Charitable Solicitation, Fundraising, and UBIT

Jennifer L. Urban, Esq.
Attorney for Nonprofits
West End Office Park
5353 Gamble Dr., Suite 320
St. Louis Park, MN 55416

t: 612-284-6441 | m: 612-418-0199
e: jenn@legalforgood.com
w: www.legalforgood.com

Today's Agenda

1. Charitable Solicitation Registration and Fundraising Rules
2. Disclosure Statements and Requirements
3. Donors' Recordkeeping and Substantiation Requirement
4. Professional Fundraising Registration and Rules
5. Restricted Gifts, Endowments, and Donor-Advised Funds
6. UBIT: When Contributions Create Taxable Income for the Organization
7. Charitable Giving: Current Market Conditions and Tax Deductions

Overview

The United States is the most generous country in the world:

- In 2019, there were there are more than 1.54 million charitable organizations in the United States.
- Approximately 90% of high net worth households give to charity. On average, high net worth donors gave $29,269 to charity in 2017. By comparison, general population households gave $2,514 on average. Charitable Giving Statistics, NPTrust, (2020) (http://www.nptrust.org/philanthropic-resources/charitable-giving-statistics).
- In 2019, the largest source of charitable giving came from individuals at $309.66 billion, or 69% of total giving; followed by foundations ($75.69 billion/17% of the total share of American giving), bequests ($43.21 billion/10%), and corporations ($21.09 billion/5%).
- In 2019, the majority of charitable dollars went to religion (29%), education (14%), human services (12%), grantmaking foundations (12%), and health (9%). These percentages and top funding areas stayed the same from 2018.
- Charitable giving accounted for 2.1% of gross domestic product in 2018.
- Historically, charitable giving rises about one-third as fast as the stock market.

Overview

This generosity, however, has attracted criminals who profit from dishonest fundraising practices. To curb the exploitation of generous citizens, a patchwork of state-by-state fundraising regulations exist to protect consumers and nonprofits from deceptive and unscrupulous fundraising practices.

List of U.S. Charity Offices:
https://www.nasconet.org/resources/state-government/

Charitable Solicitation Registration and Fundraising Rules

Solicitation

- The legal term for fundraising is "charitable solicitation."
- The definition of "charitable solicitation" is extremely broad. In most jurisdictions, a solicitation includes a direct or indirect request for a contribution with the understanding that it will be used for a charitable purpose, and likely includes all of the following methods:
    - Oral or written request.
    - The distribution, circulation, mailing, posting, or publishing of any advertisement or publication.
    - The making of any announcement to the press; over the radio; or by television, telephone or telegraph, concerning an event to which the public is requested to attend or make a contribution to.
    - The sale or attempted sale of any advertisement, advertising space, book, card, magazine, merchandise, subscription, ticket of admission or any other thing; the use of the name of any charitable person in any offer or sale as an inducement or reason to purchase such item; or the making of any statement in connection with any such sale, that the whole or any part of the proceeds from such sale will be used for any charitable purpose.

Solicitation

What about the internet?

- Charleston Principles:
  - Every nonprofit that raises funds using the internet and social media should be familiar with the Charleston Principles. The Charleston Principles are guidelines on charitable solicitations using the internet, and were approved by the National Association of State Charity Officials in March 2001. See: http://www.nasconet.org/wp-content/uploads/2018/04/Charleston-Principles.pdf
  - In general, if a charity has a website with a passive "donate here" button, that, alone, is not enough to require solicitation registration in multiple states. However, if the charity responds to a donation from that "donate here" button with an active request for further donations, such as "thank you for your donation, please consider another donation…," the charity has now solicited and is required to register.
- Be aware that that no matter what vehicle your nonprofit is using for fundraising (Twitter, Facebook, texting, phone calls, or old-fashioned snail mail and personal "asks") if the underlying activity is solicitation – defined as *asking for a donation* – that's regulated activity in most states.
- Crowdfunding and giving days can trigger registration requirements in multiple states.

Fundraising Regulations

Fundraising regulations generally come in 2 flavors:

- Charitable Solicitation Registration: To facilitate fundraising regulation, state authorities have traditionally required charities soliciting their residents for donations to register with its state charity office. https://www.nasconet.org/resources/state-government/. Registration allows the state to monitor who is soliciting within the jurisdiction, ensuring a responsible party can be contacted if complaints arise.
- Professional Fundraiser Registration: Many states also regulate the activity of paid fundraising consultants and require them to register with the designated state body. Paid fundraising consultants are usually called "Professional Fundraisers" or "Professional Solicitors."

#1: Charitable Solicitation

#1: Fundraising by the Charity & Disclosure of Charitable Contributions

#1: Charitable Solicitation

Fundraising by the Charity:

- The general rule is: Charitable organizations must file a registration statement with the state's charity office (sometimes it's the Attorney General's Office; sometimes it's the Secretary of State's Office) prior to any charitable solicitation, and an annual return thereafter. Late fees apply so be sure to note renewal deadlines.
- Exceptions:
  - Certain jurisdictions have exemptions from this filing requirement for specific types of organizations.
  - Some jurisdictions do not have a filing requirement at all.

#1: Charitable Solicitation

Fundraising by the Charity:

- Common exemptions from charitable registration:
  - Charitable organizations that are composed ENTIRELY of volunteers (no paid staff) and receive less than $X in annual contributions from the public. (NOTE: Some jurisdictions say $25,000; some say $5,000; some say $50,000; some say "receive contributions from fewer than 10 people.")
  - Religious organizations exempt from filing Form 990s
  - Accredited educational institutions/schools
  - Organizations that solely solicit contributions from its voting members
- There are others, so check state-by-state where your charitable organization "does business."

#1: Charitable Solicitation

State-by-State Registration

#1: Charitable Solicitation

- Each state's system of fundraising regulation is different.
- Nonprofits have long agonized over the complexity of complying with the existing national patchwork of inconsistent and ever changing laws.
- These laws, although attempting to protect the public from deceptive fundraising practices, is costly and burdensome for charities.

#1: Charitable Solicitation

State-by-State Approach:

- Pros:
  - Allows you to be more targeted in your approach to registration, registering only in jurisdictions where it's absolutely necessary (saving $, and time in future years)
- Cons:
  - Each jurisdiction has its own form and its own laws
  - Requires a search for the forms, but now Google makes this easier and most jurisdictions have the forms on-line and/or an on-line registration process
  - Many state registration forms require signatures by more than one corporate officer, so allow time to collect the necessary signatures well in advance of filing deadlines
- Helpful resource: https://www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration

State	Requirements for Exemption	Statutory Citation	Fee
Alabama	Contributions of $25,000 or less, and no hired fundraisers	Al. Code Sec. 13A-9-71,72	$25
Alaska	Contributions of $5,000 or less (excluding grants) OR contributions are from 10 persons or less, and no hired fundraisers. No paid officers.	AS 45.68.10,120 et seq. and AAC 12.010 et seq.	$40
Arizona	No registration required	ARS 44-6551 to 44-6561	
Arkansas	Nonprofits raising less than $25,000 per year with no paid staff or hired fundraisers	Ark. Code ann. 4-28-401	$0
California	Any charity organized in another state that is not "doing business" or holding property in California	Cal. Govt. Code 12580 to 12596; Cal Code of Reg., Title 11 300 to 310, 999.1 to 999.4; Bus. & Prof. Code Sec. 17510 to 17510.85, 22930; Cal. Corp. Code Sec. 5250.	sliding scale based on revenue/assets
Colorado	Charities that do not raise or receive gross revenue over $25,000 (excluding grants) OR contributions are from 10 persons or less.	Colo. Rev. Stat. 6-16-101	$10
Connecticut	Contributions of $50,000 or less, and no hired fundraisers	C.G.S. 21A-175, 190(d)	$50
Delaware	No registration required		
D.C.	Total gross receipts of less than $1,500, and no paid staff (including no paid fundraisers)	D.C. Code 44-1701, 1703	$70
Florida	Contributions of $25,000 or less, and no hired fundraisers.	F.S. 496.405, 406	sliding scale based on revenue
Georgia	Organizations with less than $25,000 in annual revenue	O.C.G.A. 43-17-1, 9	$35 initial; $20 renewal
Hawaii	Contributions of $25,000 or less, and no hired fundraisers	Hawaii Rev. Stat. 467B	$0
Idaho	No registration required		
Illinois	No applicable exemption	760 ILCS 55/1 and 225 ILCS 460/1	$15
Indiana	No registration required		
Iowa	No registration required		
Kansas	Contributions of $10,000 or less	KSA 17-1760	$35
Kentucky	No applicable exemption	K.R.S. 367.650	$0
Louisana	All organizations are exempt unless they hire fundraisers	La. R.S. 51: 1901 to 1904; La. Admin. Code, Title 16, Part III, Chpt. 5, Sec. 515	$25
Maine	Charities that do not raise over $10,000 OR contributions are from 10 persons or less, and no hired fundraisers. No paid officers.	9 M.R.S.A. Chpt. 385, Sec. 5001 to 5018	$50 initial; $25 renewal
Maryland	Contributions of $25,000 or less, and no hired fundraisers. BUT: Orgs exempt because they receive less than $25,000 in charitable contributions must file "Exempt Organization Fundraising Notice" Form SS-208.	Ann. Code, Bus. Reg. Art., Sec. 6-101	sliding scale based on revenue
Massachusetts	Contributions of $5,000 or less OR contributions are from 10 persons or less, and no hired fundraisers.	Mass. Gen. Law, Chpt 12 & 68	$50 initial
Michigan	Charities that receive $25,000 or less annually, the organization has no hired fundraisers, and its financial statements are available to the public.	MCLA 400.27, 283	$0
Minnesota	Contributions of $25,000 or less, and no paid staff.	Minn. Stat. Chpt. 309	$25
Mississippi	Contributions of $4,000 or less, and no hired fundraisers.	Miss. Code Ann. Sec. 79-11-501	$50

