By **Christopher R. Hoyt**

Tax-Free Transfers From IRAs To CRTs and CGAs

Checklist for qualified charitable

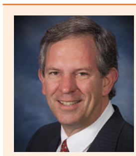
For over 15 years, individuals over the age of 70½ have been able to make tax-favored gifts directly from their individual retirement accounts outright to charities. These IRA owners are now eligible to make a once-in-a-lifetime deferred gift of up to $50,000 directly from an IRA to a charity for a charitable gift annuity (CGA) or to a charitable remainder trust (CRT).[1] The distribution will be excluded from the IRA owner's taxable income as a qualified charitable distribution (QCD).[2] For individuals age 73 or older, the QCD qualifies toward satisfying their required minimum distribution for that year.[3]

The CGA or the CRT must be funded exclusively with such IRA funds (no other assets can be commingled). The beneficiary of the CGA or CRT can only be the IRA owner and/or that individual's spouse, and the interest must be non-assignable. All distributions made from the CGA or CRT will be taxed as ordinary income, with no chance of capital gains treatment.

The $50,000 limit means that a CRT generally won't be economically viable. The annual administrative costs (for example, to file the tax return) would consume too much of the CRT's assets. One exception might exist for a married couple when each spouse contributes the maximum $50,000 amount to a single $100,000 CRT. Some charities are willing to administer a CRT for a minimum $100,000 contribution.

Except for this situation, as a practical matter, the immediate benefit of this law will be limited to CGAs. Many universities and other large charities offer such annuities, and many offer them for a minimum payment of just $10,000. CGAs pay a lower rate than commercial annuities because a portion of the acquisition cost is a tax-deductible charitable gift.[4] A CGA will be attractive to seniors who want to support a charity and who like the idea of receiving a steady stream of payments for the rest of their lives.

Things can change, of course. Many view this law as a foot in the door for future legislation that will expand the dollar limitation or permit IRA funds to be added to a CRT that's been funded with other types of assets.



Christopher R. Hoyt is a professor of law at University of Missouri (Kansas City) School of Law in Kansas City, Mo.

QCD Exclusion

An IRA owner over age 70½ can exclude from gross income the amount of a QCD made from an IRA:

(1) to a charity
  (i) as an *outright gift* or
  (ii) as a *deferred gift* for a CGA from the charity,
or
(2) to the trustee of an eligible CRT (either a charitable remainder annuity trust (CRAT) or a charitable remainder unitrust (CRUT)) as a *deferred gift*.

To be a QCD, the charitable gift needs to meet all of the requirements to qualify for a charitable income tax deduction under IRC Section 170, including the substantiation requirements.[5] For an outright gift, the entire IRA distribution would have to qualify for the deduction.[6] For a deferred gift, the value of the remainder interest would have to qualify for a charitable income tax deduction.[7]

If all of the requirements are met, then the entire IRA distribution (including the portion that's used for a lifetime annuity) qualifies as a QCD

and will be excluded from the taxpayer's income. The responsibility for reporting the favorable tax treatment falls on the IRA owner.The Form 1099-R that's issued by the IRA administrator will classify all IRA distributions as taxable distributions, including the distributions that were made to eligible charities. On the Form 1040 income tax return, the IRA owner first reports the total amount of the distribution and then excludes the QCD from taxable income by making the notation "QCD." When the QCD is excluded from taxable income, the IRA owner can't claim an itemized charitable income tax deduction for the contribution.[8] Usually, the charitable IRA exclusion from a QCD provides greater tax benefits than an itemized charitable deduction.[9]

QCD Checklist

All of the following requirements must be met to qualify for the QCD exclusion:

1. **The IRA owner must be over age 70½.**[10]
2. **Only IRAs are eligible to make QCDs.**[11] Internal Revenue Code Section 401(k) plans (401(k) plan), IRC Section 403(b) plans and *ongoing* Savings Incentive Match Plan for Employees (SIMPLE) IRAs or *ongoing* Simplified Employee Pension Plans (SEP) IRAs aren't eligible.[12]
3. **The distribution must be a *QCD* of otherwise fully taxable income.** To be a QCD, the IRA distribution must consist of fully taxable income.[13] Two situations could potentially cause a problem. The first is if the donor has an IRA that holds amounts that weren't deducted when the IRA owner made contributions to an IRA. The second is if the IRA owner was still working after age 70½ and made a tax-deductible contribution to an IRA.

