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THE Good Advisor

# Donor Control over Charitable Gifts

## INTRODUCTION

Many donors have specific ideas about how their gift should benefit a charity. However, a donor may also have expectations of control he or she can exert over the gift that could imperil the tax benefits created by the gift. In this issue, we look at what degree of control a charity can offer its donors, and how much control is too much. Understanding these limits can help you advise your clients and avoid potentially adverse tax consequences.

## EARMARKED GIFTS

A donor can earmark a charitable contribution for a particular purpose and claim a deduction if the restrictions are consistent with the charity's tax-exempt purpose, and the restrictions do not prevent the charity from freely utilizing the transferred assets. For example, a donor gives a university a gift meant to set up a scholarship to benefit students who want to study agriculture.

However, restrictions proposed by the donor cannot create a conduit to direct the gift to a particular individual. For instance, the IRS declined to permit deductions for gifts made to a divinity school that were individually identified by account numbers to go to certain students. Under this set-up, the student would solicit the funds, the donors would give money to the charity, and the charity would distribute the money to the student as a monthly stipend [PLR 9405003].

And, clearly, a donor cannot claim a tax deduction for a charitable contribution if the donor receives a bargained-for benefit in return for the gift. Charities are required to report the value of goods and services received by the donor for quid pro quo contributions in excess of $75.

## CONDITIONS PRECEDENT AND SUBSEQUENT

If a charitable gift depends upon the performance of some act or the occurrence of an event in order to make it effective, no deduction is allowed. However, if the possibility that the gift to charity will not become effective is so remote as to be negligible, a deduction is permitted [Reg. Sec. 1.170A-1(e)].

For example, a donor gives a city land on the condition that the property is used by the city for a public park. If, on the date of the gift, the city does plan to use the land for a park and the possibility that the city will not use the land for a public park is so remote as to be negligible, the donor is entitled to a deduction under IRC Sec. 170 for his charitable contribution.

Note that a donor who has made a gift that cannot be deducted because of a condition precedent or subsequent can deduct the gift once that condition is removed or waived by the donor [Rev. Rul. 79-249].

**Keep In Mind:** An important consideration of some major gifts is the estimate for administrative costs associated with the gift. The proposal for such a gift should include the costs to maintain and manage the gift over a potentially long time.

## PARTIAL INTEREST RULE

Generally, in order to take a deduction, the donor must transfer the entire interest in a gift to a qualified charity. A donor cannot continue to enjoy control over donated funds or property contributed; the gift must be irrevocable to qualify for the charitable deduction. Thus, a gift of a partial interest generally does not qualify for a deduction [see IRC Sec. 170(f)(3)].

However, there are exceptions to the partial interest rule – gifts of property that do qualify for a deduction even though the donor retains certain rights.

### Remainder Interest in a Personal Residence or Farm

The donor makes a charitable gift of the remainder interest in a personal residence or farm under IRC Sec. 170(f)(3)(B)(i). The donor (and spouse, if desired) will retain a life estate in the property with full enjoyment of the property for life or a term of years (as noted in the gift agreement).

### Undivided Interest

A deduction is allowed under IRC Sec. 170(f)(3)(B)(ii) for the value of a charitable contribution not in trust of an undivided portion of a donor's entire interest in property. An undivided portion of a donor's entire interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the donor in such property. It must also extend over the entire term of the donor's interest in such property and in other property into which such property is converted.

### Qualified Conservation Contributions

A deduction is allowed under IRC Sec. 170(f)(3)(B)(iii) if the donor agrees to provide a perpetual conservation restriction over the real property that is enforceable by a qualified organization to meet conservation purposes [IRC Sec. 170(h); Reg. Sec. 1.170A-14(a)].

### Retaining Insubstantial Rights

The retention of insubstantial rights does not cause the gift to be termed a non-deductible partial interest. This is true if the rights the donor retains do not interfere with the charity's interest in the property. For instance, the donor who makes a gift of land with the proviso that he be allowed to train his hunting dogs on the land is an insubstantial right [Rev. Rul. 75-66, 1975-1 CB 85].

## For the Use of Contributions

The difference between a gift made to a charity and a gift made for the use of a charity is not especially clear. In *Davis v. United States*, 495 US 472, 110 S. Ct. 2014, 65 AFTR2d 90-1051 (1990), the Court interpreted the term to mean in trust for the donee charity, or in a similarly enforceable legal arrangement for its benefit.

