

ADDITIONAL CHARITABLE REMAINDER TRUST CONSIDERATIONS

We previously [provided an overview of Charitable Remainder Trusts \(“CRTs”\)](#) and suggested that now might be a good time to employ this strategy to avoid immediate capital gains taxes on appreciated or concentrated marketable securities positions. That overview has sparked a number of inquiries about this strategy. [We followed the introduction with an article specifying who can and should be involved in the creation of a CRT.](#) In this article, we look at specific questions about flexibility in choosing ultimate charitable beneficiaries, limits on how much of the charitable income tax deduction can be taken in a given tax year, what types of trust assets should be considered for contribution to a CRT, and what types should be avoided.

Choice of Charitable Beneficiaries

Using a CRT appeals to those who truly care about philanthropy, and who wish in some measure to give back to society a portion of their success. It is important that they have the utmost flexibility in choosing those charities that will eventually benefit from the assets held in the CRT.

One of the methods used for flexibility in choosing charities is to draft the CRT so that the trustmaker may change the charitable beneficiaries at any time. This right can be exercised during life or can be exercised in a trustmaker’s will or trust. In fact, this right to change charitable beneficiaries can be given to other income beneficiaries such as the trustmaker’s spouse or children. With this type of drafting, if a trustmaker’s charitable objectives change or if the charity is no longer able to meet the trustmaker’s needs, then a new charity or charities can be named.

There are certain requirements that must be met by a charity before it can be a “qualified” charity for purposes of a CRT. A charity must be qualified in order to ensure that the CRT’s benefits will be realized and that the assets will not be included in the trustmaker’s estate. Charitable beneficiaries can include [public charities and operating and non-operating private foundations](#) (often referred to as non-public charities). The only repercussion of naming non-public charities as the charitable beneficiary of a CRT is that the amount of the current charitable income tax deduction drops substantially regardless of the kind of property that is

being contributed to the CRT. All charities that are named in a CRT must be [qualified charities](#) as defined in the Internal Revenue Code.

CRT trustmakers can name as many or as few charitable beneficiaries as they choose. There are a number of different methods that are used to name charitable beneficiaries. For example, a trustmaker could allocate a fixed percentage to a number of charities, such as: 40 percent to the Red Cross, 25 percent to the Boy Scouts, 25 percent to the Girl Scouts, and 10 percent to the American Legion. In another example, a trustmaker could name all or a portion to the trustmaker's own charitable foundation or a donor advised fund, such as: 100 percent to the John and Sarah Doe Charitable Foundation, or 50 percent to the Sam and Betty Smith Foundation and 50 percent to the Fidelity Charitable Fund with advice given by the trustmaker's children. Finally, trustmakers may leave all or part of the CRT assets to their local Community Foundation or to a National Foundation, such as: 100 percent to the National Foundation for Philanthropy, or 50 percent to the Community Foundation for Anne Arundel County and 50 percent to the National Heart Foundation.

Annual Limits on CRT Charitable Income Tax Deductions

A federal judge once said, "Trying to understand the various exempt organization provisions of the Internal Revenue Code is as difficult as capturing a drop of mercury under your thumb." Because of the inordinate complexity of the Internal Revenue Code, it is impossible to succinctly give you an overview of this area of the law in this article. However, you should know these basics:

- Gifts of long term capital gain property are deductible up to 30 percent of the trustmaker's contribution base (i.e., his or her adjusted gross income computed without regard to the charitable deduction and any net operating loss carryback) if given to public charities, but only up to 20 percent if given to certain private foundations.
- While cash gifts can normally be deducted up to 50 percent of the trustmaker's contribution base if given directly to public charities, this increase limitation is not available for contributions to CRTs. For a gift of cash to a CRT, the most that can be deducted in any one year is 30% of the contributor's contribution base.
- If these limitations prevent a taxpayer from deducting the predicted value that will ultimately pass to charity from his CRT in the year of contribution, any deduction generated by making gifts to a CRT can be carried forward for an additional 5 years.

- A Charitable Remainder Annuity Trust will not qualify for an income tax deduction if the probability exceeds 5 percent that the trust assets will be exhausted prior to passing to charity. (This restriction does not apply to Charitable Remainder Unitrusts.)

I find that the decision whether or not to proceed with CRT planning is not generally based on the amount of the charitable income tax deduction. It does not play a major role in most people's decision-making process, possibly because the capital gain issue is of much greater concern. As in all planning, the motivation of each person differs, and it is the task of your advisors to make sure your planning fits these motives.

CRT Contributable Trust Assets

Using cash is the easiest method to fund a CRT. There are no initial capital gains tax savings when cash is given to a CRT, but the charitable deduction that can be taken is a maximum of 30 percent of taxpayer's "contribution base." If these limits keep the trustmaker from deducting the entire amount that is predicted to go to charity, he or she may carryover the unused amount of the deduction for up to five additional years.

The second easiest assets to give to a CRT are publicly traded securities. Because these securities are traded publicly, they are easy to value and can be readily sold. Charitable deductions can also be taken for CRT gifts of marketable securities up to a maximum of 30% of the contributor's contribution base with any unused charitable deduction amount subject to carryover for up to five years.

CRTs can accommodate gifts of assets which are difficult to value as long as there is an independent trustee. These hard-to-value assets include:

- Real estate
- Closely-held stock
- Tangible personal property

CRTs are generally not designed to accommodate gifts of:

- Assets encumbered with debts (such as real property subject to a mortgage or deed of trust)
- Business inventory
- Limited partnership and limited liability company interests
- Real estate investment trust interests

- Options to acquire or sell securities
- Installment obligations

Contributions of these types of assets could invalidate the trust or create significant income tax problems and should be avoided in almost every situation.

The Irrevocability of a CRT and the Gifts to it

A CRT is irrevocable; its essential terms cannot be changed. As a result, great care should be taken to make sure that every CRT document provides the exact instructions of its trustmakers and the precise handling of the innumerable contingencies that might arise in the future. It is imperative that these trusts be carefully designed and written by experts.

Just as the trust documents are irrevocable, the gifts that are made to them are also irrevocable. They are not conditional and cannot be taken back.

Additional gifts cannot be made to Charitable Remainder Annuity Trusts, but additional gifts can be made to [any type of charitable remainder unitrust](#). Note, however, that, if circumstances change and a new CRT is desired, the provisions of the new CRT do not have to be the same as the original one. It may be a good idea to make a series of CRTs, especially if you believe that interest rates will be increasing over a long period ahead.

As you can gather from our discussions about the details of CRTs, they are powerful strategies if implemented by those who know what they are doing. They should only be created with the help of an experienced tax planner and trust attorney. If you think that a CRT might be a solution for your situation, I would be honored if you contacted me for assistance with this strategy.