   Does an IRA hold any nondeductible contributions? This issue is easy to spot. If a taxpayer ever makes a nondeductible contribution to an IRA, then that individual must attach IRS Form 8606 Nondeductible IRAs to their Form 1040 income tax return for the rest of their life (or until all IRAs have been depleted, whichever ends first). Such a contribution most commonly takes place when the IRA owner was covered by a plan at work (for example, a 401(k) plan) and made a contribution to an IRA when the taxpayer's income exceeded the threshold for the year.[14]

   If an individual ever made a nondeductible contribution to an IRA, there's a chance that part of the distribution won't be a QCD because it's a tax-free recovery of capital rather than taxable income. Fortunately, there's a special rule that reduces this risk. It provides that charitable distributions from IRAs that hold nondeducted contributions are deemed to come first from the taxable portion, thereby leaving the maximum amount of tax-free dollars in the IRA.[15] An example is in the endnote.[16] This favorable tax treatment also extends to individuals who have several IRAs and made nondeductible contributions to just a few of them. An example of this is in the endnote.[17] Although distributions from Roth IRAs are generally tax free (and thus ineligible for QCD treatment), if the Roth IRA owner hasn't had a Roth IRA for at least five years, there could be taxable investment income in the Roth IRA that's eligible for a QCD.[18]

   Assuming the taxpayer itemizes deductions and can get income tax benefits from charitable gifts, there are minimal tax problems for outright charitable gifts when all or a portion of an IRA distribution fails to qualify as a QCD.

   Did the IRA owner claim an income tax deduction for a contribution to an IRA after age 70½? There's an additional danger for individuals over age 70½ who deducted contributions to an IRA after that age. Distributions to charities and CRTs generally won't be excluded from taxable income until the full amount of those deducted contributions have been recovered though earlier charitable distributions.[19] An example appears in endnote 20 at the end of this article.[20]

Will it be a problem if a distribution that includes post-70½ IRA deductions is made to a charity in exchange for a CGA? An argument can be made that all assets held in such a CGA (including the portion that doesn't qualify for the charitable IRA exclusion) meet the definition of a QCD, so that the CGA was "funded exclusively by qualified charitable distributions."[21] But others could disagree. Until the Internal Revenue Service issues guidance that would permit a split-interest entity to receive post- age 70½ IRA deductions, it's best to avoid making any distributions whatsoever to a CGA or a CRT if the distribution would include amounts that the IRA owner deducted as a contribution to an IRA after age 70½.[22]

Most charities are eligible to receive QCDs, but there are a few that aren't eligible.

This danger only applies to individuals who deducted contributions to traditional IRAs under the rules that permit annual IRA contributions of up to $6,500 ($7,500 for individuals over age 49). It doesn't apply to individuals who contributed amounts after age 70½ to SEP IRAs or to SIMPLE IRAs or to Section 401, 403(b) or 457(b) plans that were later rolled over to IRAs.[23]

What's the problem, officer? If either nondeducted contributions or (perhaps) post-70½ deducted contributions are distributed from an IRA to a charity, that portion doesn't qualify as a QCD. For nondeducted IRA contributions, the donor is deemed to have received that amount free from income tax and can claim an itemized charitable income tax deduction for a charitable gift of that part of the payment. For individuals who deducted contributions to an IRA after age 70½, the charitable distribution is treated as taxable income and then the IRA owner can claim an offsetting itemized charitable income tax deduction for a charitable gift for that part of the payment.[24]

Assuming the taxpayer itemizes deductions and can get income tax benefits from charitable gifts, there are minimal tax problems for outright charitable gifts when all or a portion of an IRA distribution fails to qualify as a QCD. The IRA owner recognizes the taxable portion of an IRA distribution on their income tax return and then claims an offsetting itemized charitable income tax deduction under the rules of Section 170.[25]

By comparison, there could be very harsh tax consequences for a deferred gift to a CGA or a CRT if any portion of the IRA distribution fails to qualify as a QCD. Whereas an outright gift to a charity from an IRA can be partly a QCD and partly an itemized charitable deduction, a CGA or CRT must be funded "exclusively" with QCDs for the IRA distribution to be excluded from income.[26] This wouldn't be the case if the CRT or the CGA held an IRA distribution that included nondeducted contributions or (perhaps) post-70½ deducted contributions. A taxpayer might then have to report a taxable distribution of up to $50,000 but claim an offsetting charitable income tax deduction of as little as $5,000. And for the 90% of taxpayers who don't itemize deductions,[27] there would be no offsetting income tax deduction whatsoever.

