THE NEW YORK COMMUNITY TRUST

# PROFESSIONAL TAX & ESTATE PLANNING NOTES

**OCTOBER 2012**

## 3 Timing of Charitable Contributions

Many people wait until the end of the calendar year to begin thinking about charitable gifts. Timing of such gifts is important, not only to ensure a current charitable income tax deduction, but also because the value of the gift is determined on the date of the contribution. For assets subject to market fluctuation, the date of the gift can be crucial in determining the amount of the charitable deduction.

### General Rules

Under Code Section 170(a)(1)[1] and the Treasury Regulations thereunder, a deduction is permitted for the payment of a charitable contribution made within the taxable year. Generally, a contribution is made when the donor transfers control of the gift to The New York Community Trust or another charity. Typically, an unconditional gift is effected when it is physically delivered to the charity or its agent. (A pledge is not deductible until the gift is actually made, even if the pledge is legally enforceable.)

The form of the contribution and the method of delivery will determine the effective date of the contribution.

### Gifts Paid by Cash, Check, and Credit Card

A contribution of cash is effective when the donor delivers it to the charity. This is true even if the donor is an accrual basis taxpayer.

A charitable gift by check is effective when the check is delivered or mailed, as long as the check clears in due course, even though a donor theoretically could stop payment at any time until the check is presented for payment.



By Jane L. Wilton, general counsel, The New York Community Trust

1 All "Code Section" references are to sections of the Internal Revenue Code of 1986, as amended, and all "Treas. Reg. Section" references are regulations promulgated thereunder.

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**www.nycommunitytrust.org**

**ISSUES IN THIS SERIES**

Treas. Reg. Section 1.170A-1(b) refers to “mailing” a check or stock certificate, a reference commonly understood to refer to the U. S. Postal Service. In a different context, Code Section 7502, which provides that a tax return is properly filed when mailed, was amended in 1996 to authorize use of other widely available delivery services (such as Federal Express). The permitted use of alternative delivery services has not be extended to charitable contributions. We advise donors to use the U.S. Postal Service whenever the date of mailing a charitable contribution is important.

Many charities accept gifts made by credit card. The Internal Revenue Service has ruled that the gift occurs when the donor becomes indebted to the credit card issuer. If there is a lag between authorizing the credit card charge and the posting of the transaction by the credit card company, it appears that the posting date is the date of the gift.

## Gifts of Securities

As noted previously, a contribution of property is completed when the donor unconditionally relinquishes control of the asset to the charity or its agent. In the case of a contribution of stock or bonds, the gift is effective when the donor unconditionally gives up control of the securities and can no longer revoke the authorization to transfer them.

The deduction for publicly traded securities generally will be the average high and low trade on the day of the gift. In a volatile stock market, the value of contributed securities may vary significantly over a few days, or even in the course of a day. The donor’s charitable income tax deduction will reflect the value on the date the transfer is deemed to occur, not on the day she gave instructions to her broker.

When the stock certificate itself is delivered to the charity, the contribution of stock is effective on the date of mailing (or delivery if by some means other than US mail) of a properly endorsed stock certificate. Of course, it is not a good idea to mail an endorsed stock certificate because it is a negotiable instrument. Rather, the stock certificate and a fully executed stock power should be mailed in separate envelopes, by certified mail. The date of gift is the date both are mailed (or the date of the last mailing, if mailed at different times).

> If a gift of securities is time sensitive, delivery of the stock certificate and stock power directly to the charity or its agent generally is preferable.

If the donor delivers or mails the stock certificate to his or her own agent or to the issuing corporation or its transfer agent for transfer to the charity, the contribution of the stock is not effective until the stock is transferred on the corporation’s books. The mere delivery to the donor’s agent or to the issuing corporation with the order for the transfer does not effectuate the transfer, and the actual issuance of new certificates or the transfer on the corporation’s books can take weeks. If a gift of securities is time sensitive, delivery of the stock certificate and stock power directly to the charity or its agent generally is preferable.

The transfer of stock held in a brokerage account in so-called “street name” is effective when the stock is transferred on the issuing corporation’s books, or when the stock is delivered to the charity or its agent. If the donor and the charity use the same broker, the contribution is effective when the broker transfers the share from the donor’s account to the charity’s account. When there is little time to complete a gift, a donor’s broker may suggest establishing an account for the charity so that the broker can act as its agent. More typically, a broker will wire transfer the securities through the Depository Trust Corporation (DTC). We understand that the Internal Revenue Service regards the DTC as the donor’s agent, and that the gift is not complete until the shares are credited to the charity’s account. By their nature, mutual funds generally are transferred through a change of ownership on the issuer’s books. They cannot be transferred through the DTC system as the shareholder does not hold a certificate of ownership.

