

# **Exhibit C**

**From:** [Mills, Beth \(DOR\)](#)  
**To:** [Nabors, Ramona \(OFM\)](#); [Knutson, Rachel \(OFM\)](#); [Schmidt, Jim \(OFM\)](#); [Flanagan, John \(GOV\)](#); [Shirk, Drew \(GOV\)](#)  
**Cc:** [DOR DL Key Legislative](#)  
**Subject:** 5096 ESSB Capital gains tax - DOR Bill Report  
**Date:** Friday, April 30, 2021 5:04:44 PM  
**Attachments:** [5096 ESSB - DOR Bill Report.docx](#)

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Good evening Ramona, Rachel, Jim, John, and Drew:

Attached is the Department of Revenue's bill report for [ESSB 5096](#) – ***Concerning an excise tax on gains from the sale or exchange of certain capital assets.***

This bill was passed by the Senate on March 6 (25-24-0-0) and by the House on April 21 (52-46-0-0). Conference committee report was adopted and passed the House on April 24 (52-44-0-2) and the Senate on April 25 (25-24-0-0). The bill was signed by the President of the Senate and the Speaker of the House on April 25, then delivered to the governor on April 26.

Please let me know if you have any questions.

Best wishes,

***Beth Mills***

Legislative Coordinator | Legislation & Policy  
Washington State Department of Revenue

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## Enrolled Bill Analysis & Agency Recommendation

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**Bill Number & Title**      **ESSB 5096**      **Concerning an excise tax on gains from the sale or exchange of certain capital assets.**  
Sponsor:      Originally sponsored by Senator Robinson *by request of the Office of Financial Management*

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**Agency Contact**      Beth Mills, Legislative Coordinator, (360) 534-1524

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**Agency Recommends**       Sign       Veto       Partial Veto       No Position

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**What the Bill Does**      This bill imposes a tax on the sale or exchange of certain long-term capital assets. The taxable amount is an individual's Washington capital gains. The tax rate is 7%. The tax takes effect on January 1, 2022, and the first payments are due in 2023.

Revenues from the tax, and any associated interest and penalties, are distributed as follows:

- The first \$500 million received each year is deposited into the Education Legacy Trust Account.
- The remainder is deposited into the Common School Construction Account.

The maximum amount distributed into the Education Legacy Trust Account is adjusted for inflation annually.

The sale or exchange of the following assets are exempt from the tax:

- Real estate.
- Interests in a privately-held entity to the extent that the capital gain or loss from such sale or exchange is directly attributable to the real estate owned directly by such entity.
- Assets held in certain retirement accounts.
- Assets subject to condemnation, or sold or exchanged under imminent threat of condemnation.
- Livestock by farmers or ranchers.
- Assets used in a trade or business to the extent those assets are depreciable under Title 26 U.S.C. Sec. 167(a)(1) of the internal

revenue code or qualify for expensing under Title 26 U.S.C. Sec. 179 of the internal revenue code.

- Timber and timberlands, including dividends and distributions from real estate investment trusts derived from the sale of timber and timberlands.
- Commercial fishing privileges.
- Goodwill received from the sale of a franchised auto dealership.

The bill includes the following deductions from a taxpayer's Washington capital gains:

- A standard deduction of \$250,000 per year per individual, married couple, or domestic partnership. This amount is adjusted for inflation annually.
- The long term capital gain from a taxpayer's sale of a qualified family-owned small business.
- Charitable donations in excess of \$250,000 per year per taxpayer. The charitable donations deduction cannot exceed \$100,000 per year per taxpayer. These amounts are adjusted for inflation annually.

The bill contains the following tax credits:

- A business and occupation (B&O) tax credit for B&O taxes due on the same sale or exchange that is also subject to the Washington capital gains tax.
- A Washington capital gains tax credit for the amount of any legally imposed income or excise tax paid by the taxpayer to another taxing jurisdiction on capital gains derived from capital assets within the other taxing jurisdiction to the extent such capital gains are included in the taxpayer's Washington capital gains.

The Education Legacy Trust Account is amended to permanently allow funds to be used for early learning and child care programs.

This bill takes effect 90 days following the end of session and includes a provision stating that the tax is necessary for the support of state government and its existing public institutions, which will presumably prevent the bill from being subject to the referendum process.