Hopefully, the IRS will issue guidance that will avoid harsh tax consequences if an IRA distribution to a CGA or CRT includes nondeducted contributions or post-70½ deducted contributions. Administrative efficiency and tax compliance will increase if there are simple solutions for highly technical provisions such as these. Perhaps an IRA owner would be permitted to receive from the split-interest entity the nondeducted and the post-70½ amounts so that the split-interest entity retains only the otherwise taxable QCD amountsUntil there's administrative clarity, IRA owners who have nondeductible contributions in their IRAs, or who deducted contributions to an IRA after age 70½, should be cautious and verify that the entire distribution to a CRT or CGA will constitute a QCD.

4. **The distribution must be made *directly* to an *eligible* charity for either an outright gift or for a CGA deferred gift, or to a trustee of a CRAT or CRUT for a deferred gift.**[28] The check from the IRA must be issued payable to the charity. If a check is issued from the IRA payable to the IRA owner, who then endorses the check to the charity, it fails to qualify as a QCD and must be reported as a taxable distribution to the IRA owner.

   Many IRA administrators distribute "IRA checkbooks" to their clients who have IRAs. The IRA administrators report each check written by the IRA owner from such accounts as a distribution from the IRA on Form 1099-R. A check issued from an IRA checkbook to a charity should qualify as a QCD.[29] This is probably the most efficient way to make QCDs because IRA owners can simply refers to their checkbooks when preparing their income tax return for the year to identify the QCDs that were made each year.

   Most charities are eligible to receive QCDs, but there are a few that aren't eligible. The recipient organization of an outright gift must be described in Section 170(b)(1)(A).[30] That statute includes most public charities as well as private *operating* foundations. There are, however, two notable exceptions: a donor-advised fund (DAF) and a Section 509(a)(3) supporting organization (SO). Although contributions to DAFs and SOs qualify for public charity tax deductions, they're not eligible beneficiaries for the charitable IRA exclusion.[31] If an IRA distribution is made to a DAF or an SO, the donor must report the IRA distribution as taxable income and then claim an offsetting itemized charitable income tax deduction.[32]

   Grant-making private foundations (PFs) are generally excluded, except perhaps QCDs can be made to two types of grant-making PFs: (1) conduit PFs and donor-directed funds.[33] Private *operating* foundations, such as libraries and museums, that are endowed by one family, are eligible recipients.[34] Payments to other types of organizations that qualify for charitable income tax deductions but that aren't public charities—notably veterans organizations, certain fraternal organizations and cemetery companies—aren't eligible for the charitable exclusion for IRA distributions.[35]

   Although *outright* gifts to PFs, DAFs and SOs aren't eligible for QCD treatment, there's speculation in the charitable community over whether it may be possible to have a PF, DAF or SO be the remainder beneficiary of a deferred gift.[36] Until such an arrangement is specifically approved in an IRS notice or announcement, the conservative approach would be to avoid having CRTs or CGAs payable to PFs, DAFs or SOs.
5. **The maximum annual exclusion for QCDs is $100,000 per year** [37] **(though in the case of a QCD to a CRT or for a CGA, there's a maximum once-in-a-lifetime exclusion of just $50,000**[38]**).** Both the $100,000 and $50,000 thresholds are indexed for inflation.[39]
6. **The payment to the charity or to the CRT would have otherwise qualified for a charitable income tax deduction.**[40] The charitable deduction rules are governed by Section 170. Among the many requirements, there would need to be a qualified appraisal if the IRA transfer included illiquid assets valued at over $5,000.[41]

To be a QCD, the IRA charitable gift must have met all of the requirements to qualify for a charitable income tax deduction under Section 170, including the substantiation requirements.

