


## Top Tax Tips for Increasing Totals to Charity

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April 2023




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THE NEW STANDARD IN WEALTH MANAGEMENT

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### AGENDA

- I. Overview
  - Why Do Individuals Give?
  - Where Do You Start?
- II. Legislative Background
- III. Charitable Giving Strategies
  - Cash, Stock or Other Assets
  - Standard Deduction v. Itemized Deductions
  - IRAs
  - Charitable Remainder Trusts (CRUTs and CRATs)
  - Charitable Lead Annuity Trusts (CLATs)
  - Charitable Deduction for Trusts and Estates
- VI. Charitable Giving Vehicles
  - Private Foundations; Donor Advised Funds; "Charitable" LLCs; Purpose Trusts; 501(c)(4) Social Welfare Organizations
- VII. Doing Well AND Doing Good



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## Overview


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### WHY DO INDIVIDUALS GIVE?

#### Studies on Charitable Giving

- Psychological—giving causes happiness<sup>1</sup>
- Social—signaling one's wealth or status<sup>2</sup>
- Economic—tax breaks<sup>3</sup>

<sup>1</sup> Andreoni, J., "Giving with impure altruism: Application to charity and ricardian equivalence," *The Journal of Political Economy* (1989); Andreoni, J., "Impure altruism and donations to public goods - a theory of warm glow giving," *Economic Journal* (1990); Dunn, E. W., Aknin, L. B., & Norton, M. I., "Spending money on others promotes happiness," *Science* (2008); Harbaugh, W., Mayr, U., & Burgelman, G., "Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations," *Science*, vol. 316, no. 5831 (2007).  
<sup>2</sup> Becker, G. S., "Theory of social interaction," *Journal of Political Economy* (1974); Glazer, A., & Konrad, K. A., "A signaling explanation for charity," *American Economic Review* (1998); Griskevicius, V., et al., "Bastant benevolence and conspicuous consumption: When romantic motives elicit strategic costly signals," *Journal of Personality and Social Psychology* (2007).  
<sup>3</sup> Clotfelter, C. T., "Federal tax policy and charitable giving," Chicago: University of Chicago Press (1985); Clotfelter, C. T., "The economics of giving," in J. W. Barry & B. V. Manno (Eds.), "Giving better: giving smarter", Washington, DC: National Commission on Philanthropy and Civic Renewal (1997); Reece, W. S., & Zieschang, K. D., "Consistent estimation of the impact of tax deductibility on the level of charitable contributions," *Econometrica* (1985).




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### WHERE DO YOU START?

#### Key Questions for Uncovering Explicit Needs:

- How has uncertainty in the current environment impacted your charitable giving?
- In what ways have you documented your values and charitable goals?
- How are you providing for charity while accomplishing wealth transfer goals for your loved ones?
- What have you done to prepare your children to receive your wealth?
- What assets have you considered for charitable giving?



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## Legislative Background

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### TAX CUTS AND JOBS ACT OF 2017 (2018-2025)

What Actually Happened	Consequences
<p><b>Charitable Contributions</b></p> <ul style="list-style-type: none"> <li>Percentage limit increased from 50% to 60% (for cash)</li> </ul> <p><b>Standard Deduction Increased (adjusted for inflation)</b></p> <ul style="list-style-type: none"> <li>\$27,700 (married filing jointly, 2023)</li> <li>\$13,850 (single, 2023)</li> </ul> <p><b>State and Local Tax (SALT) Deductions Limited</b></p> <ul style="list-style-type: none"> <li>\$10,000 (married filing jointly and single)</li> </ul>	<p><b>Fewer Taxpayers Itemize</b></p> <p><b>Standard Deduction Results in \$0 Tax Benefit for Charitable Contributions</b></p>

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### INCOME AND INCOME TAXES

Income Category	AGI	Share of Total AGI	Share of Total Income Taxes Paid
Top 1%	>\$546,434	20.1%	38.8%
Top 5%	>\$221,572	35.9%	59.4%
Top 10%	>\$154,589	47.3%	70.8%
Top 25%	>\$87,917	68.8%	86.6%
Top 50%	>\$44,269	88.5%	96.9%
Bottom 50%	<\$44,269	11.5%	3.1%

Source: Internal Revenue Service, "SOI Tax Stats - Individual Income Tax Rates and Tax Shares," 2022 review of 2019 tax return data.