Missouri	All 501(c)(3) organizations are exempt	RSMo. Sec. 407.450	$15
Montana	No registration required		
Nebraska	No registration required		
Nevada	No applicable exemption	N.R.S. 82A.110	$0
New Hampshire	No applicable exemption	R.S.A. 7:19 to 7:32-I	$25 initial; $75 renewal
New Jersey	Contributions of $10,000 or less, and no paid staff (including no hired fundraisers)	NJSA 45:17A	sliding scale based on contributions
New Mexico	No applicable exemption	NMSA 22 Sec. 57-22-1	$0
New York	Contributions of $25,000 or less, and no hired fundraisers	NY EXEC § 172-a	$25
North Carolina	Contributions of $25,000 or less, and no hired fundraisers. No paid officers/trustees/directors.	Chapter 131 F	sliding scale based on contributions
North Dakota	No applicable exemption	N. Dak. Century Code, Chpt. 50-22	$25 initial; $10 renewal
Ohio	Contributions of $25,000 or less, and no hired fundraisers.	O.R.C. 1716	sliding scale based on contributions
Oklahoma	Organizations raising less than $10,000.	Title 18 O.S. Sec. 552	$65 initial; $15 renewal
Oregon	No applicable exemption	Ore. Rev. Stat. 128.610 to 129	sliding scale based on revenue
Pennsylvania	Contributions of $25,000 or less, and no paid staff.	10 P. S. 162.1	sliding scale based on contributions
Rhode Island	Contributions of $25,000 or less, and no hired fundraisers.	RI ST 5-53.1-3	$90
South Carolina	Contributions of $20,000 or less and no paid staff (including no hired fundraisers)	S. Carolina Code or Laws Sec. 33-56-50	$50
South Dakota	No registration required		
Tennessee	Contributions of $30,000 or less.	T.C.A. 48-101-502, 504, 506	renewal - sliding scale based on revenue
Texas	No registration required		
Utah	No applicable exemption	U.C.A. 13-22-8	$75
Vermont	No registration required		
Virginia	Contributions less than $5,000 over 3 preceding years, and no hired fundraisers.	Code of Virginia Sec. 57-48 to 57-69	$100 plus sliding scale based on contributions
Washington	Contributions of $25,000 or less, and no hired fundraisers, paid staff, or paid officers/trustees/directors.	RCW Chpt. 19.09	$60
West Virginia	Contributions of $25,000 or less, and no hired fundraisers.	Sec. 29-19-5	$15 or $50 based on revenue
Wisconsin	Contributions of $5,000 or less, and no paid staff (including no hired fundraisers).	Wis. Stat. 202.12	$54
Wyoming	No registration required		

#1: Charitable Solicitation

Alternatives to State-by-State Registration

#1: Charitable Solicitation

A. Uniform Registration Statement

#1: Charitable Solicitation

Unified Registration Statement:

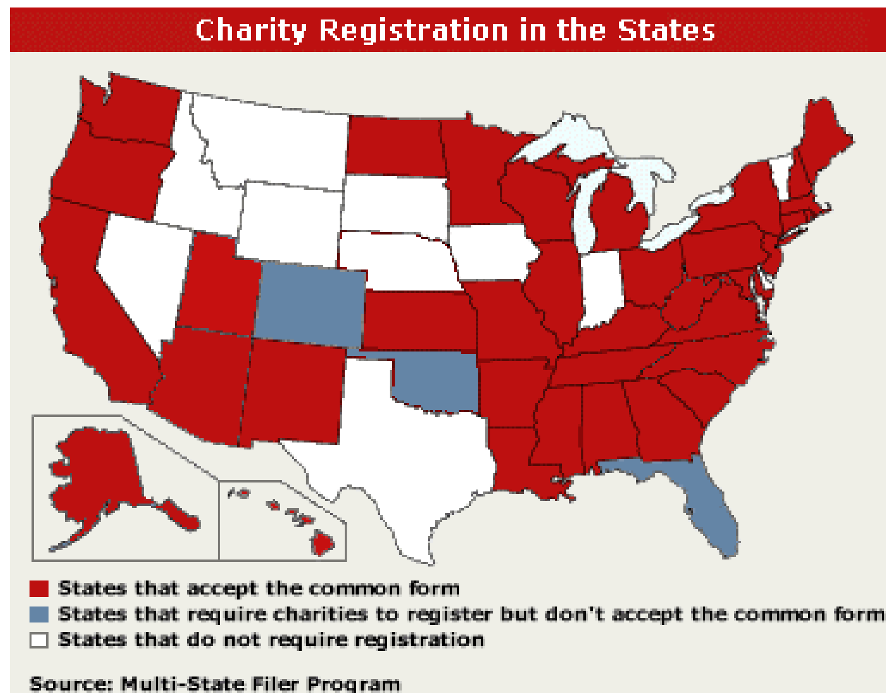
- What is it?: The Unified Registration Statement (URS) represents an effort to consolidate the information and data requirements of all states that require registration of nonprofit organizations performing charitable solicitations within their jurisdictions. The outdated effort was organized by the National Association of State Charity Officers and the National Association of Attorneys General, and was one part of the Standardized Reporting Project, whose aim is to standardize, simplify, and economize compliance under the states' solicitation laws.
- The URS is an *alternative* to filing all of the respective registration forms produced by each of the cooperating states. In those states, a registering nonprofit may use *either* the state form *or* the URS. Thus, the URS proves most useful to nonprofits soliciting regionally or nationally and, therefore, subject to the registration laws of *multiple* states. But the URS may be used by any nonprofit that is registering in a state accepting it.
- http://www.multistatefiling.org/

legal for good

#1: Charitable Solicitation

Unified Registration Statement:

Which States Require Registration of Charitable Soliciting Organizations and Accept the URS?