7. **The IRA owner can't receive any financial benefit from the QCD that would have reduced a charitable income tax deduction**[42] **(except, in the case of deferred gifts, for the projected present value of the CGA payments or CRT payments).**[43] **Before filing the income tax return for the year, the IRA owner must receive a contemporary written acknowledgment (CWA) from the charity confirming that the IRA owner didn't receive any financial benefit**

for an outright gift (and for a deferred gift, stating the value of the projected annuity payments from a CGA).[44] To be a QCD, the IRA charitable gift must have met all of the requirements to qualify for a charitable income tax deduction under Section 170, including the substantiation requirements.[45] To claim an itemized charitable income tax deduction for any contribution of $250 or more, a donor must receive from the charity a CWA before the income tax return is filed.[46]

In the case of an IRA distribution to a charity, the absence of a CWA would trigger horrible income tax consequences. The IRA owner would have to report the IRA distribution that was given to the charity as fully taxable income (it failed to qualify as a QCD because of the missing CWA), and the IRA owner wouldn't be entitled to any offsetting itemized charitable income tax deduction whatsoever (again, because of the missing CWA). It's crucial that the CWA requirement be met for a charitable gift from an IRA.

All distributions from a CRT or a CGA shall be treated as ordinary income in the hands of the beneficiary.

To be a CWA, the charity's gift acknowledgment must include: (1) the amount of cash and a description (but not necessarily the value) of any property other than cash that was contributed; (2) whether the donee organization provided any goods or services in consideration, in whole or in part, for the property (if none, state "no goods or services"), and (3) if any goods or services were provided to the donor, a description and good faith estimate of the value of those goods or services.[47] With a QCD for a CGA, the charity should state the value of the annuity that the donor is receiving.

The other requirement is that the CWA must be "contemporaneous." The donor must receive the acknowledgment on or before the earlier of: (1) the date on which the taxpayer files a return for the taxable year in which the contribution was made, or (2) the due date (including extensions) for filing such return.[48] The IRS and the Tax Court have taken a strict position on this requirement. They won't permit an acknowledgment that was received after the income tax return was filed to correct mistakes in an earlier acknowledgment or to make up for the absence of a CWA before the tax return was filed.[49]

Deferred Gifts

The following additional requirements apply to *deferred* gifts for CGAs or to CRTs (split-interest entities):

1. **An IRA owner can only use the QCD exclusion for a gift to a split-interest entity in one taxable year in their lifetime.**[50]
2. **In that year, the IRA owner's maximum QCD exclusion for a gift to a split-interest entity is $50,000.**[51]
3. **The CGA or CRT must be funded exclusively with otherwise taxable QCDs of the IRA owner (though, perhaps, QCDs from the IRA owner's spouse are also permitted to be made to the same CGA or CRT).**

   Because an eligible split-interest entity can last for the joint lives of a married couple, it should be possible for each spouse to separately contribute to that same CGA or CRT from their respective IRAs.[52] Such a split-interest entity would then be funded exclusively with QCDs made by the beneficiaries of that CGA or CRT.

   Please see the text above concerning the danger of commingling IRA distributions with other assets or when an IRA owner has either made nondeductible contributions to an IRA or has made deductible contributions to an IRA after age 70½.
4. **No individual may hold an income interest in the split-interest entity other than the IRA owner, the spouse of such individual or both.**[53]

   The limitation regarding married couples is

more restrictive than the general rule that applies to CGAs. Typically, a CGA can be paid over the lives of any two individuals.[54] Thus, a traditional CGA could be issued for the lives of an unmarried couple. But if a CGA for unmarried individuals were funded with an IRA distribution, it wouldn't qualify for the QCD exclusion from income. In that case, the IRA owner might have to report a taxable IRA distribution of up to $50,000, but only be able to claim an offsetting itemized charitable income tax deduction of as little as $5,000. The same outcome would apply to a comparable transfer to a CRT that has multiple unmarried beneficiaries.

5. **The income interest in the split-interest entity must be nonassignable.**[55] Sometimes CRT beneficiaries and CGA annuitants don't need the payments, and they want to support the sponsoring charity. Usually, CRT beneficiaries can donate their income interest to the charity, and then under the doctrine of merger (the charity has both the income interest and the remainder interest), the CRT can terminate early. Similarly, many CGA agreements permit the annuitant to terminate the payments by assigning the annuity to the sponsoring charity.