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**Current Law**

There is no capital gains tax, or equivalent tax, in this state.

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**Stakeholder  
Testimony**

The following persons testified in support of the bill: Senator June Robinson, Prime Sponsor; Aaron Czyzewski, Food Lifeline; Andrew Villeneuve, Northwest Progressive Institute; Andy Nicholas, Washington State Budget & Policy Center; Brittany Williams, Home Care Aide/SEIU 775 Caregiver; Children's Alliance; Claudia Balducci, King County Council; Clifford Cawthon, MLK County Working Families Party; Courtney Williams, Community Employment Alliance; Cynthia Stewart, League of Women Voters of Washington; Dan Olmstead, Poverty Bay Coffee Company; Dan Price; Darrell Johnson, NA; David Goldstein, Civic Ventures; Dennis Eagle, Washington Federation of State Employees; Dr. Mark Vossler, Washington Physicians for Social Responsibility; Drayton Jackson, Statewide Poverty Action Network; Dylan Grundman O'Neill, Institute on Taxation and Economic Policy; Emily Murphy, NARAL Pro-Choice Washington; Jacob Vigdor, University of Washington; Jennifer Bereskin, RAP Resident Action Project Steering Committee & WLIHA Board Member; Julia Buck; Katrina Simmons, Retired Public Employees Council; Kevin Litwack; Martha Burke; Matthew Lang, Seattle Transit Riders Union; Nina Crocker; Pauli Owens, Service Employees International Union 925; Retired Public Employees Council; Rhonda Gray; Robert Cruickshank, Washington's Paramount Duty; Ruth Lipscomb; Ryan Pricco, Child Care Aware of Washington; Sakara Remmu, Washington Black Lives Matter Alliance; Scarlett To, MomsRising; Scott Merriman, Office of Financial Management; Seth Dawson, Community Employment Alliance; Shaula Massena, Northwest Sustainable and Responsible Insights; Shomya Tripathy, Asian Counseling and Referral Service; Sonya Champion, Champion Foundation; Stephan Blandford, Children's Alliance; Stephen Gillett; Summer Stinson, Economic Opportunity Institute; Todd Foster, The Foster Group, Inc.; and Zak Nelson, SEIU 925.

The following persons testified in opposition: Aaron Lang; Adrian Bradford, COR Cellars & Vineyards; Ashley Cooper; Bill Stauffacher, Independent Insurance Agents & Brokers of Washington; BOMA; Brian Hess; Building Industry Association of Washington; C Davis, Washingtonians to Recall Inslee; Chester Baldwin, Washington Business Properties Association; Christie Biesold, Merlino Fine Foods; Christophe Allen, Acme Fuel Company; Claudius Mbemba, Neu; Codi Winans; Dan Jennings; Dan Newhouse, Office of Congressman Dan Newhouse; Dan Piantanida, GP Realty Finance, Inc.; Daniel Schifflbein; Dann Mead Smith, Washington Policy Center; Debra Manjarrez; Don Arsenault, CCIM, Washington Self-Storage Association & CCIM Institute; Gary Smith, Independent Business Association; Gary Wray; Greg Seifert, Washington Association of Health Underwriters; ICSC; Jack Field, Washington Cattle Feeders Association; Jake Jacobson, Osborne Construction and AGC; Jason Mercier, Washington Policy Center; Jeff Pack,

Me; Jeff Pack, Washington Citizens Against Unfair Taxes; Jeffrey Slotnick, Setracon Inc.; Jerry VanderWood, AGC of Washington; Jim Lusk, Retirement Nationwide, Inc.; Kenneth Moninski; Kenneth Rosenkranz; Kevin Wallace, Wallace Properties, Inc.; Lois Cook, America's Phone Guys; Manufactured Housing Communities; Mark Johnson, Washington Retail Association; Mark Streuli, Washington Cattlemens Association; Matthew Nichols; Maxford Nelsen, Freedom Foundation; Michael Eisenberg; Molly Jones, Washington Technology Industry Association; Pamela Manley; Patrick Connor, NFIB; Paul Schmidt; Randa Minkarah, Resonance AI; Rental Housing Association; Richard Beeson; Russell Millard, Park Preservations LLC; Ryan Ottele; Sharon Hanek; Sharon Lewis; Steve Edwards; Steve Miller, Pacific Propane Gas Association; Susan Gonzales; Tad Sommerville; Ted DeVol; Tim Eyman, Permanent Offense; Tim Schauer, MacKay Sposito; Tom Davis, Washington Farm Bureau; Tom Hatcher; Tommy Gantz, Association of Washington Business; Tracy Doriot; and Wayne Lunday, National Association of Insurance and Financial Advisors.