For example, a donor irrevocably gives a life insurance policy to a charity that is not fully paid-up (there are remaining premium payments). The charity decides to keep the policy rather than surrender it. The next year, the donor makes a premium payment to the life insurer on the policy the charity owns. The gift of the policy itself is a gift to the charity. The gift of a premium payment is a gift for the use of the charity.

A cash contribution made for the use of a public charity is deductible up to 30% of the donor's adjusted gross income for the tax year; a contribution of property made for the use of a public charity is deductible up to 20% of the donor's adjusted gross income for the tax year. Any amount that cannot be deducted in the current tax year is carried over in successive years (up to five years).

## VALUATION

When the donor does place restrictions on the gifted property, the corresponding charitable deduction for the gift may not be its fair market value under normal circumstances. Of course a charitable gift—except publicly traded and some restricted stock—valued at more than $5,000 requires a qualified appraisal. So, for practical reasons, a professional appraiser will be necessary to value the property with the donor's restrictions in place.

For instance, a donor agrees to create a restrictive easement over 100 acres of land near a state park for her local conservation group. She agrees that the restrictive easement will be made in perpetuity and exclusively for conservation purposes. A qualified appraiser will first look to see if there are any comparable sales of similar easements. If no such sales exist, the value of the restrictive easement can be found by subtracting the value of the property before and after the easement [Reg. Sec. 1.170A-14(h)(3); *Hughes v. Comm'r*, TC Memo 2009-94].

## CONTROL OVER INVESTMENT OF THE GIFT

A donor may not select a financial advisor to direct investment of the funds once gifted to a charity, regardless of whether or not the advisor would take commissions on any transactions. As noted above, a donor is not permitted dominion or control over funds once given to a charity (and cannot transfer

such control to a third party). However, a charity may allow the donor to suggest how the funds are invested. There are two particular gift plans that may appeal to your client's desire to control the gifted funds, yet keep the charitable deduction intact:

- A Donor Advised Fund (DAF) is a restricted fund maintained by a charitable organization or a brokerage firm. The donor makes an irrevocable contribution to the DAF, and, in turn, he or she receives an immediate tax deduction. The donor can both make recommendations and provide advice concerning the fund's distribution. However, the donor may not place any material restrictions on the fund's investments or distributions.
- A Donor Managed Investment Account (DMIA) allows the donor to direct the investment of funds irrevocably transferred to a charity for a period up to ten years. There are several restrictions on a DMIA intended to prevent self-dealing and give ultimate control over the funds to the charity. The DMIA is a relatively sophisticated planned giving tool and only available from a small number of charitable organizations.

## DONOR INVOLVEMENT IN THE ADMINISTRATION OF THE GIFT

A donor can make non-binding recommendations to the charity regarding the administration of the gift – how the charity carries out the stated goal with the property the donor has provided. However, to preserve the charitable deduction for the gift and the tax-exempt status of the charity, some independence must exist between the charity and donor. Thus (again) the charity must have the ultimate control and power over the use of the gift [see PLR 8152072].

If the charity uses the gift in a way contrary to the donor's intentions, the donor may be able to lodge a complaint with the charity's board of directors or the state attorney general, or take legal action (depending on the terms of the gift agreement and applicable state law).

### The Cy Pres Doctrine

The Cy Pres doctrine allows a probate court to change a will or trust when the original charitable intent of the donor cannot be carried out. The Cy Pres doctrine exists in most states either by case law or by statute. In these states, a court may substitute another charitable objective which is believed to approach the original charitable purpose as closely as possible. When the probate court applies the Cy Pres doctrine and selects an alternative charity, the redirected gift is considered transferred by the decedent and qualifies for the federal estate tax charitable deduction.

## WRITTEN DONOR AGREEMENTS

There are many high profile examples that highlight what can go wrong when the donor (or surviving family members) and the charity disagree on the implementation of a gift. For example, the dispute over the Barnes Foundation art collection has inspired its own documentary movie currently in distribution (the provocatively titled, "Art of the Steal"). Dr. Barnes had provided very specific written instructions for the housing of his art collection – right down to the placement of the paintings on the walls of a gallery in Merion, PA. However, by order of the state court, the collection will eventually be moved to Philadelphia. This example goes to prove there still can be a (costly) conflict over a charitable gift despite (or, perhaps, because of) a highly specific written agreement.