   This could be a problem for a CRT or a CGA funded with IRA assets, because the statute requires that the income interest in the split-interest entity must be nonassignable. In theory, tax policy should permit such an early annuity termination because it produces the equivalent effect of an outright QCD from the IRA, which has been permitted for over 15 years. IRS guidance should address whether charitable assignments will be permitted, because many CGA documents have been drafted to permit such charitable assignments.

6. **A CGA must commence fixed payments of at least 5% not later than one year from the date of funding.**[56] Most charities use the rates recommended by the American Council on Gift Annuities (ACGA), which are publicly available.[57] In the spring of 2023, there was no problem meeting the 5% requirements for a CGA over a single life.[58] Similarly, there was no problem meeting this requirement for a married couple over their joint lives, unless the younger spouse was age 66 or younger (the IRA owner must be at least age 70½ to be able to qualify for a QCD). However, as recently as December 2022, the CGA recommended rate for two 72-year old individuals would have failed the 5% requirement (it was 4.9%). Thus, if interest rates fall back to past levels and the ACGA changes its recommended rates, it could be harder for a married couple to meet the 5% requirement. The 5% requirement should be verified for married individuals whenever the younger spouse (who might be the IRA owner) is under age 75.

   The requirement that payments must commence not later than one year from the date of funding eliminates a deferred gift annuity as an option.

Split-Interest Entity Distributions

All distributions from a CRT or a CGA shall be treated as ordinary income in the hands of the beneficiary; there's no possibility of long-term capital gains or tax-free return of an investment in the contract of an annuity.[59]

> Charities should tailor their CGA agreements to meet the QCD requirements of Section 408(d)(8) for gifts from IRAs.

Because such a split-interest entity must be funded 100% with taxable IRA dollars, and because IRA distributions are exempt from the IRC Section 1411 3.8% net investment income tax (NIIT), will distributions received from such a QCD-funded CGA or CRT also qualify for exemption from the Section 1411 3.8% NIIT?

The NIIT is a 3.8% surtax on the net investment income of single taxpayers with adjusted gross income over $200,000. The threshold is just $250,000 for a married couple filing a joint return (not $400,000), which makes married couples much more

likely to be subject to the tax.[60]

Net investment income consists of interest, dividends, rents and annuities, which includes annuity income received from a traditional CGA.[61] By comparison, IRA distributions are exempt from the 3.8% surtax.[62] An unresolved issue is whether an individual who moves IRA assets via a QCD into a split-interest entity that holds nothing but IRA dollars will be able to avoid the 3.8% NIIT surtax on the distributions from that split-interest entity. With a CRT, the trust taxation rules generally provide that the distribution will keep its character as an IRA distribution. An argument can be made that the same rule should be extend to IRA-funded CGAs, because IRC Section 408(d)(8)(F) requires the CGA be funded "exclusively" by taxable QCDs. Hopefully IRS guidance will resolve this question.

Final Thoughts

A CGA is a great option for seniors who want to support a charity and who also want to receive a steady and reliable income stream for the rest of their lives. A CRT generally won't be an economically viable option for QCDs, unless future legislation increases the $50,000 limit or permits IRA distributions to be added to a CRUT that holds other assets.

Consider adding "savings" clauses to correct for mistakes.

Charities should tailor their CGA agreements to meet the QCD requirements of Section 408(d)(8) for gifts from IRAs. They shouldn't use a standard off-the-shelf CGA or CRT agreement, because such agreements might contain provisions that would disqualify a QCD (such as permitting an assignment of the annuity). An IRA-friendly CGA or CRT agreement should prohibit assignments of income interests, require that all donations be QCDs totaling $50,000 or less (indexed for inflation), which must be received in a single year, restrict payments to one life or the lives of a married couple (rather than the lives of any two individuals) and require CGAs to make fixed payments of 5% or greater not later than one year from the date of funding. Because future legislative changes are likely, agreements should permit modifications for changing rules (for example, larger dollar thresholds, permissible assignments, etc.).