#1: Charitable Solicitation

Unified Registration Statement:

http://www.multistatefiling.org/

- Required Supplementary Forms
  - Arkansas
  - California
  - District of Columbia
  - Georgia
  - Maine
  - Minnesota
  - Mississippi
  - North Carolina
  - North Dakota
  - Tennessee
  - Utah
  - Washington
  - West Virginia
  - Wisconsin
- Appendix
  - Summary of Regulations for the Cooperating States
  - Other States that Require Registration
  - Annual Financial Reporting

#1: Charitable Solicitation

Unified Registration Statement:

- Pros:
  - One form – eases filing burdens
- Cons:
  - Not all jurisdictions accept it
  - Some of the jurisdictions that accept it still require supplemental forms with additional information
  - Does not provide you with information about whether your organization is specifically exempt from filing in each jurisdiction – and once you register, it's difficult to "unring the bell"

#1: Charitable Solicitation

B. Single Portal

#1: Charitable Solicitation

Single Portal:

- What is it?: The State Charity Registration Portal (Single Portal) represents an updated effort to consolidate the information and data requirements of all states that require registration of nonprofit organizations performing charitable solicitations within their jurisdictions. The effort is organized by the National Association of State Charity Officers, GuideStar, the Multistate Registration and Filing Portal, Inc., and others in an updated attempt to standardize, simplify, and economize compliance under the states' solicitation laws.
- Single Portal is an *alternative* to filing all of the respective registration forms produced by each of the cooperating states. In those states, a registering nonprofit may use *either* the state form *or* the Single Portal. Thus, the idea is that the Single Portal will prove to be most useful to nonprofits soliciting regionally or nationally and, therefore, subject to the registration laws of *multiple* states. Single Portal may be used by any nonprofit that is registering in a state accepting it.
- http://www.statecharityregistration.org/

#1: Charitable Solicitation

Single Portal:

- What states can you register in?: Single Portal launched a pilot with Connecticut and Georgia. It expects to have at least 2 more states (Massachusetts and New Hampshire) join in the second cohort, which they estimated would launch by June 23, 2019.
- Operates through Multistate Registration and Filing Portal, Inc., which is a Delaware nonprofit organization tax-exempt under 501(c)(3). MRFP was formed in 2013 by state charity officials for the purpose of providing a multistate charitable registration system through which charities and their professional fundraisers may comply with the registration requirements of multiple jurisdictions at one location.
- Handles both new registrations and renewals
- Cost: $9 per charity per state and a 3% processing fee. AND…state filing fee. Payment can be made via credit and debit card.

#1: Charitable Solicitation

Single Portal:

- Pros:
  - One form – eases filing burdens
  - Avoid inconsistency
  - Provides a modicum of guidance on where a charity needs to register (unlike the URS)
- Cons:
  - Not all jurisdictions accept it – only 2 so far!
  - Unsure whether the jurisdictions that accept it still require supplemental forms with additional information

#1: Charitable Solicitation

Now that you've registered, what are the disclosure requirements you must make to your donors?

Disclosure Statements - State

- In addition to registration requirements, several states also require "disclosure statements" that alert potential donors that the nonprofit is registered in the state. The disclosure statements must be included in solicitation materials, such as annual appeal letters and letters confirming pledges.
- For state-by-state info on disclosure statements: http://www.perlmanandperlman.com/fundraising-compliance/charts-resources/

Disclosure Statements - State

Examples:

- Minnesota: Minn. Stat. § 309.556, Subd. 1
  The following information must be clearly disclosed in any written charitable solicitation:
  - the name and location by city and state of each charitable organization on behalf of which the solicitation is made;
  - the tax deductibility of the contribution; and
  - a description of the charitable program for which the solicitation campaign is being carried out; and, if different, a description of the programs and activities of the organization on whose behalf the solicitation campaign is being carried out.
- Ohio: O.R.C. § 1716.10
  Every charitable organization that directly solicits contributions in this state must make the following disclosures at the point of solicitation:
  - The name of the charitable organization and the city of the principal place of business of the charitable organization;
  - If the charitable organization has not received a determination letter from the Internal Revenue Service that is currently in effect, stating that the organization is exempt from federal income taxation under section 501(a) and described in section 501(c)(3) of the Internal Revenue Code, and the particular charitable purpose or purposes to be advanced with the funds raised.
- Illinois: 225 ILCS 460/15(b)
  If a charitable organization engages in any public solicitation and purports to relate the purpose or purposes for which the funds are solicited, such purposes must be fully and accurately identified to the prospective donor. If a charitable organization whose purposes include the rendering of noneducational program services intends to expend or budget more than 50% of its program service expenditures for informing or educating the public, and the funds being solicited will be used for such purpose, the donor at his or her request must be told that a primary use of the program funds will be for public education.

Disclosure Statements - State

Examples (continued):

- New York: McKinney's Executive Law § 174-b
  Any solicitation, by any means, including oral and written solicitations, by or on behalf of a registered charitable organization, must include:
  1. A statement that upon request, a person may obtain from the organization or from the attorney general, a copy of the last financial report filed by the organization with the attorney general. Such statement shall specify the address of the organization and the address of the attorney general, to which such request should be addressed and in the case of a written solicitation, must be placed conspicuously in the material with print no smaller than ten point bold face type or, alternatively, no smaller than the size print used for the most number of words in the statements.
  2. A clear description of the programs and activities for which it has requested contributions or a statement that, upon request, a person may obtain from the organization such a description.
  3. If any charitable organization makes contributions to another organization which is not its affiliate, the solicitation must include a statement that such contributions have been made and that a list of all organizations which have received contributions during the past twelve months from the soliciting organization may be obtained from that organization provided, however, a united way, federated fund or incorporated community appeal, by or through which a donation is merely transferred to a charity selected by the donor, need not include such donor selected organizations in the list. The term "affiliate" includes any chapter, branch, auxiliary, or other subordinate unit of any registered charitable organization, howsoever designated, whose policies, fund raising activities, and expenditures are supervised or controlled by such parent organization.

The written disclosure must be placed conspicuously in the materials with print no smaller than 10 point bold face type or, alternatively, no smaller than the size print used for the most number of words in the solicitation.

- California: No disclosure requirements for written solicitations by charities not using professional solicitors.

Disclosure Statements - Federal

- A nonprofit organization should provide a written disclosure (sometimes called a "donation acknowledgement") to a donor when the nonprofit organization receives contributions of $250 or more, and MUST provide a written disclosure when the donor makes a payment exceeding $75 partly as a contribution and partly as a compensation for goods and services provided by the organization (this is called a *quid pro quo* contribution). See: I.R.C. § 6115(a)(1)-(2)(2013); See also IRS Pub. 1771 at 11 (2013) (http://www.irs.gov/pub/irs-pdf/p1771.pdf).
- The written disclosure should contain the following:
  - Name of organization
  - Amount of cash contribution
  - Description (but not the value) of non-cash contribution)
  - Statement that no goods or services were provided by the organization in return for the contribution, if that was the case
  - Description and good faith estimate of the value of goods or services, if any, that an organization provided in return for the contribution
  - If it's a *quid pro quo* contribution, a notification to the donor that the amount of the contribution that is deductible for federal income tax purposes is limited to the excess of money (and the fair market value of property other than money) contributed by the donor over the value of goods or services provided by the organization

Disclosure Statements - Federal

A penalty is imposed on charities that do not meet the written disclosure requirement when receiving *quid pro quo* contributions. The penalty is $10 per contribution, not to exceed $5,000 per fundraising event or mailing. An organization may avoid the penalty if it can show that failure to meet the requirements was due to reasonable cause.

Disclosure Statements – Federal Contributions with Special Rules

NOTE: The IRS has separate, specific requirements for vehicles, land, buildings, and stock.

- Vehicles: See IRS Publication 4302 and Form 1098-C
- Land/Buildings: Beware of UBIT, Form 8283, and IRS Publications 526 & 561
- Stock: Beware of Rev. Rul. 78-197 (1978) (https://www.pgdc.com/pgdc/story/rev-rul-78-197), 2003 PLR (https://www.irs.gov/pub/irs-wd/0321010.pdf), and IRS Publication 526

Disclosure Statements - Federal

Beware of in-kind donations:

- An in-kind donation typically comes in the form of goods or services. Examples of in-kind donations include individuals providing school supplies to nonprofit organizations that serve at-risk youth, a gift card for a silent auction, or works of art given to a museum.
- Nonprofit organizations should provide donors who give in-kind donations a receipt similar to one provided to an individual who gives a cash donation. The only difference is that the nonprofit organization is not expected to list the actual value of the in-kind donation. However, it is important to describe what was donated.
- Example: "Thank you for your contribution of 5 gift cards with a face value of $100. Charity received this donation on [date]. No goods or services were provided in exchange for this contribution." or "Thank you for your contribution of a used oak baby crib and matching dresser…."
- The donor is responsible for valuing the goods or services provided in non-cash contributions and reporting that amount on their own tax return if they are seeking a charitable deduction.

Disclosure Statements – Federal Non-501(c)(3)

What if the nonprofit corporation doesn't have 501(c)(3) status??