Unfortunately, there is no way to create a fail-safe agreement. However, here are some precepts to keep in mind when crafting a gift agreement meant to last:

- A clear statement of the donor's intentions
- Specific restrictions on the use of the contribution
- Realistic benchmarks for measuring the success of the restricted gift
- Flexibility for use of the contributed funds over time in order to preserve the donor's intentions
- Provisions for dispute resolution

## IN CLOSING

The generosity and enthusiasm of donors are extremely important to the growth and vision of a charity. As advisors, you can help your clients to be creative in shaping a gift to match both their own ideals and the needs of the charity. However, it is important to preserve the bright line between where donor control ends and charity autonomy begins.

# New Tax Developments

## NEW SUGGESTED RATE SCHEDULES PROMULGATED BY THE ACGA

The American Council on Gift Annuities (ACGA) has announced a new schedule of its suggested gift annuity rates effective July 1, 2010. The new schedule of maximum suggested rates reflects slightly higher rates up through age 81 as compared with the rates the ACGA announced in February 2009. All suggested rates qualify at a CFMR of 3.2% or higher. The new rate recommendations are effective July 1, 2010.

**Single Life**

| Age | Rate |
|---|---|
| 65 | 5.5 |
| 70 | 5.8 |
| 75 | 6.4 |
| 80 | 7.2 |
| 85 | 8.1 |
| 90 & over | 9.5 |

**Two Lives - Joint and Survivor**

| Ages | Rate |
|---|---|
| 65/68 | 5.2 |
| 70/72 | 5.4 |
| 78/80 | 6.1 |
| 80/83 | 6.5 |
| 85/88 | 7.4 |
| 88/90 | 8.0 |

***To learn more, visit the ACGA website at acga-web.org.***

## U.S. TAX COURT PERMITS RULES ON CHARITABLE DEDUCTIONS

A recent Tax Court case, Wilkes v. Comm'r, T.C. Summ. Op. 2010-53 (April 22, 2010), concerned whether gifts made to certain individuals qualified as charitable contributions. The petitioners are members of the Church of Jesus Christ (Church), which has no hierarchical structure, clergy or formal leadership. Members of the Church worship in local churches found in their communities. The court examined three particular types of charitable gifts made by the petitioners:

One, the petitioners claimed deductions for charitable contributions made to certain individuals identified by the petitioners' local church as "Needy Saints." The Court noted that gifts made directly to individuals for private benefit are deemed private gifts and not deductible charitable contributions under IRC Sec. 170.

Two, the petitioners claimed deductions for charitable contributions made to missionaries of the Church. The court found that the Church of Jesus Christ itself was not a qualified charitable organization for purposes of IRC Sec. 170. However, the local churches affiliated with the larger Church that were located in the United States were qualified. The money given directly to missionaries working within an agency relationship with the local churches did qualify for a charitable deduction.

Three, the petitioners claimed deductions for charitable contributions made to a missionary of the Church who served a church located in South Africa. Because the petitioners could not show that the local church in South Africa was a qualified charitable organization for purposes of IRC Sec. 170, the money given to the missionary serving that church could not be deducted.

This newsletter is only for professional advisors and only for their information and discussion. It is intended only to provide general information about charitable gifts and charitable-gift planning. This newsletter is not (1) legal, tax, accounting, or financial advice, (2) any solicitation of legal, tax, accounting, or financial services, (3) any securities or investment advice, or (4) any solicitation of securities or investment advisory services. Each professional must evaluate the tax and financial consequences of each individual situation.

Although The Catholic Foundation has been diligent in attempting to provide accurate information, the accuracy of the information in this newsletter cannot be guaranteed. Laws and regulations change frequently and are subject to differing legal interpretations. Accordingly, The Catholic Foundation shall not be liable for any loss or damage caused or alleged to have been caused by the use or reliance upon the information in this newsletter.

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# Donor Control over Charitable Gifts: An Overview

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## Introduction

There are two basic (though not necessarily equal) reasons why people donate to a charity: one, the charity can accomplish good works with the gift; and two, the donor earns a tax deduction. If a client wants to take advantage of a deduction for a charitable contribution, an advisor must take care to explain the rules governing the allowance for such deductions. An important consideration concerning the deductibility of a charitable donation is the extent of donor control over that gift. Any gift can be made if both donor and charity are willing, but not every gift will entitle the donor to a deduction under the Internal Revenue Code or Treasury Regulations. The task for advisors is explaining how strings attached to a gift made to a charitable organization may compromise its deductibility.