Consider adding "savings" clauses to correct for mistakes. Mistakes will happen, and innocent donors shouldn't be unfairly punished. The staff at a charity might mistakenly use a standard CGA form that permits an assignment (an assignment is prohibited for an IRA gift). Perhaps the IRA check to the charity is in an amount over $50,000. Perhaps part of an IRA distribution includes a tax-free return of a nondeductible contribution, which wouldn't be a QCD. If it's determined that part of an IRA distribution didn't qualify as a QCD, the CGA or CRT document could provide that the amount must be distributed to the IRA owner to bring the split-interest entity into full compliance and thereby preserve the IRA owner's transfer to the split-interest entity as a QCD. Hopefully the IRS will publicly disclose a policy that permits corrections of mistakes. It could be similar to recent IRS revenue procedures that protect taxpayers from other common innocent mistakes, such as missing the deadline for a 60-day IRA rollover[63] or triggering an inadvertent termination of an S corporation election.[64]

With properly drafted agreements, and with helpful guidance from the IRS and Treasury, this legislation permits senior citizens to use some of their IRA assets in a tax-favored manor to support their favorite charities while at the same time providing them with a reliable income stream that will last them for the rest of their lives.

Endnotes

1. Internal Revenue Code Section 408(d)(8)(F), added by Section 307 of the Setting Every Community Up for Retirement Enhancement 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023, Public Law 117-328 (Dec. 29, 2022).
2. IRC Section 408(d)(8)(A).
3. Internal Revenue Service Notice 2007-7, Q&A 42.
4. IRC Sections 501(m)(5) and 514(c)(5). To avoid triggering debt-financed unrelated business income, Section 514(c)(5) imposes the following requirements on charitable gift annuities (CGAs):

   (A) at the time of the exchange, the value of the annuity is less

than 90% of the value of the property received in the exchange, (B) is payable over the life of one individual in being at the time the annuity is issued, or over the lives of two individuals in being at such time, and (C) is payable under a contract that doesn't (1) guarantee a minimum amount of payments or specify a maximum amount of payments, and (2) provide for any adjustment of the amount of the annuity payments by reference to the income received from the transferred property or any other property.

