupra.com/legalnews/looking-ahead-to-the-biden-7980283/#:~:text=The%20Biden%20administration%20may%20eliminate,the%20proceeds%20into%20another%20property.>

⁶⁰ See David Kocieniewski, *Major Companies Push the Limits of a Tax Break*, N.Y. TIMES (Jan. 6, 2013), <https://www.nytimes.com/2013/01/07/business/economy/companies-exploit-tax-break-for-asset-exchanges-trial-evidence-shows.html>.

⁶¹ See generally DAVID C. LING & MILENA PETROVA, *THE TAX AND ECONOMIC IMPACTS OF SECTION 1031 LIKE-KIND EXCHANGES IN REAL ESTATE* (2020).

⁶² *Id.* at 50–77.

⁶³ See *id.* at 1 (thanking the Real Estate Research Consortium and its sponsors for providing financial support for the article).

⁶⁴ See, e.g., *Legislative History of IRC Section 1031*, *supra* note 34.

⁶⁵ *Become a Member: FEA Value Proposition*, FEDERATION OF EXCHANGE ACCOMMODATORS, (last visited Apr. 6, 2021), <https://1031.org/FEA/Membership/FEA/Benefits.aspx?hkey=6af40206-31af-42ce-b7b3-ddbbebe694a3> (acknowledging that “the strength in numbers and ability to spread the

by eliminating § 1031 truly outweighs the harm to investors, local real estate markets, and economic activity is an empirical question that is hard to answer amidst the current abundance of partisan reports, lobbyists, and elected officials with divergent views of the statute.⁶⁶

E. Alternatives to Eliminating § 1031

Alternatives to eliminating § 1031 exist. The TCJA took a step towards narrowing the scope of § 1031 to exchanges only involving real property.⁶⁷ The definition of “like-kind” under § 1031 could be restricted further such that the properties being exchanged must be of like-kind in reference to their type, rather than being of a like-kind only in reference to their value.⁶⁸ For example, qualifying property could be limited to urban residences which could then only be exchanged for other urban residences with a similar fair market value; rural land could only be exchanged for other rural land; etc. Alternatively, the legislature could restrict the rule even further and mandate that “qualifying property” only includes farmland—harkening back to the state of affairs when § 1031 was promulgated in 1921.⁶⁹

Another possibility includes imposing a cap on the amount that taxpayers are able to defer under § 1031. For example, after Congress’s Joint Committee on Taxation issued a report in 2014 estimating that the federal government would gain \$40 million dollars in tax

cost of high quality lobbyists who keep us informed, provide access to key players in Congress, provide guidance to our Government Affairs Committee, and effectively spread our message that IRC §1031 is a valuable economic stimulant facilitated by an industry comprised of responsible, knowledgeable professionals.)

⁶⁶ See Kocieniewski, *supra* note 60 (“Many tax breaks began with narrow targets and expanded into vast, expensive subsidies far beyond their original intent or the Internal Revenue Service’s ability to monitor them. Most have developed constituencies of taxpayers, lobbyists and elected officials who fiercely defend them, making it politically treacherous to limit or eliminate them. With hundreds of thousands of transactions a year, it is hard to gauge the true cost of the tax break for so-called like-kind exchanges ...”).

⁶⁷ See Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (limiting application of § 1031 to real property).

⁶⁸ See I.R.C. § 1031. Currently, the rule requires that like-kind properties must be similar in value rather than the type of property.

⁶⁹ See Kocieniewski, *supra* note 60 (“[Section 1031] began more than 90 years ago as a small tax break intended to help family farmers who wanted to swap horses and land.”).

revenue over ten years by repealing § 1031, President Obama proposed limiting tax deferral for like-kind exchanges to \$1,000,000 per taxpayer.⁷⁰ Although this proposal did not come to fruition at the time, a cap is worth revisiting if proponents of § 1031 are predominantly concerned about local real estate markets and small-scale investors. Similar caps exist elsewhere in the Code, including § 121, which allows taxpayers not to include gains from the sale of their principal residence in their gross income, up to \$250,000 for single taxpayers and \$500,000 for married taxpayers.⁷¹

Either limiting § 1031 to like-kind exchanges of property of the same type or imposing a cap may help achieve the policy goals that Congress initially intended when the statute was passed in 1921, while limiting wealthy individuals' and corporations' ability to push the boundaries of the tax code. This could help shift the cost of running the federal government to those who have the greatest ability to pay taxes, while enabling small real estate investors to dispose of their property without facing liquidity and valuation problems.

F. Conclusion

§ 1031 provides that “no gain or loss shall be recognized on the exchange of [qualifying] real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of a like-kind which is to be held either for productive use in a trade or business or for investment.”⁷² Although the TCJA eliminated the application of § 1031 to personal property, like-kind exchanges of real property remain a highly-popular method of deferring gains among real estate investors. Critics of § 1031 argue that the modern application of the statute is far removed from Congress's original intent when it was enacted 100 years ago. Proponents of § 1031 disagree, citing the tax policy underpinnings that led to the statute in the first place (benefitting a broad spectrum of taxpayers and stimulating the U.S. economy) remain relevant today.

As of the 2020 presidential election, § 1031 is possibly on the chopping block. The Biden administration has suggested that wealthy real estate investors should not be getting the equivalent of a govern-

⁷⁰ Kayleigh Kulp, *Like-Kind Exchanges Could Be at Risk under Trump*, CNBC (Dec. 27, 2016), <https://www.cnbc.com/2016/12/23/like-kind-exchanges-could-be-at-risk-under-trump.html>.

⁷¹ I.R.C. § 121.

⁷² I.R.C. § 1031.

ment subsidy while revenues from taxing § 1031 exchanges could be better used to benefit the needs of average Americans. Some real estate and financial scholars disagree, suggesting that tax revenue losses from § 1031 exchanges are overstated, and removing such exchanges would likely harm small investors and local markets rather than the superrich. Currently, the partisan divide with respect to § 1031 makes it challenging to empirically analyze the possible impacts of eliminating or limiting § 1031 on the economy. Alternatives to eliminating § 1031, such as imposing a monetary cap on like-kind exchanges or narrowing the scope of “qualifying property,” could be a good step toward generating greater tax revenue while maintaining the positive advantages that § 1031 has historically provided.

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