## Issue One: Acceptable and Unacceptable Restrictions on a Gift

A donor generally may earmark gifts for a particular use or purpose by a qualified charity and still deduct that gift [Reg. Sec. 1.507-2(a)(8)(i)].

However, any restrictions placed on the gift cannot conflict with the tax-exempt purpose of the charity. Nor can such restrictions create a conduit for the gift to be channeled to a particular person [*Estate of Hubert v. Comm'r*, TC Memo. 1993-482]. The tax-exempt purpose of an organization must fit a category under IRC Sec. 501(c)(3), and must be maintained so as to avoid the suspicion that the tax-exempt organization is used as a conduit for private benefits. It does not matter that the private party is needy or otherwise deserving of charity if the tax-exempt purpose is not served.

Compare four examples of a gift made to benefit a tax-exempt religious organization's missionary program:

1. In 1990, the Supreme Court ruled that a deduction could not be claimed for payments made to church-designated travel agents to pay the travel expenses for their children while serving as missionaries for their church. Though the church did not control the funds, the church did exercise control over the activities and defined the amount of their support needs. The Court rejected the taxpayers' contention that the payments were directed towards church sponsored activity because the church itself never had actual control of the funds [*Davis v. United States*, 495 US 472, 110 S. Ct. 2014, 65 AFTR 2d 90-1051 (1990)].
2. In 1994, the IRS issued a technical advice memorandum that proscribed a donor from taking a deduction for monthly gifts to a church made with the stipulation that such payments be used to support a ministry created by their son: "The test in each case is whether the organization has full control of the donated funds, and discretion as to their use so as to ensure that they will be used to carry out its functions and purposes" [PLR 9405003].
3. In 1962, the IRS issued a ruling that permitted a deduction for a donation made to a church for the benefit of its missionary activity even though the donor's son was a missionary on behalf of the church and would indirectly benefit from the donation [Rev. Rul. 62-113, 1962-2 CB 10].
4. In 2010, the Tax Court issued a ruling that permitted a deduction for donations made directly to missionaries of local churches because the missionaries worked within an agency relationship with the local churches [*Wilkes v. Comm'r*, T.C. Summ. Op. (April 22, 2010)].

The critical factor seems to be the degree of autonomy the charity had over each gift versus the probability that the donation would primarily benefit a particular individual: "the charity begins where certainty in

### Maintain a Clear Line between Donor and Charity

The following questions should be considered in determining whether a donor has placed a material restriction or condition on a contribution under Reg. Sec. 1.507-2(a)(8)(i):

1. Who owns the assets received from the donor?
2. Are the assets held and administered by the donee charitable organization for the purposes of furthering the charitable organization's exempt purposes?
3. Does the donee charitable organization's governing body have the ultimate control over the assets?
4. Is the donee charitable organization's governing body organized and operated independently from the donor?

Factors used to identify an independent governing body include: the selection of the governing body, the terms of service for governing board members, and terms of renewal of service time for governing board members.

the beneficiaries ends" [*S.E. Thomason v. Commissioner*, 2 T.C. 441 (1943)].

## Issue Two: Gifts Made Subject to Conditions

A gift made conditional on a preceding act or event cannot qualify for a charitable deduction unless the condition that would preclude the gift is so remote as to be negligible [Reg. Sec. 1.170A-1(e); see also, Reg. Sec. 20.2055-2(b), Reg. Sec. 25.2522(a)-2(b)]. To answer the question of what condition could possibly be important enough to include in a gift contract, yet remain so remote as to be negligible, we look to the example included in the regulation itself [Reg. Sec. 1.170A-1(e)]:

"For example, a donor transfers land to a city government for as long as the land is used by the city for a public park. If on the date of the gift the city does plan to use the land for a park and the possibility that the city will not use the land for a public park is so remote as to be negligible, X is entitled to deduction...for his charitable contribution."

And, here is another example—this time for a conditional gift that could not be deducted: A donor transferred a patent to a university but the gift was made contingent on the university's continued employment of a particular faculty member for another 15 years. The IRS ruled that this condition was not so remote as to be negligible since the university might very well not employ the individual for 15 more years [Rev. Rul. 2003-28, 2003-11 I.R.B. 594].