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### CARES ACT OF 2020 AND CAA ACT, 2021\*—ONLY FOR 2020 AND 2021

Deducting Cash Gifts of \$300	Deducting Cash Gifts Up to 100% of AGI
<ul style="list-style-type: none"> <li>Excludes private non-operating foundations, supporting organizations and donor advised funds</li> <li>No need to itemize</li> <li>Per tax filing unit in 2020 (i.e., \$300 for both spouses), but up to \$600 for married couples in 2021</li> <li><b>Not extended for 2022</b></li> </ul>	<ul style="list-style-type: none"> <li>Excludes private non-operating foundations, supporting organizations and donor advised funds</li> <li>Stacking—exhaust other AGI limits first, then apply to 100%</li> <li><b>Not extended for 2022</b></li> </ul>

\* The Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 and Consolidated Appropriations Act, 2021.

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### STANDARD DEDUCTION AND CHARITABLE DEDUCTION?

**Universal Charitable Giving Tax Deduction<sup>1</sup>**

- Proposed legislation
- Above-the-line deduction for charitable contributions of individuals who do not itemize
- May not exceed 1/3 of the standard deduction

**41.4M taxpayers claimed the special \$300 CARES Act deduction for 2020—more than 25% of all non-itemizers<sup>2</sup>**

<sup>1</sup> The "Charitable Act," S. 566 (Feb. 28, 2023), would apply to tax years beginning in 2023 and 2024. See also H.R. 651 (Jan. 17, 2019); H.R. 5771 (May 10, 2018); S. 2123 (Nov. 14, 2017); and H.R. 3988 (Oct. 4, 2017).  
<sup>2</sup> IRS Publication 4801 (Rev. 11-2022), "Statistics of Income, Individual Income Tax Returns, Line Item Estimates, 2020."

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## Charitable Giving Strategies

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### WRITTEN ACKNOWLEDGMENTS AND QUALIFIED APPRAISALS: INTERNAL REVENUE CODE § 170 AND FINAL TREASURY REGULATIONS

**Gifts of \$250 or More**

**"Contemporaneous Written Acknowledgement" (CWA)<sup>1</sup>**

- Must state whether you received something in return (e.g., goods or services)
- For a donor advised fund, must confirm that it "has exclusive legal control over the assets contributed" under IRC § 170(f)(18)
- Must receive acknowledgment by the earlier of:
  - (i) date the Federal income tax return for the year of the contribution is filed; or
  - (ii) due date (including extensions) of the return

<sup>1</sup> Albrecht v. Commissioner, T.C. Memo 2022-53 (May 25, 2022) (No deduction for 120 items donated under five-page gift agreement without statement of goods or services provided); Keefer v. U.S., U.S. District Court, Northern District of Texas, Dallas Division, No. 3:20-cv-0836-B (N.D. Tex. Jul. 6, 2022 and Aug. 10, 2022) (DAF acknowledgment letter did not confirm that it "has exclusive legal control over the assets contributed," under IRC § 170(f)(18), and supplemental material from DAF was not incorporated by reference); Durden v. Commissioner, T.C. Memo 2012-140 (Receipt from charity lacked statement of goods or services provided, and second receipt was not contemporaneous).

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**WRITTEN ACKNOWLEDGMENTS AND QUALIFIED APPRAISALS: INTERNAL REVENUE CODE § 170 AND FINAL TREASURY REGULATIONS**

**Gifts of More Than \$5,000**

**"Qualified Appraisal"<sup>1</sup> (limited exceptions—e.g., publicly traded securities)**

- Summary or actual appraisal (e.g., \$500K+ donation or \$20K art)
- Must be attached to the Federal income tax return (for the year of contribution and carryover years)

<sup>1</sup> Schweizer v. Commissioner, T.C. Memo 2022-102 (Oct. 6, 2022) (No deduction for failure to comply with the substantiation requirements of Treas. Reg. § 1.170-13); Gempfer v. Commissioner, T.C. Memo 2016-1 (Failure to include qualified appraisal for facade easement resulted in denial of deduction and penalties with no grounds for mitigation of the penalties by reason of acting with reasonable cause and in good faith); Mohamed v. Commissioner, T.C. Memo 2012-152 (No deduction for failure to comply with the substantiation requirements of Treas. Reg. § 1.170-13); and Evenchik v. Commissioner, T.C. Memo 2013-34 (No deduction for donated shares of a corporation when appraisal was for two apartment buildings owned by the corporation).