- If the organization is not eligible to receive tax-deductible donations (i.e., is NOT a 501(c)(3)), solicitations on behalf of that organization must contain an express and easily recognizable statement that donations are not deductible as charitable contributions for federal income tax purposes. While a good faith effort to meet the foregoing will suffice, the IRS has provided safe harbor rules for complying with this requirement. See: IRS Notice 88-120 (1988) (https://www.irs.gov/charities-non-profits/notice-88-120-1988-2-cb-454); I.R.C. § 6113(a) (2013).
- To meet the safe harbor in a written solicitation, the statement must:
  - Be in at least the same size type as the primary message and readily visible.
  - Be on the same page, and in close proximity to, the request for donations.
  - Be the first sentence of a paragraph, or constitute the entire paragraph.
  - Be worded as one of the following:
    - ✓ "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions for Federal income tax purposes."
    - ✓ "Contributions or gifts to [name of organization] are not tax deductible."
    - ✓ "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions."
- For oral solicitations, the same statement must be made in close proximity to the request for contributions (i.e., during the same telephone conversation and by the same solicitor).

Donors' Recordkeeping and Substantiation Requirements

GENERAL RULE: Donors are allowed to deduct the difference between the value of the amount contributed and the value of the goods and services received in return from the nonprofit organization.

Exception 1

Token Exception:

- Insubstantial goods or services a charitable organization provides in exchange for contributions do not have to be described in the acknowledgment.
- Goods and services are considered to be insubstantial if the payment occurs in the context of a fundraising campaign in which a charitable organization informs the donor of the amount of the contribution that is a deductible contribution, and:
  - the fair market value of the benefits received does not exceed the lesser of 2 percent of the payment or $106; or
  - the payment is at least $53, the only items provided bear the organization's name or logo (e.g., calendars, mugs, or posters), and the cost of these items is within the limit for "low-cost articles," which is $10.60.
  - NOTE: These dollar amounts are for 2016. Guideline amounts are adjusted for inflation. Contact IRS Exempt Organizations Customer Account Services at (877) 829-5500 for annual inflation information.
- Example: If a charity gives a coffee mug bearing its logo and costing the organization $10.60 or less to a donor who contributes $53 or more, the organization may state that no goods or services were provided in return for the $53 contribution. The $53 is fully deductible.

Exception 2

Membership Benefits Exception:

- An annual membership benefit is also considered to be insubstantial if it is provided in exchange for an annual payment of $75 or less and consists of annual recurring rights or privileges, such as:
  - Free or discounted admissions to the charitable organization's facilities or events
  - Discounts on purchases from the organization's gift shop
  - Free or discounted parking
  - Free or discounted admission to member-only events sponsored by an organization, where a per-person cost (not including overhead) is within the "low-cost articles" limits
- Example: If a charity offers a $75 annual membership that allows free admission to all of its weekly events, plus a $20 poster, a written acknowledgement need only mention the $20 value of the poster, since the free admission would be considered insubstantial and, therefore, would be disregarded.

Exception 3

Intangible Religious Benefits Exception:

- If a religious organization provides only "intangible religious benefits" to a contributor, the acknowledgment does not need to describe or value those benefits. It can simply state that the organization provided intangible religious benefits to the contributor.
- "Intangible religious benefits" are benefits provided by a tax-exempt organization operated exclusively for religious purposes, and are not usually sold in commercial transactions outside a donative (gift) context.
- Examples include admission to a religious ceremony and a *de minimis* tangible benefit, such as wine used in a religious ceremony. Benefits that are not intangible religious benefits include education leading to a recognized degree, travel services, and consumer goods.

Donor Substantiation

- A separate acknowledgment may be provided for each single contribution exceeding the threshold, or one acknowledgment, such as an annual summary, may be used to substantiate several single contribution exceeding the threshold. There are no IRS forms for the acknowledgment. Letters, postcards, or computer-generated forms with the above information are acceptable.
- Recipient organizations typically send written acknowledgments to donors no later than January 31 of the year following the donation.

#2: Professional Fundraisers

#2: Fundraising by a Professional

#2: Professional Fundraisers

Fundraising by a Professional:

- Nonprofits hiring outside consultants to provide assistance with fundraising should be familiar with state laws that may require the registration with the state charity office prior to any solicitation activity.
- While registration of the consultant may not be the nonprofit's direct obligation, it is prudent to verify that your fundraising consultant is registered, if required by state law.

#2: Professional Fundraisers

Fundraising by a Professional:

- Fundraising professionals often go by the following names:
  - Professional Fundraiser
  - Professional Solicitor
  - Fundraising Counsel
  - Grant Professional
- The general rule: If a person is a.) soliciting b.) on behalf of a charity c.) and being paid to do so, he/she is a fundraising professional and must register with the state charity office prior to any solicitation activity. This rule generally applies to independent contractors/consultants, not employees.

#2: Professional Fundraisers

Fundraising by a Professional:

- This general rule applies to grant writers as much as it applies to phone solicitors in call-centers.
- What commonly needs to be filed:
  - Registration Statement
  - Solicitation Notice
  - Written authorization from the charity, usually in the form of a contract
  - Surety bond (usually in the amount of $25,000) – some jurisdictions waive this requirement if the professional is not going to have custody and/or control of the charitable contributions
  - Solicitation Campaign Report Form within 90-days of the close of the fundraising “campaign”
  - Fee

#2: Professional Fundraisers

Fundraising by a Professional: Be sure you hire a reputable professional

- Federal Trade Commission: https://www.ftc.gov/tips-advice/business-center/guidance/raising-funds-what-you-should-know-about-hiring-professional
- Fundraising Fables: Retaining Fund Development Professionals: http://fundraisinggoodtimes.com/2014/07/21/fundraising-fables-retaining-fund-development-professionals/
- Check with your state's charity office to get more information about the fundraising professional and to determine if he/she is properly registered. http://www.nasconet.org/resources/state-government/

#2: Professional Fundraisers

Fundraising by a Professional:

- It is not considered ethical to compensate fundraising professionals with a commission, or a percentage of contributions, or funds raised.
- See:
  - Association of Fundraising Professionals: http://www.afpnet.org/Ethics/EthicsArticleDetail.cfm?ItemNumber=734
  - Council for Advancement and Support of Education: http://www.case.org/Samples_Research_and_Tools/Principles_of_Practice/CASE_Statements_on_Compensation_for_Fundraising_Performance.html

Restricted Gifts, Endowments, and Donor-Advised Funds

Donor Imposed Restrictions

Restricted gifts

Donor Imposed Restrictions

Restricted gifts:

- What are they?
  - Restricted gifts: Donors may designate or "restrict" the use of their donations by the charity to a particular purpose or project. An example is a gift to a special scholarship fund at a university.
  - Unrestricted gifts: "Unrestricted" contributions are donations the nonprofit may use for any purpose. Unrestricted funds usually go toward the operating expenses of the organization, including wages.
- Why do they matter? Restricted donations can be spent only for purposes as designated by the donor; unrestricted donations can be spent on anything from programs to toilet paper.

Donor Imposed Restrictions

Restricted gifts:

- How do you know if a gift is restricted? Look at the "gift instrument"
  - Only the donor can determine if a donation is restricted or not. The designation can be made by a letter from the donor or through an explicit agreement with the nonprofit.
  - Often grants from foundations are restricted to a particular program or purpose, and that restriction is set out in the documentation that accompanies the award.
- Nonprofits must be clear when asking for gifts:
  - Some charities have experienced donor backlash when it appeared that donors were donating for a particular purpose only to find out that the charity used their gift in an unrestricted way.
  - In addition to the moral obligation to the donor, most state laws prohibit "false and misleading" solicitations and require donations be used in accordance with the intended charitable purpose.
  - If a donor restricts a donation to a particular purpose and the nonprofit does not comply, the donor can demand a refund. The donor can take legal action if needed and report the charity to the Office of the Attorney General in the state where the charity resides.

Donor Imposed Restrictions

Restricted gifts:

- Types of restricted funds:
  - Temporarily Restricted: Donors sometimes impose time-limited restrictions. Time-restricted means that the donation can be used for a particular purpose for a specified period, or it must support a specific program or campaign. When the time is up, or the project is done, the funds become unrestricted or stopped. Examples include a grant, graduation of a scholarship recipient, or the completion of a building project.
  - Permanently Restricted: Permanently restricted funds never expire. Usually, this means that the charity invests the gift and then uses the interest and investment returns in perpetuity. Permanently restricted funds often go into an endowment that supports a particular activity or the organization in general.
- Whatever type of restricted fund is set up, the nonprofit must keep track of it and report it appropriately in its financial statements. Consult the Accepted Accounting Principles (GAAP) at the Financial Accounting Standards Board (FASB) for detailed information.
- Can a charity "un-restrict" a gift? Restricted gifts can be unrestricted only by the donor or a court.