Several Court decisions have set out to define what it means to be "so remote as to be negligible". One court explained the phrase as a chance so highly improbable that a person would generally ignore it with reasonable safety in undertaking a serious business transaction [*United States v. Dean*, 224 F. 2d 26, 29 (1st Cir. 1955)]. Another court defined the phrase as a chance that every dictate of reason would justify an intelligent person in disregarding as so highly improbable and remote as to be lacking in reason and substance [*Estate of Woodward v. Commissioner*, 47 T.C. 193, 196 (1966)].

## Issue Three: The Partial Interest Rule

Generally, in order to take a deduction, the donor must transfer the entire interest in a gift to a qualified charity. A donor cannot continue to enjoy control over donated funds or property contributed; the gift must be irrevocable to qualify for the charitable deduction. Thus, a gift of a partial interest generally does not qualify for a deduction [see IRC Sec. 170(f)(3)].

However, there are exceptions to the partial interest rule—gifts of property that do qualify for a deduction even though the donor retains certain rights.

- **Remainder Interest in a Personal Residence or Farm:** The donor makes a charitable gift of the remainder interest in a personal residence or farm under IRC Sec. 170(f)(3)(B)(i). The donor (and spouse, if desired) will retain a life estate in the property with full enjoyment of the property for life or a term of years.
- **Undivided Interest:** A deduction is allowed under IRC Sec. 170(f)(3)(B)(ii) for the value of a charitable contribution not in trust of an undivided portion of a donor's entire interest in property. An undivided portion of a donor's entire interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the donor in such property. It must also extend over the entire term of the donor's interest in such property and in other property into which such property is converted.
- **Qualified Conservation Contributions:** A deduction is allowed under IRC Sec. 170(f)(3)(B)(iii) if the donor agrees to provide a perpetual conservation restriction over the real property that is enforceable by a qualified organization to meet conservation purposes [IRC Sec. 170(h); Reg. Sec. 1.170A-14(a)].
- **Retaining Insubstantial Rights:** The retention of insubstantial rights does not cause the gift to be termed a non-deductible partial interest. This is true if the rights the donor retains do not interfere with the charity's interest in the property.

  Here are some examples of permissible donor retention of an insubstantial right:

  - The donor who makes a gift of land with the proviso that he be allowed to train his hunting dogs on the land is an insubstantial right [Rev. Rul. 75-66, 1975-1 CB 85].
  - The donor retains approval rights for the gallery design and the installation design for artwork donated to the charity [PLRs 9303007 and 200223013].

  Here are some examples of rights retained by the donor which are not insubstantial (and, thus, impermissible):

- The donor retains the right to vote shares of donated stock [Rev. Rul. 81-282, 1981-2 CB 78].
- The donor retains mineral rights believed to be viable in underlying contributed land [Rev. Rul. 76-331, 1976-2 CB 52].
- The donor retains the right to cut timber on the contributed land [Rev. Rul. 76-253, 1976-2 CB 51].

**Important Note:** A donor may be denied a charitable deduction if he or she divided the gifted property (creating a partial interest) with the sole intention of avoiding the partial interest rule.

**Valuation**

When the donor does place restrictions on the gifted property, the corresponding charitable deduction for the gift may not be its fair market value under normal circumstances. Of course a charitable gift of property—except publicly traded and some restricted stock—valued at more than $5,000 requires a qualified appraisal [Reg. Sec. 1.170A-13(c)]. So, for practical reasons, a professional appraiser will be necessary to value the property with the donor's restrictions in place.

### "For the Use of" Contributions

The difference between a gift made to a charity and a gift made for the use of a charity is not especially clear. In *Davis v. United States*, 495 US 472, 110 S. Ct. 2014, 65 AFTR2d 90-1051 (1990), the Court interpreted the term to mean in trust for the donee charity, or in a similarly enforceable legal arrangement for its benefit.

For example, a donor irrevocably gives a life insurance policy to a charity that is not fully paid up (there are remaining premium payments). The charity decides to keep the policy rather than surrender it. The next year, the donor makes a premium payment to the life insurer on the policy the charity owns. The gift of the policy itself is a gift to the charity. The gift of a premium payment is a gift for the use of the charity.