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**BASS V. COMMISSIONER<sup>1</sup>**

**Similar Items of Property Treated As One Property**

**Background**

- Taxpayer donated "various" property in "good used" condition
- \$25,446 aggregate clothing donations—\$13,852 Goodwill and \$11,594 Salvation Army
- 173 separate trips to Goodwill and Salvation Army—often multiple trips on same day—with donation acknowledgment receipt for each trip with a fair market value of less than \$250

**Court Ruling**

- All clothing donations must be aggregated—equaled more than five times the \$5k threshold for appraisal
- For \$500 and \$5,000 thresholds, "similar items of property" donated to one or more charitable organizations are treated as one property (§ 170(f)(11)(F); Treas. Reg. § 1.170A-13(c)(1)(i))

<sup>1</sup> Bass v. Commissioner, T.C. Memo. 2023-41 (Mar. 27, 2023)

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**ESTATE OF HOENSHIED V. COMMISSIONER<sup>1</sup>**

**Assignment of Income—Presale Charitable Contribution of Company Stock to Donor-Advised Fund (DAF)**

**Background**

- Attorney advised: "transfer would have to take place before there is a definitive agreement in place"
- Donor's email responses: "If we do it and the sale does not go through, I guess my brothers could own more stock than I..." "I do not want to transfer the stock until we are 99% sure we are closing"

**Court Ruling**

- Completed transfer was on July 13, two days before July 15 closing, when sale was a "virtual certainty"—not June 11 date on confirmation letter from DAF<sup>2</sup>
- Transferor, considering the reality and substance of all the circumstances, had a fixed right to income in the property at the time of transfer—doesn't matter that DAF was "obligated to sell"
  - "Bonus payouts and distributions could not be clawed back," no substantial "unresolved contingencies," final written consent was "a foregone conclusion," and "formal shareholder approval was purely ministerial"
- Also, **NO** qualified appraisal and **NO** qualified appraiser—June 11 valuation date failed to consider \$6.1M bonus payouts prior to July 13, and appraisal failed to sufficiently describe appraiser's relevant qualifications and valuation experience

<sup>1</sup> Estate of Hoensheid v. Commissioner, T.C. Memo. 2023-34 (Mar. 15, 2023). See also Lucas v. Earl, 281 U.S. 111 (1930) ("the fruits cannot be attributed to a different tree from that on which they grew").

<sup>2</sup> Michigan state law "requires a showing of: (1) donor intent to make a gift; (2) actual or constructive delivery of the subject matter of the gift; and (3) donee acceptance."

<sup>3</sup> Compare with Rev. Rul. 78-197, 1978-1 C.B. 83 (proceeds treated "as income to the donor only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption"). See also Treas. Reg. § 1.170A-10 and Reuterford v. Commissioner, 116 T.C. 127 (1998).

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**ESTATE OF WARNE V. COMMISSIONER<sup>1</sup>**

**Valuation Discounts for Charitable Gifts of LLC Interests**

**Background**

- Estate held majority interests, ranging from 72.5% to 100%, in five LLCs holding real estate
- Estate donated entire 100% interest in one LLC by splitting donation between two charitable organizations
  - 75% to family foundation
  - 25% to church

**Court Ruling**

- Discounts should be applied for lack of control and lack of marketability
  - Taxpayer win for controlling majority interests (6.9% discount)
  - Taxpayer loss for charitable deduction (4% discount for 75% interest; 27.385% discount for 25% interest)—*easily could have been avoided*

<sup>1</sup> Estate of Warne v. Commissioner, T.C. Memo. 2021-17 (Feb. 18, 2021).