Donor Imposed Restrictions

Endowments

Donor Imposed Restrictions

Endowments:

- What are they? Permanently restricted funds. Only the interest from an endowment can be spent, not the principal that anchors the endowment. Professional money managers often oversee endowment funds, investing the money in stocks, bonds, and other investments.
- Why do they matter? They serve as an "insurance policy" for the future of an organization. With an endowment, facing the ups and downs of the economy and fundraising becomes easier.
- Your Board should set up the rules of the endowment in an investment policy. For instance, you will want to name the endowment, restrict its use, and provide guidelines for how much of the interest can be employed yearly and when the endowment principal can be tapped if needed under extraordinary circumstances.
- The endowment can be set up within your existing nonprofit corporation, or it can be spun off into a separate 501(c)(3) organization or foundation.

Donor Imposed Restrictions

Donor-Advised Funds

Donor-Advised Funds

Donor-Advised Funds:

- What are they? A donor-advised fund, or DAF, is a giving vehicle established at a sponsoring public charity.
- How does it work?
  - It allows individual donors to make a charitable contribution (an irrevocable contribution of personal assets, including cash, stock, real estate, etc.), or multiple contributions over time
  - The individual donor immediately receives the maximum tax deduction allowable by the IRS, but the contribution is placed into a DAF account where it can be invested by the public charity sponsor and grow tax-free
  - At any time, the individual donor can recommend usually with strong persuasive authority to the public charity sponsor that it make grants from the DAF to qualifying charities (generally public charities)
  - The individual donor can remain anonymous and still enjoy his/her charitable deduction. Since the individual donor's contribution was made through an intermediary DAF, the sponsoring public charity can execute the contribution anonymously on behalf of the individual donor.
- The first DAFs were created in the 1930s, but regulatory recognition did not exist until the Tax Reform Act of 1969. In the 1990s, DAFs began to grow in visibility and popularity, and today they are philanthropy's fastest-growing vehicles.

Percent of U.S. Individual Giving Going to Donor-Advised Funds and Private Foundations (1991-2019)

Private Foundations and DAFs Combined 28%

26%
21%
20%
18%
16%
16%

Private Foundations 15%

5%
7%
9%
11%
19%
15%
12%
11%
13%
13%
11%
14%
12%
15%

Donor-Advised Funds 13%

4%
3%
5%
7%
8%
11%

1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019

Donor-advised funds began reporting contributions in 2007.
Sources: DAF data from National Philanthropic Trust, *2014 Donor-Advised Fund Report*, 2014, 2015, and 2020.
Foundation data from *Giving USA: The Annual Report on Philanthropy for the year 2019 (2020)*. Chicago: Giving USA Foundation, pp. 332 and 335.

Donor-Advised Funds

Requirements and Restrictions:

- The public charity serving as the sponsor of the DAF must retain expenditure responsibility over the funds. This means the sponsoring public charity must develop procedures, demonstrate ownership and control over the DAF, and provide the individual donor with mere advisory privileges.
- DAFs cannot make distributions to only a single identified organization or government entity.
- DAFs cannot make contributions:
  - to natural persons and private foundations (other than private operating foundations)
  - for purposes unrelated to the recipient's mission
  - where the original donor receives more than an "incidental benefit," either directly or indirectly, from the distribution

Donor-Advised Funds

Pros and Cons:

- Benefits:
  - Donations to a DAF qualify for the more favorable charitable deduction treatment of a gift to a public charity than donations to a private foundation.
  - DAFs are not subject to the self-dealing and payout rules applicable to private foundations.
  - DAF contributions do not count negatively toward the recipient's public support test because they are coming from another public charity.
  - Unlike private foundations that require a minimum annual distribution, a DAF has no distribution requirements and can allow investment funds within the account to build up for years or even decades. This can increase the donation as the investment grows.
- Pitfalls:
  - But… Recipient public charities cannot access to the funds for their charitable purpose because unlike private foundations that require a minimum annual distribution, a DAF has no distribution requirements and can allow investment funds within the account to build up for years or even decades.
  - There are restrictions, rules, and laws that make DAFs difficult to do correctly, including excise tax penalties.
  - Because of their popularity and controversiality, the IRS is scrutinizing DAFs more carefully than in the past.

Why Regulate DAFs?

It's Not Supposed to Be This Way:

- Existing laws and rules are written to incentivize outright gifts to public charities and to ensure that private foundations provide a regular public benefit.
- Donor-advised funds co-opt benefits that were intended to only apply to true outright gifts to public charities.
- In a recent study that looked at payout of individual DAF accounts in 2020, 32% of individual DAF accounts paid out 9% or more and **35% of individual DAF accounts paid out nothing at all!**

Why Regulate DAFs?

$1.2 Trillion

The amount currently set aside in private foundations and donor-advised funds

Recent Push to Regulate: ACE Act

- On June 9, 2021, Senators King (I-ME) and Grassley (R-IA) introduced the Accelerating Charitable Efforts (ACE) Act. Has not been passed.
- ACE aims to reform tax laws that cover charitable donations so that philanthropic funds are made available to working charities within a reasonable time period.
- ACE, if passed, would establish a timeline for donations to working charities from donor-advised funds (DAFs), which currently have more than $140 billion set aside for future charitable gifts, but no requirement to distribute those funds. Accordingly, DAFs can accept and hold charitable donations that have generated a federal income tax deduction, but never devote the resources to charitable work.

Recent Push to Regulate: ACE Act

ACE would address the problem by replacing existing DAF rules with 2 new types of DAFs:

- **15-year DAFs:** The bill would create a new form of DAF under which a donor would get upfront tax benefits (as under current law), but only if DAF funds are distributed (or advisory privileges are released) within 15 years of the donation. To avoid overvaluations, the income tax deduction for complex assets – such as closely-held or restricted stock – would be the amount of cash made available in DAF accounts as a result of the sale of the asset (instead of the appraised value).
- **50-Year DAFs:** As an alternative, donors who want more than 15 years to distribute their DAF funds will be allowed to elect an "aligned benefit rule." Under this rule, a DAF donor would continue to receive capital gains and estate tax benefits upon donation, but would not receive the income tax deduction until the donated funds are distributed to the charitable recipient. All funds would be required to be distributed outright to charities no later than 50 years after their donation.

Recent Push to Regulate: ACE Act

ACE would also address private foundations' behavior:

- Contributions to DAFs cannot count toward a private foundation's 5% payout requirement unless the funds come out of the DAF by the end of year following the contribution.
- Salaries and travel expenses to family members cannot count toward the 5% payout requirement.
- Incentives for faster payout: Private foundations can avoid excise tax by paying out 7% or more or being established for a 25-year term.

Recent Push to Regulate: ACE Act

BUT…Community foundations will receive certain exemptions under this bill to support their place-based, mission-driven work; specifically, ACE will allow any donor to hold up to $1 million in DAF funds at any community foundation without being subject to payout rules. For amounts over $1 million, a donor still can receive up-front tax benefits if the DAF requires a five percent annual payout or if donations must be distributed within 15 years of contribution.

Basics of a Planned Giving Program

Planned Giving Program Basics

Planned Giving Program:

- What is it?
  - Planned giving is the solicitation of major gifts by a nonprofit, often contributed by an individual donor who commits to give a major gift, over time or at death, as a part of the donor's overall financial and estate planning. A planned gift is a contribution that is arranged in the present, usually through a will, bequest, or trust, and is distributed at a future date, traditionally when the donor passes away.
  - Planned giving vehicles can get quite exotic. Planned gifts can range from the relatively simple bequest made in a will, to gifts like charitable gift annuities and charitable remainder trusts that provide major gifts to a non-profit while at the same time returning income to the donor.
- Why does it matter? Planned gifts can be game-changing for your organization. Even relatively smaller planned gifts can be used to sustain certain programs or facilities, add capacity, establish endowments, or launch major new initiatives. Simply put, every non-profit should be focused (in part) on finding benefactors to leave them planned gifts because there is no better way to plan for the future growth and strength of your organization.
- Establishing a Planned Giving Program: See https://philanthropy.iupui.edu/files/course_resources/establishing_a_planned_giving_program_regenovich.pdf

UBIT: When Contributions Create Taxable Income for the Organization

legal for good

UBIT

Unrelated Business Income and Taxing it:

Definition. There are three pillars to identifying a business activity as generating unrelated business income. An "unrelated trade or business" is any activity that:

- (i) constitutes a trade or business or a facet of a trade or business,
- (ii) is regularly carried on, and
- (iii) is not substantially related to an organization's exempt purposes.