A cash contribution made for the use of a public charity is deductible up to 30% of the donor's adjusted gross income for the tax year; a contribution of property made for the use of a public charity is deductible up to 20% of the donor's adjusted gross income for the tax year [Reg. Sec. 1.170A-8(a)(2)]. Any amount that cannot be deducted in the current tax year is carried over in successive years (up to five years).

For instance, a donor agrees to create a restrictive easement over 100 acres of land near a state park for her local conservation group. She agrees that the restrictive easement will be made in perpetuity and exclusively for conservation purposes. A qualified appraiser will first look to see if there are any comparable sales of similar easements. If no such sales exist, the value of the restrictive easement can be found by subtracting the value of the property before and after the easement [Reg. Sec. 1.170A-14(h)(3); *Hughes v. Comm'r*, TC Memo 2009-94].

## Issue Four: Permissible Control over Investment of the Gift

A donor may not retain any immediate control over a gift. This prohibition extends to the charity's investment of the gifted assets. A donor may not invest his or her own gift to a charity. However, some donors believe that the charity could benefit from their own financial savvy.

A Donor Advised Fund (DAF) allows a donor to make an irrevocable charitable gift to the fund (which creates a tax deduction). A donor may suggest that payments be directed to a particular qualified charitable organization [IRC Sec. 4966(d)(2)]. The donor may make suggestions on grants to qualified charities. However, the donor may not place any material restrictions on the fund's distribution—that is a gift of a partial interest and the donor could not claim a charitable deduction for the contribution. What constitutes a material restriction is a question that must be determined by looking at all of the facts and the circumstances.

A Donor Managed Investment Account (DMIA) permits a donor to suggest how the gift funds are invested. The donor can invest irrevocably donated funds for up to ten years after making the gift. However, the donor retains no interest or right in the gifted funds except for a limited power to manage the funds subject to the charity's veto power. The charity owns the account and has the option of withdrawing any or all assets at any time. The donor is prohibited from any self-dealing between the fund and his other interests. There is an outright prohibition on investment in companies in which the donor owns 5% or more of the outstanding shares of stock. Furthermore, the proposed terms for this plan as approved by the IRS would limit the investment of DMIA funds to U.S. equities, U.S. mutual funds, U.S. closed-end funds, U.S. fixed income securities, off-shore or on-

shore hedge funds, REITs, and private placements. Keep in mind that the IRS will look to the terms of each DMIA to determine whether its terms are acceptable control factors or unacceptable material restriction factors [Reg. Sec. 1507-2(a)(8)(i)). PLR 200445023, PLR 200445024].

It is important to note that for both the DAF and the DMIA, the donor can only request that the charity act or invest a certain way—the charity itself has the ultimate decision as to what causes to benefit and what investments to choose.

## Issue Five: Can the Donor Have Final Say Over Use of the Gift?

The donor must not have continuing authority to change the use or purpose of the contribution. A donor should not retain dominion and control over funds or property contributed or the power to direct the disposition or manner of enjoyment of the property, which can otherwise render a gift incomplete.

Many donors would like to include a reverter clause within the contract to provide for the return of the gift if and when the charity does not meet certain criteria. As noted above, such a clause might compromise the deductibility of the charitable gift because a revocable gift is not deductible.

A better option would be to create an 'alternative charity' clause. The donor can set forth his or her criteria for the gift. If the original charity cannot or will not meet the reasonable (and permissible) expectations set forth by the donor, the donated funds or assets will be transferred to a different charity. This preserves the charitable deduction because a different 501(c)(3) charity receives the funds.

Another way that a donor could structure a gift to retain some indirect control over the use of the gift would be to make a gift on an installment plan. When donor and charity agree to the gift, the parties could also agree to stages for completion of the gift. Generally, once the donor is satisfied that progress has been made, the donor makes the next installment on the gift.

### Written Donor Agreements

Any gift contract between the donor and charity should clearly stipulate the conditions and restrictions associated with the gift and clearly state that such conditions and restrictions are consistent with the charity's mission. Furthermore, there are certain precepts to keep in mind when crafting a gift agreement meant to last:

- A clear statement of the donor's intentions
- Specific restrictions on the use of the contribution
- Realistic benchmarks for measuring the success of the restricted gift
- Flexibility for use of the contributed funds over time in order to preserve the donor's intentions
- Provisions for dispute resolution

## Issue Six: Gifts under Scrutiny

The issue of donor control can be difficult to discuss with clients. A gift is by definition an act of generosity, but attaching strings to a gift can create problems. It might be useful to discuss the recent legislative trends towards greater scrutiny over charitable gifts and more rigorous administrative enforcement of the rules. A good point of reference would be the Pension Protection Act of 2006 (PPA).