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**ASSET OPTIONS: STOCK VS. CASH**

	Sell Stock and Donate Cash	Donate Stock
Value of Stock	\$250,000	\$250,000
Taxes on Capital Gains	(\$50,000)	\$0
Charitable Deduction	\$200,000	\$250,000
Amount to Charity	\$200,000	\$250,000

**Donating Stock**

- Saves taxpayer \$50k in capital gains taxes
- Provides taxpayer with an additional \$50k charitable deduction
- Provides charity with an additional \$50k

Assumes stock with \$166,667 long-term capital gain, and 30% blended tax rate on capital gains (federal and state).

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**BUNCHING ITEMIZED DEDUCTIONS**

**Who Should Consider?**

- Taxpayers with itemized deductions that fall short of the standard deduction amount—in other words, itemized deductions do not produce any tax benefit

**Solution**

- Rather than deduct the standard deduction every year, time deductions (when possible) and bunch together in one year

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### BUNCHING ITEMIZED DEDUCTIONS

	2023	2024	2025
State Income Taxes	\$15,000	\$15,000	\$15,000
Property Taxes	\$15,000	\$15,000	\$15,000
Mortgage Interest	\$7,700	\$7,700	\$7,700
Charitable Gifts	\$10,000	\$10,000	\$10,000

SALT Deduction limited to \$10,000  
Standard Deduction is \$27,700 (for married couple, 2023)

**Without Bunching: No Charitable Deduction**  
**With Bunching of \$30k Charitable Gifts in Single Year: Charitable Deduction**  
 2023 = \$47,700  
 2024 = \$28,300 (standard deduction w/ inflation adjustment)  
 2025 = \$28,800 (standard deduction w/ inflation adjustment)

For illustration purposes, estimated annual inflation adjustment to standard deduction. See Rev. Proc. 2022-38.

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### CHARITABLE PLANNING WITH IRAS TAX BENEFIT OF NAMING CHARITY AS IRA BENEFICIARY

	Stock to Charity and IRA to Child		IRA to Charity and Stock to Child	
	Charity	Child	Charity	Child
Stock	\$1,000,000		—	\$1,000,000
IRA	—	\$1,000,000	\$1,000,000	—
Income Tax	—	(\$450,000)*	—	—
<b>NET BEQUEST</b>	<b>\$1,000,000</b>	<b>\$550,000</b>	<b>\$1,000,000</b>	<b>\$1,000,000**</b>

\* Assumes a blended ordinary income tax rate of 45% (federal and state) upon distribution from the IRA.  
 \*\* Note that the child's shares of stock also receive a step-up in basis when the decedent dies.

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### CHARITABLE PLANNING WITH IRAS SECURE ACT 2.0, SECURE ACT, PATH ACT OF 2015\*

#### Qualified Charitable Distributions (aka Charitable IRA Rollovers)

- "Permanent" extension
- Required minimum age of 70½
  - **Beware** of SECURE Act tax trap if post-70½ deductible contributions
  - Can satisfy required minimum distribution (RMD) beginning at age 72
- Excluded from gross income, but no charitable deduction
- Up to \$100k per year
  - Will be **indexed for inflation under SECURE Act 2.0** starting in 2024
- Must be paid directly to public charity
  - No supporting organizations, non-operating private foundations (unless conduit rules apply), or donor advised funds\*\*

\* The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, SECURE Act 2.0 of 2022, and Protecting Americans from Tax Hikes (PATH) Act of 2015.  
 \*\* Note that the "Charities Helping Americans Regularly Throughout the Year Act" ("Charity Act") (H.R. 2916, Jun. 15, 2017; S. 1343, Jun. 13, 2017; and S. 2750, Apr. 6, 2016) and "Grow Philanthropy Act" (H.R. 4907, Apr. 12, 2016) would strike existing prohibition for IRA distributions to donor advised funds.