UBI can result in income tax payable to the IRS by the charity.

legal for good

UBIT

Unrelated Business Income and Taxing it:

What is a "Trade or Business?":

- Under Section 513, a "trade or business" includes any activity that is carried on for the production of income from the sale of goods or the performance of services.
- A trade or business activity must be operated for profit or at least have a profit motive.
- A trade or business activity does not lose that characterization simply because it is carried on as part of a larger activity or complex of activities that may be related to the EO's exempt purpose.
- Policy of preventing unfair competition between exempt and non-exempt organizations carrying on the same business.

legal for good

UBIT

Unrelated Business Income and Taxing it:

What is a "Regularly Carried On?":

- Not surprisingly, this term refers to the frequency and continuity of an activity. Treas. Reg. § 1.513-1(c).
- If the activity is carried on with the frequency and continuity of a commercial enterprise, it will be considered "regularly carried on." Again, the policy of preventing unfair competition is cited.
- The regulations also examine the time span in which activities are carried out. Treas. Reg. § 1.513-1(c)(1).
  - Year round?
  - Sporadic?
  - Compared to commercial business – is it also seasonal/intermittent?

UBIT

Unrelated Business Income and Taxing it:

What is "Substantially Related?":

- A trade or business is related to an exempt purpose if it has a causal relationship with the accomplishment of the EO's exempt purpose. To avoid UBIT treatment, the causal relationship must be substantial and "important." Whether this relationship exists depends on the facts and circumstances of each case.
- If activities are inherently non-charitable, or if they are activities normally carried on by for-profit businesses, the activity may be considered as related if it is carried on at below-market costs and or is provided to other charities or individuals who are proper objects of charity.
- The scale of the activity can also matter. Assume that an EO carries out an activity that is seemingly related to the EO's purpose. If the activity is conducted on a significantly larger scale than is necessary to accomplish the EO's exempt purposes, then the portion the activity that is not necessary for accomplish those exempt purposes will generate UBTI. Treas. Reg. § 1.513-1(d)(3).

UBIT

Unrelated Business Income and Taxing it:

Statutory Exceptions. Some activities are statutorily excepted from the definition of an unrelated trade or business. Treas. Reg. § 1.513-1(e). A sample of these activities are (see IRS Publication 598 for a more detailed description):

- Volunteer workforce: A trade or business in which substantially all the work is performed for the organization without compensation.
- Convenience of members: As to 501(c)(3) organizations and state colleges and universities, an activity that is carried on primarily for the convenience of the organization’s members.
- Selling donated merchandise: The selling of merchandise, substantially all of which was received by the EO as contributions or gifts.
- Certain bingo games.
- Qualified trade show activity.
- Qualified public entertainment activity (i.e., a fair or exposition promoting agriculture and education)
- Qualified sponsorship activities

UBIT

Unrelated Business Income and Taxing it:

Other Important Rules and Exceptions:

- S Corporation Income. All income from ownership of S corporation stock is UBIT, regardless if the S corporation business is related or unrelated. Code § 512(e).
- Section 512(b)(1): UBIT does not include dividends, interest, payments with respect to securities loans (as defined in subsection (a)(5)), amounts received or accrued under a loan agreement, annuities, and deductions with respect to all such amounts.
- Section 512(b)(2): UBIT does not include royalties, however measured, and all deductions with respect to royalties.

UBIT

Unrelated Business Income and Taxing it:

Other Important Rules and Exceptions:

- Section 512(b)(3): UBIT does not include rents from real property or rents from personal property leased in connection with the real property if the rents attributable to the personal property are incidental to the total rents under the lease.
- Note: there are exceptions, and exceptions to the exceptions.
- Example: Debt Financed Income is NOT UBIT even though, by definition, debt financed income is a passive investment held to produce income. See materials, IRC Section 514, and IRS Publication 598.

UBIT

Unrelated Business Income and Taxing it: **Why do we even care?**

- Too much UBIT can jeopardize an EO's tax-exempt status.
- It can require tax-exempt organizations to pay tax. But, incurring UBIT liability isn't inherently bad:
  - If you generate "unrelated business income" per the IRS rules, you should report this income and directly connected expenses on IRS Form 990-T. Subsequently, you may owe some taxes on that income.
  - However, since you only pay taxes on the activity's net income after you subtract allowed expenses ("directly connected expenses") from the gross reported income, in many cases, generating unrelated business income results in no tax liability.
  - Many nonprofits that have been at this for a long time simply consider the tax liability on their UBI as a cost of doing business. If your nonprofit incurs unrelated business income, you're in good company. In 1995, more than 36,000 exempt organizations reported gross unrelated business income. This number has no doubt risen in the past five years.
- A nonprofit that expects to incur $500 or more in UBIT liability must make estimated tax payments on a quarterly basis. Large nonprofits that generate substantial unrelated business income may be subject to the Electronic Federal Tax Payment System (EFTPS).

Unrelated Business Income: *§ 511*

- The calculation of UBI has changed under the Tax Cuts and Jobs Act of 2017.
- The Act disallows exempt organizations from using business losses from one economic activity and deducting them from the gains of another economic activity. In essence, losses from one unrelated trade or business will only be available to offset income from that activity.
- Organizations can, however, use one year's losses on the same unrelated business to reduce taxes on another year's operation of the same unrelated business.
- This change will likely result in many exempt organizations paying more tax on UBI.

Unrelated Business Income: *§ 511*

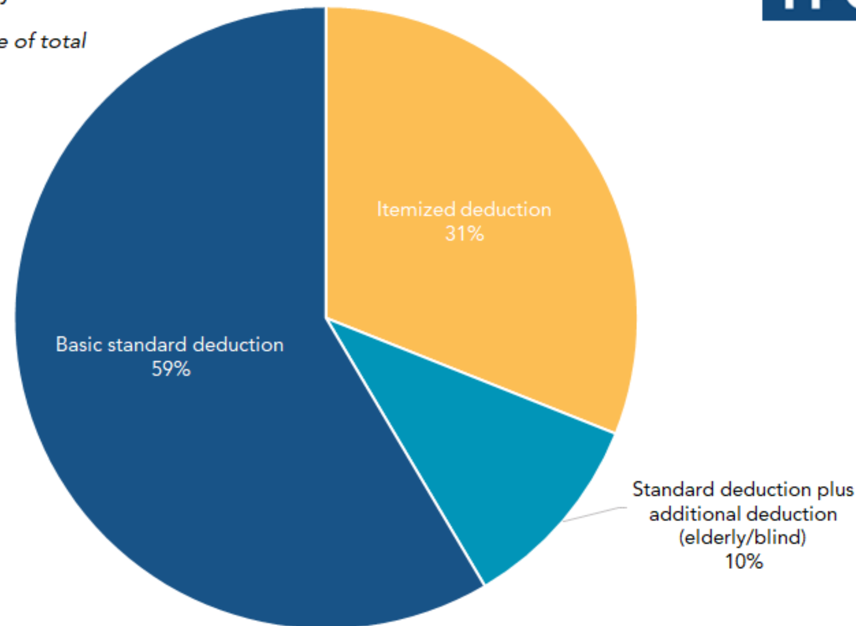
- Changes in the corporate tax rate will apply to taxation of UBI.
- Previously, the tax rate was 15% on the first $50,000 of taxable income, gradually increasing to 35%.
- Under the Act, UBI is subject to a flat rate 21% in tax. Exempt organizations with net taxable UBI below approximately $91,000 will experience a tax increase rather than a decrease.

Charitable Giving: Current Market Conditions and Tax Deductions

Setting the Stage: Standard vs. Itemized Deductions

Setting the Stage: Standard vs. Itemized Deductions

Taxpayers can either take a standard deduction or itemize their deductions to reduce the taxable income on their federal income tax return. Taxpayers typically choose to itemize when they can claim more on itemized deductions than on the standard deduction. In recent years, about 30 percent of taxpayers chose to itemize. https://www.taxpolicycenter.org/briefing-book/what-are-itemized-deductions-and-who-claims-them



Setting the Stage: Standard vs. Itemized Deductions

The most common itemized deductions are those for state and local taxes, mortgage interest, charitable contributions, and medical and dental expenses. The revenue cost of those four deductions was just under $240 billion in 2017.