In *Morrison v. Commissioner*, 53 T.C.M. 251 (1987), the Tax Court ruled that when the donor and recipient charity maintained brokerage accounts with the same firm, a transfer of stock held in street name was effective at the time of the entry of the transaction on the brokerage house's books. The court noted that the date of the gift was not the earlier date when the donor directed the broker to transfer the stock (when the stock price was $5 a share higher), because the donor could have revoked her authorization at any time prior to the entry of the transaction.

Because delays in transferring stock often occur, especially with the involvement of third parties, such as banks, brokers or transfer agents, a donor who is contemplating a gift of stock in the current year would be well advised not to wait until the final days of December to make the gift.

## Other Assets

Contributions of real estate are deductible in the year in which the real estate is transferred under applicable state law. In New York, this occurs when the deed is delivered. In some states, there may be a requirement that the deed be recorded.

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## Contributions Subject to Conditions

If a contribution is conditioned on the performance of an act by the charity or some other event, the contribution is not effective until the act or event occurs, unless the possibility that the charitable transfer will not become effective is "so remote as to be negligible." For example, if a charity informs donors that their contributions will be refunded if all required funds are not raised for a specific project, and the possibility that the funds will not be raised is not so remote as to be negligible, the contribution is not effective until there is a final determination not to refund the contributions. See, Rev. Rul. 79-249, 1979-2 C.B. 104.

Similarly, if a contribution is made, but the charity's interest in the contribution could be defeated by a subsequent event, the contribution is not effective unless the possibility of the occurrence is so remote as to be negligible.  The regulations cite an example in which a donor transfers land to a city for as long as the city uses the land as a park and the city intends to use the property for a park, concluding that the contribution is effective when the land is transferred, provided the likelihood of the city using the land for other purposes is so remote as to be negligible.

## Accrual Basis Corporations

A corporation that reports its taxable income on the accrual basis may elect to treat a contribution as paid during the taxable year if its board of directors authorizes a contribution during the taxable year, and the corporation actually pays the contribution on or before the fifteenth day of the third month after the close of the taxable year.

## Conclusion

As the end of the year nears, donors commonly have questions about the timing of contributions to assure a current charitable deduction.  In a volatile market, the timing of gifts of securities can materially affect the amount of the contribution. These timing rules affect the deduction for contributions to a new or existing fund in The New York Community Trust; however, because grants from such a fund to other charitable organizations do not have tax consequences to the original donor, they may be made at any time.

*For further information, see:*
Code Section 170: Charitable contributions
Code Section 7501(f): Filing; treatment of private delivery service
Treas. Reg. Section 1.170A-1(b): Time of making contribution
Treas. Reg. Section 1.170A-1(e): Transfers subject to a condition
Treas. Reg. Section 25.2512-2: Value of securities for gift tax purposes
Revenue Ruling 54-135, 1954-1 C.B. 205
Revenue Ruling 78-38, 1978-1 C.B, 67
Revenue Ruling 79-249, 1979-2 C.B. 104
Morrison v. Commissioner, 53 T.C.M. 251 (1987)
Ferguson v. Commissioner, 108 T.C. 244 (1997), aff'd, 174 F.3d 997 (1999)

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## About The Trust

Since 1924, The New York Community Trust has served the needs of donors and nonprofits in the New York area. One of the oldest and largest community foundations, The Trust is an aggregate of funds created by individuals, families, and businesses to support the voluntary organizations that are crucial to a community's vitality.

Grants made from these funds—which now number more than 2,000—meet the needs of children, youth and families; support community development; improve the environment; promote health; assist people with special needs; and bolster education, arts, and human justice.

In addition to reviewing proposals from nonprofit agencies and responding to the grant suggestions of donors, The Trust is alert to emerging issues and develops strategies to deal with them, works collaboratively with other funders and with government, and gets out information to the public. Recent initiatives have included programs that address youth violence, managed health care, immigration, child abuse, and public school reform.

The Trust is governed by a 12-member Distribution Committee composed of respected community leaders. Its staff is recognized for its expertise in grantmaking, financial administration, and donor services. Local divisions are located on Long Island and in Westchester. In 2011, The Trust made grants of $137 million from $1.9 billion in assets.

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