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### CHARITABLE PLANNING WITH IRAS LEGACY IRA ACT UNDER SECURE ACT 2.0\*

#### One-Time \$50,000 (Adjusted for Inflation) Qualified Charitable Distribution—Life Income Rollover

- Allows income benefit for lifetime with remainder to charity after death
- Can benefit participant and spouse
- Required minimum age of 70½
- Can satisfy required minimum distribution (RMD) beginning at age 72
- To a charitable gift annuity (CGA), charitable remainder unitrust (CRUT), or charitable remainder annuity trust (CRAT)
  - Likely most effective with CGAs given cost and administrative burden of charitable trusts

\* SECURE Act 2.0 of 2022. See also prior unsuccessful legislative proposals, including Legacy IRA Act, H.R. 1337 (Mar. 2, 2017); H.R. 5171 (May 6, 2016).

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### NEW MORTALITY RATE TABLES—PROPOSED REGULATIONS<sup>1</sup>

#### Actuarial Tables, IRC § 7520

- For valuing annuities, unitrust interests, income interests and life estates
- Tax rules require new tables "not less frequently" than every 10 years
  - New in 1989, updated in 1999, updated in 2009, **but not** in 2019 because of delays with 2010 census
  - Updated tables finally released on May 5, 2022—**more than three years late**.
- May rely on current or proposed tables after 2020 through effective date of final regs.—but must take consistent approach

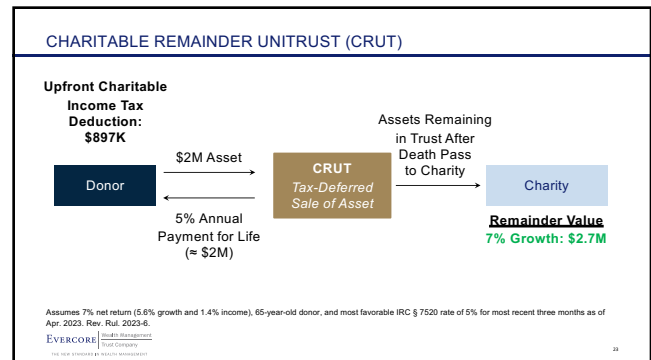
#### General Impact of New Tables

- Longer life expectancy assumptions—people are living longer
  - Probability of surviving from age 60 to 90 went from 21% to 26.6% over 10-year period
- Lower value for remainder interest
- Higher value for income interest

<sup>1</sup> Available at: <https://www.irs.gov/retirement-plans/actuarial-tables>

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### CHARITABLE REMAINDER ANNUITY TRUST (CRAT)

**Fixed Dollar Annual Payment (CRAT) vs. Unitrust (CRUT)**  
**One or two-life CRATs**

- Previously, not possible due to low interest rate environment for those younger than about 74
- Probability of exhaustion test—greater than 5% probability all assets will be paid out

**IRS Revenue Procedure 2016-42 (Aug. 9, 2016)**  
**Safe harbor provision**

- Early termination if CRAT's assets fall below 10% of initial value multiplied by discount factor
- Not triggered if investments outperform § 7520 rate

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### CCA 202233014<sup>1</sup>

**CRUT with Variable Unitrust Payout to Spouse or Charity**

**Background**

- Annual CRUT unitrust payment of 5% for life with remainder to charity after death
  - 25% of unitrust payment—that is, 1.25% of CRUT—**must** be distributed to decedent's spouse
  - 75% of unitrust payment—that is, 3.75% of CRUT—may be distributed to **either** decedent's spouse **or** charity at the discretion of the trustee

**Conclusion**

- No estate tax charitable deduction under § 2055 for any portion of unitrust interest
- No estate tax marital deduction under § 2056 for 75% discretionary portion of unitrust interest
- IRS changed position from earlier rulings that taxpayers were entitled to an estate tax marital deduction under § 2056 or a gift tax marital deduction under § 2523 for a CRUT unitrust interest that can be distributed between a charity and spouse at the trustee's discretion<sup>2</sup>

<sup>1</sup> Chief Counsel's Advice 202233014 (Aug. 19, 2022).  
<sup>2</sup> PLRs 201845014, 201117005, 200832917, and 200813006.