5. IRS Notice 2007-7, Q&A 39.
6. Section 408(d)(8)(C).
7. Section 408(d)(8)(F)(iii).
8. *Supra* note 5.
9. By reducing gross income, a senior might be able to reduce Medicare B and Medicare D premiums or keep a larger portion of Social Security benefits exempt from income tax.
10. Even though the age at which required minimum distributions must begin was increased to 73 (IRC Section 401(a)(9)(C)), the age to be able to make a qualified charitable distribution (QCD) remains 70½. Section 408(d)(8)(B)(ii).
11. The QCD provisions are in Section 408(d)(8). Section 408 governs individual retirement accounts, whereas other types of qualified retirement plans are governed by IRC Sections 401, 403 or 457.
12. Whereas distributions from IRAs that were once part of a Simplified Employee Pension (SEP) plan or a Savings Incentive Match Plan for Employees (SIMPLE) plan qualify for the charitable exclusion, grants made from either an *ongoing* SEP IRA or an *ongoing* SIMPLE IRA don't. Employers of small companies often establish an SEP IRA plan or a SIMPLE IRA plan as the company's only retirement plan. The employer makes contributions to each employee's IRA rather than to the usual arrangement of a single retirement trust maintained by the employer. A SEP IRA or a SIMPLE IRA is an *ongoing* arrangement if a contribution was made to it during the year. Thus, a retired individual who has an SEP IRA or a SIMPLE IRA and received employer contributions during their working career can make charitable distributions from that IRA if no employer contributions were deposited in the same year as the charitable gift. IRS Notice 2007-7, Q&A 36.
13. Section 408(d)(8)(B) (last sentence): "A distribution shall be treated as a qualified charitable distribution only to the extent that the distribution would be includible in gross income without regard to subparagraph (A)."
14. In 2023, the IRA contribution deduction begins to phase out with modified adjusted gross income of $68,000 (single or head of household), $109,000 (married filing jointly) and just $10,000 (married filing separately). IRS Tax Tip 2022-178 (Nov. 21, 2022).
15. Section 408(d)(8)(D).
16. Example: An IRA owner has a traditional IRA with a balance of $100,000, consisting of $20,000 of nondeductible contributions and $80,000 of deductible contributions and accumulated earnings. Typically, 80% of a distribution to the IRA owner would be taxable and 20% would be a tax-free return of nondeductible contributions. However, if there's a distribution to a charity that qualifies as a QCD, then the distribution is deemed to come first from the taxable portion. Thus, if the IRA trustee makes an $80,000 distribution to a charity, the entire $80,000 is deemed to come from the taxable portion of the IRA and is a QCD. No amount is included in the IRA owner's taxable income. The $20,000 that remains in the IRA is treated as entirely nondeductible contributions. Modified from Example 2 of *Technical Explanation Of H.R. 4, The Pension Protection Act of 2006*, prepared by the Staff of the Joint Committee On Taxation Aug. 3, 2006 (JCX-38-06), at p. 268.
17. Example: An IRA owner has an IRA at Bank "A" with a balance of $50,000 and another IRA at Mutual Fund "B," which also has a balance of $50,000. The IRA owner made nondeductible contributions of $20,000 only to the IRA at Bank "A." The entire $50,000 balance at Bank "A" is transferred to Charity XYZ in exchange for a CGA. Under the special computation of Section 408(d)(8)(D), all IRAs are treated as a single IRA. Thus, the entire $50,000 distribution from the IRA at Bank "A" qualifies as a QCD. The $50,000 IRA at Mutual Fund "B" is now deemed to hold the $20,000 of nondeducted contributions. Section 408(d)(8)(D). The computation is reported on IRS Form 8606 Nondeductible IRAs.
18. IRS Notice 2007-7, Q&A 36.
19. Section 408(d)(8)(A) (last sentence).
20. For example, assume that an IRA holds $100,000 of assets, of which $6,000 consists of contributions that the IRA owner made and deducted while working after age 70½. If $10,000 is transferred from the IRA as an outright gift to a charity, the first $6,000 will be taxable income to the IRA owner, and only the remaining $4,000 will qualify as a QCD that's excluded from income. The IRA owner can then claim an itemized charitable income tax deduction of $6,000 under the usual rules that apply to charitable gifts under IRC Section 170.
21. Section 408(d)(8)(B) provides that a distribution is a QCD "only to the extent that the distribution *would be* includible in gross income without regard to subparagraph (A)." (Emphasis added.) But for Subparagraph A, a distribution that includes post-70½ IRA contribution deductions is taxable. In fact, Subparagraph (A) provides that a distribution to a charity that include post-70½ IRA contribution deductions *is* includible in the IRA owner's taxable income. Subparagraph (A) states that the "amount of distributions not includible in gross income . . . shall be reduced (but not below zero) by . . . the aggregate amount of deductions allowed to the taxpayer under section 219. . . . "
22. *Ibid.* Every IRA charitable distribution will include post 70½ IRA deduction amounts until the full amount of those deducted amounts

have been recovered though earlier charitable distributions.

23. Section 408(d)(8)(A) reduces the QCD exclusion by "the aggregate amount of deductions allowed to the taxpayer under *section 219*" after age $70\frac{1}{2}$. (Emphasis added.) Section 219 contains the annual $6,500 limit that applies to contributions to traditional IRAs. By comparison, contributions to SEP-IRAs, SIMPLE-IRAs, Section 401 employer plans, Section 403(b) tax-sheltered annuities and Section 457(b) plans are claimed under statutes other than Section 219.
24. IRS Notice 2007-7, Q&A 43.
25. *Ibid.*
26. Section 408(d)(8)(F)(i).
27. Taxpayers claimed itemized deductions on only 9.5% of all returns filed for the year 2020. IRS Publication 1304 (Rev. 11-2022), at p.21. The charitable deduction is an itemized deduction that doesn't produce a tax benefit on the over 90% of tax returns that use the standard deduction.
28. Section 408(d)(8)(B)(ii).
29. IRS Notice 2007-7, Q&A 41 states*:*

    If a check from an IRA is made payable to a charitable organization described in IRC Section 408(d)(8) and delivered by the IRA owner to the charitable organization, the payment to the charitable organization will be considered a direct payment by the IRA trustee to the charitable organization for purposes of IRC Section 408(d)(8)(B)(i)."