The following persons testified as “other”: Adrienne Stuart, Developmental Disabilities Council; Jared Walczak, Tax Foundation; Joseph Bishop-Henchman, National Taxpayers Union Foundation; Joseph Carroll; and Moriah Banasick, Washington State Society of Certified Public Accountants.

**Revenue Impact**

| Fund                                | Fiscal Year 2022 | Fiscal Year 2023 | 2021-2023 Total | 2023-25 Biennium | 2025-27 Biennium |
|-------------------------------------|------------------|------------------|-----------------|------------------|------------------|
| Common School NEW                   |                  | 27,000,000       | 27,000,000      | 134,000,000      | 188,000,000      |
| Educ. Legacy Trust NEW              |                  | 500,000,000      | 500,000,000     | 1,028,000,000    | 1,070,000,000    |
| GF-State B&O Tax                    |                  | (77,000,000)     | (77,000,000)    | (170,000,000)    | (185,000,000)    |
| Workforce Educ. Invest Acct B&O Tax |                  | (8,000,000)      | (8,000,000)     | (18,000,000)     | (20,000,000)     |
| Total                               |                  | 442,000,000      | 442,000,000     | 974,000,000      | 1,053,000,000    |

**Expenditure Impact**

The Department of Revenue will incur total costs of:

- \$2,561,900 in fiscal year 2022.
- \$4,334,200 in fiscal year 2023.
- \$4,077,000 in fiscal year 2024.
- \$2,871,100 in fiscal year 2025.

**Reason for Recommendation** The Department of Revenue has no position on the bill. We drafted the original version of the bill and many of the revisions incorporated into the final version of the bill. The bill is administrable and technically sound.

While we are not requesting a veto of the charitable deduction in Section 9 of the bill, we wanted to note a couple of potential legal risks associated with this deduction. The charitable deduction was included in the Conference Committee striker but not in the versions that originally passed the Senate or House.

The charitable deduction applies to donations made to “qualified organizations.” In order to be considered a “qualified organization,” an organization must be “principally directed or managed within the state of Washington.” We believe that limiting qualifying organizations to those organizations that are principally directed or managed within the state of Washington creates a significant risk of violating the Commerce Clause of the United States Constitution. See [Chapman v. Commissioner of Revenue](#), 651 N.W.2d 825 (Minn. 2002) (deduction from Minnesota’s alternative minimum tax for contributions made “to or for the use of” a charitable organization “located in and carrying on substantially all of its activities in [Minnesota]” violated the Commerce Clause).

If a Commerce Clause challenge to the charitable deduction is successful, it is uncertain whether the court would invalidate the deduction or expand the deduction for donations to all otherwise qualifying organizations regardless of where the organization is principally directed or managed.

Another issue with the charitable deduction is that, because it is a common feature of income taxes, it may increase the chance that the courts will determine that the Washington capital gains tax is an income tax. At least one lawsuit has already been filed seeking to invalidate the capital gains tax on several grounds, including that the tax is an income tax and, as such, violates articles VII, sections 1 and 2 of the Washington Constitution, because the tax is non-uniform and the tax rate exceeds the 1% aggregate rate limit.

It is impossible to quantify the extent to which the charitable deduction may strengthen the argument that the capital gains tax is an income tax. All we can say is that the charitable deduction likely incrementally strengthens the argument that the capital gains tax is an income tax. The charitable

deduction is not the only provision in the bill that opponents of the capital gains tax can point to in support of their argument that the capital gains tax is an income tax.

We brought these concerns to the attention of non-partisan fiscal committee staff and House and Senate Democratic caucus staff while the Conference Committee striker was being drafted.

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