TABLE 1

Cost of Selected Itemized Deductions

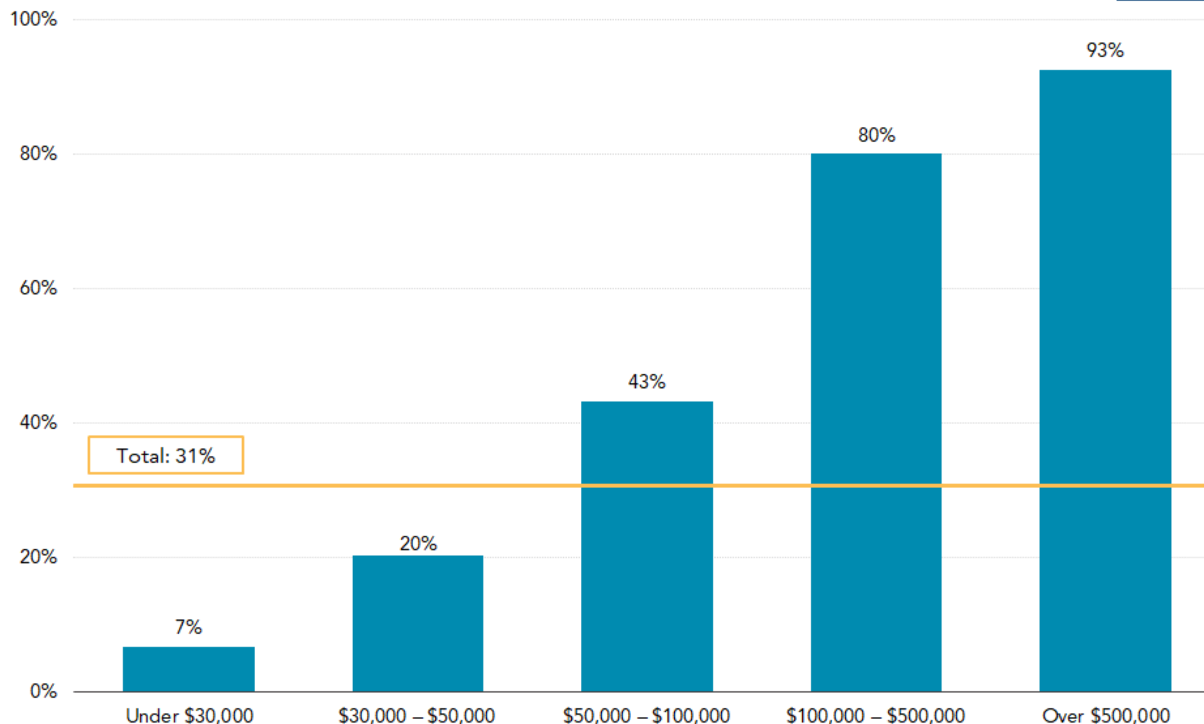
Billions of dollars, fiscal years 2018-2020

Tax expenditure	2017	2018	2019	2020
Deduction for all nonbusiness state and local taxes	$100.9	$36.6	$21.2	$22.5
Deduction for mortgage interest on owner-occupied residences	$66.4	$40.7	$27.0	$30.2
Deduction for charitable contributions	$61.0	$58.3	$46.7	$48.0
Deduction for medical expenses and long-term care expenses	$13.8	$10.5	$7.1	$7.4

Source: Joint Committee on Taxation. "Estimates of Federal Tax Expenditures for Fiscal Years 2019-2023," JCX-55-19, December 2019; Joint Committee on Taxation, "Estimates of Federal Tax Expenditures for Fiscal Years 2017-2021", JCX-34-18, May 2018.
Note: Costs in 2017 and 2018 are from JCX-34-18 and costs in 2019 and 2020 are from JCX-55-19.

Setting the Stage: Standard vs. Itemized Deductions

High-income taxpayers are much more likely to itemize. In 2017, more than 90 percent of tax returns reporting adjusted gross income (AGI) over $500,000 itemized deductions, compared with under half of those with AGI between $50,000 and $100,000 and less than 10 percent of those with AGI under $30,000.



Setting the Stage: Standard vs. Itemized Deductions

How Has the Share of Itemizers Changed over time?:

The share of returns that itemize deductions climbed from a low of 28 percent in 1994 to a peak of 36 percent in 2005 before dropping to 31 percent in 2017. A closer look at the three largest deductions—state and local taxes, home mortgage interest, and charitable contributions—helps explain why.

- **State and local taxes:** Nearly all itemizers deduct state and local taxes. A 2004 law that allowed taxpayers to deduct state and local sales taxes in lieu of income taxes slightly increased the number of itemizers taking this deduction.
- **Home mortgage interest:** Before 2006, between 81 and 83 percent of itemizers deducted mortgage interest. But that share steadily dropped to a low of 73 percent in 2016, consistent with the decline in homeownership following the housing bubble collapse and falling mortgage interest rates. The amount of mortgage interest deducted by taxpayers increased sharply from 2004 to 2008 but fell through 2017 because of falling housing values and historically low mortgage rates.
- **Charitable contributions:** The share of itemizers reporting charitable contributions declined from 91 percent in 1988 to 81 percent in 2017. Much of that drop occurred between 2005 and 2007, after Congress required written confirmations of cash gifts and limited deductions for donations of clothing and used vehicles.

https://www.taxpolicycenter.org/briefing-book/what-are-itemized-deductions-and-who-claims-them

Tax Cuts and Jobs Act of 2017 (TCJA 2017) and the projected impact on charitable giving

TCJA 2017's Potential Impact on Nonprofits and Charitable Giving: *§63*

- One of the TCJA 2017's bigger changes to the individual tax code was to nearly double the standard deduction for all taxpayers. For example, the standard deduction for individual filers was increased from $6,500 to $12,000, and for married couples from $13,000 to $24,000. The result of this change reduced the number of taxpayers who needed to itemize their deductions from 46.5 million in 2017 to roughly 18 million in 2018.
- The Joint Committee on Taxation estimated that itemized deductions would drop by $95 billion in 2018, and this reduction was estimated to shrink nonprofit giving by $13 billion or more each year. Key Provisions in House/Senate Tax Reform Bills, National Council of Nonprofits, (Dec. 15, 2017), (https://www.councilofnonprofits.org/sites/default/files/documents/comparison-house-senate-tax-bills-nonprofits.pdf).

TCJA 2017's Potential Impact on Nonprofits and Charitable Giving: *§63*

In addition, TCJA 2017 reduced marginal tax rates:

2017 Marginal Rates (before)	2018 Marginal Rates (after)
10	10
15	12
25	22
28	24
33	32
35	35
39.6	37

TCJA 2017's Potential Impact on Nonprofits and Charitable Giving: *§63*

- After TCJA 2017, as people fall into new lower tax brackets, the charitable tax deduction subsidy was also reduced.
- In general, the charitable tax deduction subsidizes private giving by reducing the out-of-pocket cost of making a contribution. For example, a taxpayer in the 28% tax bracket who gives $100 to a favorite charity cuts his or her tax bill by $28 with a charitable tax deduction, in effect reducing the out-of-pocket cost of the donation to $72. Emerging Issues in Philanthropy, The Urban Institute (http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/310256-The-Cost-of-Giving-How-Do-Changes-in-Tax-Deductions-Affect-Charitable-Contributions-.PDF).
- TCJA 2017 thus reduced the tax savings from charitable donations, effectively raising the "price" of giving as people shifted to lower tax brackets.