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### ESTATE OF BLOCK V. COMMISSIONER<sup>1</sup>

**Not a Charitable Remainder Trust—No Charitable Deduction for Estate**

**Background**

- Trust required annual payment of the greater of \$50k or the trust's net income to decedent's sister or sister's spouse with remainder to charity
- Article 4.1 stated intent to be "a charitable remainder annuity trust, within the meaning of Rev. Proc. 2003-57 and § 664(d)(1) of the Code, and the terms of this Section shall be construed to give maximum effect to such intent"
- Trust amended, effective on death, to require \$50k annually—removed "all net income"

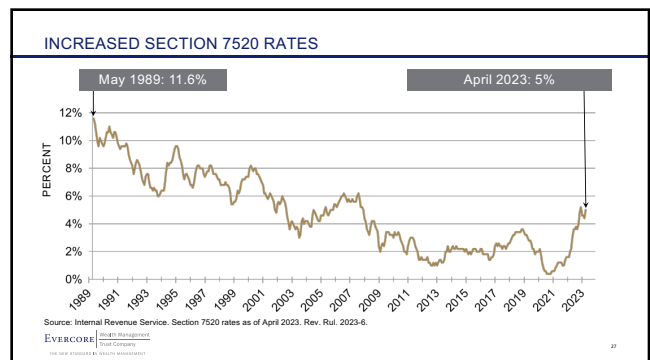
**Ruling**

- No** charitable deduction under § 2055(a)—greater of \$50k or net income is **not** a "sum certain" for a CRAT
- Not** a qualified judicial reformation under § 2055(e)(3)—amendment was **not** within 90-day period after estate tax return due and not instituted by court

<sup>1</sup> Estate of Block v. Commissioner, T.C. Memo. 2023-30 (Mar. 13, 2023) ("Congress made clear that the rules for qualified reformations are to be construed strictly, in order to prevent abuse of the charitable deduction")

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### CHARITABLE LEAD ANNUITY TRUST (CLAT)

**Upfront Charitable**

**Income Tax Deduction: \$2M**

Donor → \$2M → CLAT → \$185K Annual Payment for a Term of 15 Years → Charity

Assets Remaining in Trust after 15-Year Term Pass to Heirs → Wealth Transfer Trust

**Remainder Value**  
 7% Growth: \$870K  
 10% Growth: \$2.5M

Assumes grantor CLAT and most favorable IRC § 7520 rate of 4.4% for most recent three months as of April 2023. Rev. Rul. 2023-5.

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### CHARITABLE DEDUCTION FOR NON-GRANTOR TRUSTS AND ESTATES IRC § 642(c)

**Requirements**

- Paid from gross income
- Paid pursuant to governing document

**Unlimited in Amount**

**No Distribution Deduction**

**Generally, Must Be Actually Paid in Current Year or Following Year**

- Estates and pre-1969 trusts get charitable deduction if "permanently set aside"

**Limited to Basis (Green v. U.S., 2018)**

See Mart D. Green v. United States, 880 F.3d 519 (10th Cir. 2018).

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**CHARITABLE DEDUCTION FOR NON-GRANTOR TRUSTS AND ESTATES HYPOTHETICAL EXAMPLE**

**In 2023, Trust Has:**

- \$100K of taxable interest income

**During 2023, Trustee Distributes:**

- \$100K to Amy (mandatory income distribution)
- \$100K to Bob
- \$100K to a charity

What was distributed to the beneficiaries for tax purposes?

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**CHARITABLE DEDUCTION FOR NON-GRANTOR TRUSTS AND ESTATES HYPOTHETICAL EXAMPLE**

**\$100K Interest Income** → **COMPLEX TRUST**

**\$100K FAI/DNI**  
**\$300K Distributions**

**First-Tier Beneficiary (\$100K FAI/DNI to Amy)**

**1st-Tier Beneficiary (\$100K Principal to Charity)**

**Second-Tier Beneficiary (\$100K Principal to Bob)**

- Trust receives distribution deduction of \$100K of DNI
- \$100K DNI is taxed first to Amy
- No remaining DNI is distributed to charity
- No remaining DNI is distributed to Bob

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**CHARITABLE DEDUCTION FOR NON-GRANTOR TRUSTS AND ESTATES HYPOTHETICAL EXAMPLE**

**Another Option**

- Distribute additional \$100K to Amy instead of charity (not taxable since the DNI already came out)
- Amy can make a \$100K contribution to charity
- Amy will get an income tax deduction, subject to the AGI rules and other limitations