The passage of the PPA was a watershed event for the effort by Congress to create more strict rules regarding charitable gifts and permitted deductions for those gifts. These changes were not necessarily unexpected: the U.S. Senate Committee on Finance held a series of hearings concerning tax deductions for sus-

### Important Questions and Criteria When Advising a Client Making a Planned Gift

Here are seven basic and important questions the donor and his/her advisor should consider before making a major gift:

1. What is the donor trying to accomplish with the gift?
2. Can the charity use the gift in a way that realizes the donor's expectations for that gift?
3. What conditions or restrictions on the gift does the donor want to include in the gift contract?
4. What conditions or restrictions on the gift will the charity accept?
5. Can the donor take a charitable tax deduction for the gift?
6. If the deduction is available, how much is the deduction for?
7. What future gifts does the donor plan to make to the charity?

pect charitable gifts in the years preceding the PPA. And Congress enacted the American Jobs Creation Act of 2004 which included a provision to generally limit the charitable deduction for motor vehicles to the actual resale value rather than an estimated fair market value at the time of sale, plus a provision to limit the charitable deduction for patents and other intellectual property to the lesser of the fair market value or the taxpayer's cost basis.

The stricter rules included in the PPA include:

- More rigorous recordkeeping requirements for substantiating charitable gifts
- More exacting recapture of the tax benefit for gifts made with property not used for the charity's exempt purpose
- Special rules regarding the valuation of contributions of fractional interests in tangible personal property and a timetable to make subsequent gifts of the remaining interest in the property in order to avoid recapture of those tax benefits
- Stronger penalties for overvaluing charitable gifts
- A statutory definition for a DAF

The Joint Committee on Taxation published a thorough explanation of the charitable provisions of the PPA [see *Technical Explanation of H.R. 4 prepared by the Joint Committee on Taxation* (JCX-38-060)].

In response to the PPA, many commentators have observed that the rules and requirements are a welcome step. Others worry that additional regulations could burden non-profits, especially smaller charities that do not have deep pockets (for instance, the number of charities required to file Form 990 has significantly increased). Certainly, charities and foundations are aware of the need to promote greater understanding of the rules regarding charitable giving.

## Final Note: A Donor Bill of Rights

At times, donors are keenly interested in attaching caveats and reserving rights in regards to a potential gift. The donor wants to keep control over the gift to provide leverage or pressure points to move the charity in the right direction. Before meeting with a client to decide what retained rights are necessary for the client to execute a gift, an advisor might do well to become acquainted with the gift protocols employed by the charity. Many charities have gift acceptance policies in place that may already employ safeguards your client wants.

By way of example, a basic Donor Bill of Rights was published by the American Association of Fund Raising Counsel (AAFRC), the Association for Healthcare Philanthropy (AHP), the Association of Fundraising Professionals (AFP), and the Council for Advancement and Support of Education (CASE) to provide a model and standard for charitable organizations in their fundraising practices. Please turn the page to see the full list of rights.

## The Donor Bill of Rights

Philanthropy is based on voluntary action for the common good. It is a tradition of giving and sharing that is primary to the quality of life. To ensure that philanthropy merits the respect and trust of the general public, and that donors and prospective donors can have full confidence in the nonprofit organizations and causes they are asked to support, we declare that all donors have these rights:

I. To be informed of the organization's mission, of the way the organization intends to use donated resources, and of its capacity to use donations effectively for their intended purposes.

II. To be informed of the identity of those serving on the organization's governing board, and to expect the board to exercise prudent judgment in its stewardship responsibilities.

III. To have access to the organization's most recent financial statements.

IV. To be assured their gifts will be used for the purposes for which they were given.

V. To receive appropriate acknowledgement and recognition.

VI. To be assured that information about their donation is handled with respect and with confidentiality to the extent provided by law.

VII. To expect that all relationships with individuals representing organizations of interest to the donor will be professional in nature.

VIII. To be informed whether those seeking donations are volunteers, employees of the organization or hired solicitors.

IX. To have the opportunity for their names to be deleted from mailing lists that an organization may intend to share.

X. To feel free to ask questions when making a donation and to receive prompt, truthful and forthright answers.

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