30. Section 408(d)(8)(B)(i).
31. *Ibid.*
32. *Supra* note 24.
33. A conduit private foundation (PF) is typically a grant-making foundation that in any given year makes an election to distribute by March 15 (oversimplified) 100% of the contributions that it received that year. A donor-directed fund allows a donor to control, not just advise, the recipient of the fund's income. Conduit PFs are described in Section 170(b)(1)(A) and should therefore be eligible. Specifically, they're described in Section 170(b)(1)(A)(vii) and Section 170(b)(1)(F)(ii). Donor-directed funds are described in Section 170(b)(1)(A)(vii) and Section 170(b)(1)(F)(iii).
34. Private operating foundations are described in Section 170(b)(1)(A)(vii) via Section 170(b)(1)(F)(i).
35. Charities are one of five categories of organization that are eligible to receive contributions that qualify for charitable income tax deductions: (1) governments, (2) U.S. charities, (3) veterans organizations, (4) certain fraternal organizations, and (5) cemetery companies. Section 170(c). By comparison, only organizations described in Section 170(b)(1)(A) (generally public charities) are eligible for the charitable IRA exclusion. IRS Notice 2007-7, Q&A 35.
36. For an outright gift, Section 408(d)(8)(B)(i) requires that the recipient charity be described in Section 170(b)(1)(A) (that is, a public charity, which eliminates grant-making PFs). Subparagraph (B)(i) also specifically excludes donor-advised funds (DAFs) and supporting organizations (SOs) as beneficiaries. By comparison, subparagraph (F)(i) provides that *any* IRA distribution to a split-interest entity meets the requirements of subparagraph (B)(i). There's no requirement in paragraph (F) that the charitable beneficiary of a split-interest entity must exclude a PF, DAF or SO. Sections 408(d)(8)(F)(i) and (ii),
37. Section 408(d)(8)(A).
38. Section 408(d)(8)(F)(ii).
39. Section 408(d)(8)(G).
40. Sections 408(d)(8)(C) and (F)(iii).
41. Section 170(f)(11)(C).
42. Section 408(d)(8)(C).
43. Section 408(d)(8)(F)(iii).
44. *See supra* note 5, which states:

    qualified charitable distributions must still satisfy the requirements to be deductible charitable contributions under IRC Section 170 (other than the percentage limits of Section 170(b)), including the substantiation requirements under Section 170(f)(8)."

45. *Ibid.*
46. Section 170(f)(8).
47. Section 170(f)(8)(B).
48. Section 170(f)(8)(C).
49. *Durden v. Commissioner*, T.C. Memo. 2012-140 (2012), *Gomez v. Comm'r*; T.C. Summ. Op. 2008-93, *Albrecht v. Comm'r*, T.C. Memo. 2022-53, *Addis v. Comm'r*, 374 F.3d 881 (9th Cir. 2004).
50. Section 408(d)(8)(F)(i)(I).
51. Section 408(d)(8)(F)(ii).
52. Section 408(d)(8)(F)(iv)(I) states: "No person holds an income interest in the split-interest entity other than the individual for whose benefit such account is maintained, the spouse of such individual, or both . . ."
53. *Ibid.* The words "such account" refers to "an individual retirement account" described in Section 408(d)(8)(F)(i).
54. IRC Section 514(c)(5)(B).
55. Section 408(d)(8)(F)(iv)(II).
56. Section 408(d)(8)(F)(ii)(III).
57. Current recommended gift annuity rates for one life and for two lives are available at *www.acga-web.org/current-gift-annuity-rates*.
58. The recommended rate at age $70\frac{1}{2}$ was 5.9%, and the rate increased with age.
59. Section 408(d)(8)(F)(v).
60. On 2020 income tax returns, over 14% of married couples reported income over $200,000 (IRS statistics don't report the number of

returns with income over $250,000) compared to only 1.4% of single taxpayers. Nearly 5.8 million returns paid the net investment income tax in 2020, with married couples much more likely to be subject to the tax, *www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income.*

61. IRC Section 1411(c)(1)(A)(i).
62. Section 1411(c)(5) , Treasury Regulations Section 1.1411-8.
63. Revenue Procedure 2003-16.
64. Rev. Proc. 2022-19.