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**Charitable Giving Vehicles**

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**PRIVATE FOUNDATION VS. DONOR ADVISED FUND COMPARING TWO PHILANTHROPIC VEHICLES**

	Private Foundation	Donor Advised Fund
<b>Tax Deductibility</b>	• Cash—up to 30% of AGI • Appreciated and closely held stock—up to 20% of AGI	• Cash—up to 60% of AGI • Appreciated and closely held stock—up to 30% of AGI
<b>Minimum Payout Requirements</b>	• 5% annually	• None
<b>Investment Flexibility</b>	• Divest excess business holdings within five years or pay excise tax	• Donor chooses among investment options offered by DAF
<b>Grant Making Support</b>	• Create and handle due diligence and monitoring structure	• Professional staff of DAF handles due diligence
<b>Administration</b>	• Legal/accounting fees; filing fees; and annual tax return	• DAF handles all administration
<b>Excise Taxes</b>	• 1.39% of investment income annually	• None
<b>Liability and Risk Insurance</b>	• Must be purchased	• Provided by DAF
<b>Start-Up Costs</b>	• Legal fees and other start-up costs can be substantial	• Typically, none
<b>Valuation of Gifts</b>	• FMV for cash/publicly traded stock; cost basis for closely held stock/real property	• Fair market value
<b>Privacy</b>	• No	• Yes

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**FAIRBAIRN V. FIDELITY INVESTMENTS CHARITABLE GIFT FUND<sup>1</sup>**

**Donor Advised Fund Litigation**

**Background**

- Fidelity touted its sophisticated methods to time liquidation so as not to depress price
- Donor transferred thinly-traded shares
- Fidelity sold stock immediately upon receipt

**Court Ruling**

- Donor had no “special relationship” with DAF sponsor
- No breach of a fiduciary duty by DAF sponsor

<sup>1</sup> Fairbairn v. Fidelity Investments Charitable Gift Fund, Case No. 18-cv-04881-JSC (N. Dist. Cal. Feb. 26, 2021)

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### PINKERT V. SCHWAB CHARITABLE FUND<sup>1</sup>

**Donor Advised Fund Litigation**

**Background**

- Donor claimed Schwab Charitable Fund affiliations with Schwab Corp. maximized profits for Schwab Corp. to the detriment of charity
  - Utilized Schwab index and money market funds
  - Purchased funds at retail prices—instead of wholesale
  - Failed to leverage bargaining power to retain less expensive brokerage and custodial services

**Court Ruling**

- Court dismissed all claims
  - Donor lacked standing after making irrevocable contribution of assets and relinquishing dominion and control
  - Schwab Charitable Fund had exclusive legal control over donated assets

<sup>1</sup> Pinkert v. Schwab Charitable Fund, 48 F.4<sup>th</sup> 1051 (9<sup>th</sup> Cir. Sep. 4, 2022), aff'g Case No. 20-cv-07657-LB (N. Dist. Cal. Jun. 17, 2021).

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### DONOR ADVISED FUND: REFORM PROPOSALS

**Currently, No Mandatory Distribution Requirement, But...**

- 15-Year Qualified DAFs and 50-Year Non-Qualified DAFs—*The Accelerate Charitable Efforts (ACE) Act*, S.1981 (Jun. 9, 2021), Senators Angus King (I-ME) and Chuck Grassley (R-IA), and H. 6595 (Feb. 3, 2022)
- California failed attempts to regulate DAFs include AB 2936 (Wicks 2020) and AB 1712 (Wicks 2019)
- Five-year payout requirement and 20% excise tax for failure—*Camp Proposal* (H.R. 1, Feb. 26, 2014)
- “there is likely to be substantial variation in payout rates at the individual level across all sponsoring organization”—*Congressional Research Service Study* (Jul. 2012)
- “premature to recommend a distribution requirement... at this point”—*Department of Treasury Study* (Dec. 2011)

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### “CHARITABLE” LLC NOT A PUBLIC CHARITY, PRIVATE FOUNDATION OR CHARITABLE TRUST