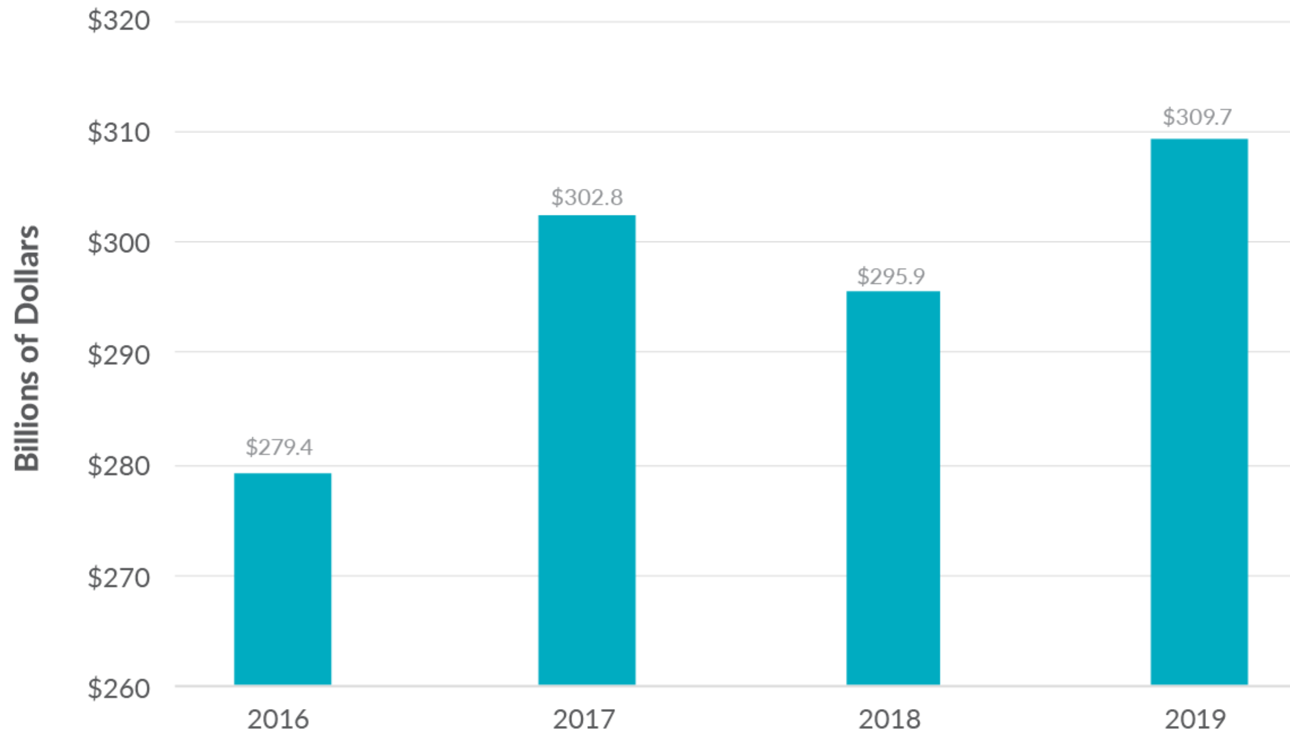
TCJA 2017's Potential Impact on Nonprofits and Charitable Giving: *§63*

- BUT…it is also important to note that individuals who make donations motivated by their belief in the work done by nonprofits, not the value of the charitable tax deduction subsidy, likely will give regardless of the reduction or loss of a tax deduction.
- Fundraising professionals did not anticipate a vast reduction in giving – most believe donors' dedication to the "cause" and "relationships" built over time will mitigate the potential reduction.

TCJA 2017's Potential Impact on Nonprofits and Charitable Giving: *§63*

- AND…one of the beneficial provisions in TCJA 2017 for charitable giving is the increase in total deduction an individual can utilize.
- Previous to TCJA 2017, contributions to public charities were deductible up to 50% of the taxpayer's adjusted gross income (computed without regard to net operating loss carrybacks), and contributions to certain private foundations, veteran's organizations, fraternal societies, and cemetery organizations were limited to 30% of the taxpayer's adjusted gross income (computed without regard to net operating loss carrybacks).
- After TCJA 2017, contributions to public charities are deductible up to 60% of the taxpayer's adjusted gross income – which is up 10%. The 30% cap remains in effect for certain private foundations, veteran's organizations, fraternal societies, and cemetery organizations. The 60% AGI limitation is effective for tax years beginning after Dec. 31, 2017 and before Jan. 1, 2026.

TCJA 2017: What Actually Happened to Giving?



TCJA 2017: What Actually Happened to Giving?

- Data indicate individual charitable donations jumped from $279 billion in 2016 to $302 billion in 2017, an 8 percent increase. (These figures are in nominal dollars.). Charitable contributions then dropped by 2 percent in 2018 to about $296 billion, indicating that some people may have pulled future donations back into 2017 to take advantage of the higher tax rates. Giving USA's data for corporations shows a similar pattern as the corporate tax rate was reduced from 35 percent in 2017 to 21 percent in 2018.
- What makes the data even more noteworthy is to see the increase in charitable contributions in 2019, even with the lower tax rates and the dramatically smaller number of taxpayers who itemize their deductions. **It indicates that people donate when they have more after-tax income and when the economy is strong, not when they are induced to do so because of the tax rate.**

TCJA 2017:
Estate and Gift Tax: *§ 2010*

- The estate and gift tax creates a strong incentive for the super-wealthy to donate their wealth to charity and form charitable trusts, rather than to subject their estate to tax on transfer.
- Doubling the estate and gift tax exclusion (from $5.5 million to $11 million) under TCJA 2017 will mean that far fewer wealthy taxpayers will be hit with a very hefty tax (40%) for leaving or gifting money to their children. And those who still have to pay such taxes will have much more of their transferred wealth exempted from being taxed.
- Many wealthy taxpayers who are subject to estate and gift taxes work with their tax planners to mitigate and minimize the taxes they would have to pay, and deductible charitable contributions are often a big part of their strategies. There is an entire industry of charitable tax planning (planned giving) that assist such taxpayers. **But the lesser the amount subject to tax, the less planning needs to be done**.

TCJA 2017:
Estate and Gift Tax: *§ 2010*

- When the estate tax was repealed in 2010, charitable bequests dropped by 37% from 2009 numbers, and then rose by 92% in the following year (2011) when the estate tax was reinstated. Keep the Estate Tax, The New York Times, (Oct. 25, 2017), (https://www.nytimes.com/2017/10/25/opinion/estate-tax.html?mtrref=www.google.com&gwh=96D91C08E66DDAA2691ADF0C19ABBE05&gwt=pay&assetType=opinion).
- The higher exclusion amount, which is expected to be about $11.2 million in 2018, is **expected to reduce charitable contributions by about $4 billion per year**.
- BUT, remember: The current higher exclusion amount is scheduled to sunset on December 31, 2025. This means that some estates not subject to tax under current rules may be subject to tax in the future.

The White House Tax Proposals' Likely Effect on Charitable Planning

No Crystal Ball – SORRY!

It is anyone's guess how charitable Americans will be in 2020 and 2021 as the economy goes through one of the biggest upheaval in decades. The record shows that giving tends to decline during each recession since 1980, although many of these economic events corresponded with changes in tax policy, such as 1981-1982, 1990-1991, and 2001-2002, so it would take more analysis to tease out cause and effect.

Best Planning Options Right Now

Best Planning Options

- The stock market is booming, so best options right now:
  - **Donating appreciated assets**:
    - Outright gifts of appreciated assets in place of cash represent a straightforward approach to planned giving.
    - By donating assets that have appreciated in value, donors may receive double benefits. They can have the full current value of the assets that they donate deducted from their taxes; and, they can avoid taxes that would have been due on capital gains had they sold the appreciated assets themselves and then donated the proceeds to charity.
  - **Charitable Remainder Trusts**:
    - A charitable remainder trust enables donors to generate income while contributing to their charitable organization. Donors and their loved ones can receive annual payments from a charitable remainder trust. When the term of the trust expires, the remaining assets go to specified charities.
    - Upon funding of a qualified charitable remainder trust, donors can take a partial deduction. The deduction amount is calculated on the remaining distribution of trust funds to the charitable organization. An additional benefit: proceeds from the sale of assets held by tax-exempt charitable remainder trusts are not subject to capital gains taxes.
- Some other options:
  - **Charitable Lead Trusts**: Like charitable remainder trusts, charitable lead trusts make annual payments. The difference is that the payments go to charities, and the remainder of the trust's assets at the end of the term goes to the donor's family members or other beneficiaries. Financial benefits for donors may come in the form of an estate tax deduction.
  - **Donor-advised fund**
  - **Private foundation**
- Consult a tax professional – the best option depends on 1-to-1 evaluation of all facts and circumstances.

Thank you!!!

Jennifer L. Urban, Esq.
Attorney for Nonprofits
West End Office Park
5353 Gamble Dr., Suite 320
St. Louis Park, MN 55416

t: 612-284-6441 | m: 612-418-0199
e: jenn@legalforgood.com
w: www.legalforgood.com