<p><b>The Good</b></p> <ul style="list-style-type: none"> <li>• LLC <i>not</i> subject to mandatory distributions or prohibitions on self-dealing, excess business holdings, jeopardy investments and taxable expenditures (e.g., lobbying/political activities)</li> <li>• LLC <i>not</i> subject to attorney general oversight</li> <li>• LLC tax returns <i>not</i> subject to public disclosure</li> <li>• Assets <i>not</i> permanently restricted for charitable purposes; can be used for any permissible purpose under state law</li> </ul>	<p><b>The Bad and the Ugly</b></p> <ul style="list-style-type: none"> <li>• LLC <i>not</i> exempt from federal income tax; taxed as “pass-through” to owners</li> <li>• <i>No</i> charitable income tax deduction from funding; future benefit if LLC donates to charity</li> </ul>
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### PATAGONIA PURPOSE TRUST AND 501(c)(4) ORGANIZATION<sup>1</sup>

**2% to Purpose Trust (Voting Shares)**

- 2% of \$3 billion = \$60 million (without discounting)
- \$17.5 million in gift taxes = 40% of \$43.75 million

**98% to Section 501(c)(4) Nonprofit “Social Welfare Organization” (Non-Voting Shares)**

- 98% of \$3 billion = \$2.94 billion (without discounting)
- NO gift, estate or GST taxes—a 40% gift tax on 98% of \$3 billion could have been as much as \$1.176 billion
- NO income taxes—can continue to grow tax free for generations
- NO charitable income tax deduction, unlike a § 501(c)(3) nonprofit charitable organization
- **Can be used for political purposes, unlike a § 501(c)(3) nonprofit charitable organization**

<sup>1</sup> Estimates based on Juliana Kaplan and Grace Kay, “Patagonia founder’s big donation potentially saves him over \$1 billion in taxes — and experts say it shows how the wealthy are able to tentatively get out of taxes,” *Business Insider* (Sep. 16, 2022), and David Gettes, “Billionaire No More: Patagonia Founder Gives Away the Company,” *The New York Times* (Sep. 14, 2022).

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## Doing Well AND Doing Good

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### SUSTAINABLE, RESPONSIBLE AND IMPACT (SRI) INVESTING

<b>Program Related Investment (PRI)</b>	Final Regulations (Apr. 25, 2016) allow private foundation investments for both charitable purposes and financial returns
<b>Environmental, Social, Governance (ESG)</b>	Positive screen for investment analysis and decision making
<b>Impact Investing (II)</b>	Direct private investment to generate measurable financial and social impact, such as community development, food security or health improvements
<b>Responsible Investment (RI)</b>	Sustainable, ethical or “green” investments that consider both financial returns and social good
<b>Socially Responsible Investing (SRI)</b>	Negative screening of the investment universe, such as excluding “sin” stocks

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**BIO**

**Justin Miller, J.D., LL.M., TEP, AEP®, CFP®**  
**Partner and National Director of Wealth Planning, Evercore Wealth Management**  
**Managing Director, Evercore Trust Company**

Justin Miller is a Partner and National Director of Wealth Planning at Evercore Wealth Management and a Managing Director at Evercore Trust Company, where he works collaboratively with accountants, attorneys, and other advisors to provide comprehensive wealth planning advice to clients. Prior to joining Evercore in 2021, Justin was a national wealth strategist for 10 years at BNY Mellon. He previously was a managing director at Wells Fargo and began his career as a tax attorney at Sidley Austin.

Justin also is an adjunct professor at Golden Gate University School of Law, a Fellow of the American Bar Foundation, and a Fellow of the American College of Trust and Estate Counsel. He has served in leadership positions with the American Bar Association, California Bar Foundation, San Francisco Estate Planning Council, and State Bar of California, and is a former editor-in-chief of the California Tax Lawyer. Additionally, he is a past recipient of the 2017 Outstanding Conference Speaker Award from the California Society of CPAs and the 2017 V. Judson Klein Award from the California Tax Bar.

Justin received a B.A., with honors, from the University of California, Berkeley, and a J.D. and LL.M. in Taxation from New York University School of Law. He also holds the Accredited Estate Planner® and CERTIFIED FINANCIAL PLANNER™ designations and is a member of the State Bar of California.

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