

COMING TO GRIPS WITH THE NEW CHARITABLE GIFT SUBSTANTIATION REGS

In summer 2018, the IRS issued final regulations on charitable gift substantiation (the "new Regs"). The new Regs are generally effective as of July 30, 2018, although as discussed hereinbelow, there is a delayed effective date for new Reg. section 1.170A-17, dealing with qualified appraisals and appraisers. The document that promulgates the new Regs is T.D. 9836.

The new Regs are not based on recent changes to the Internal Revenue Code (the "Code"). The new Regs deal with the fact that the Code has been amended piecemeal in gift substantiation matters since 1993.

Reference is made throughout this article to the old Regs. This reference applies to Reg. section 1.170A-13, which contains rules applicable to qualified appraisals and other gift substantiation issues. It is important to understand that the old Regs continue to apply except to the extent the old Regs are replaced by the new Regs. For example, old Reg. section 1.170A-13(c), to the extent it deals with the definitions of "qualified appraisal" and "qualified appraiser", is replaced by new Reg. section 1.170A-17. But old Reg. section 1.170A-13(f), dealing with contemporaneous written acknowledgments for gifts of \$250 or more, remains in effect.

One can be sure, based on numerous Tax Court cases, that IRS audit agents will attempt to use the new Regs to disallow many claimed federal income tax charitable deductions.

This article aims at providing useful information on both the new Regs and the old Regs, principally as to four-figure and larger gifts, given my professional focus on relatively large "planned gifts".

AN OVERVIEW

An individual can make a perfectly good and valuable charitable contribution and yet have his or her federal income tax charitable deduction for the gift disallowed because he or she has not properly substantiated the gift.

Charitable gift substantiation involves three main activities on the donor's part:

1. obtaining a contemporaneous written acknowledgment
(a particular form of gift receipt)
2. maintaining reliable records
3. obtaining a qualified appraisal

The case law in this arena deals largely with contemporaneous written acknowledgments and qualified appraisals. The statutory law on contemporaneous written acknowledgments is found in Code section 170(f)(8). Statutory recordkeeping requirements for all cash contributions are found

in Code section 170(f)(17). The new Regs harmonize these two Code sections, which came into the tax law at different times.

THE NEED FOR A CONTEMPORANEOUS WRITTEN ACKNOWLEDGMENT

A contemporaneous written acknowledgment is needed to substantiate any charitable contribution of \$250 or more as to which the donor claims a federal income tax charitable deduction. 1/ Lacking a contemporaneous written acknowledgment for such a contribution, the donor can find his or her entire federal income tax charitable deduction for the gift disallowed.

The acknowledgment must include:

- o a statement of the amount of any cash contributed
- o a description (but not the value) of any non-cash property donated
- o a statement as to whether the donee organization provided any goods or services in consideration of the cash or other property transferred by the donor
- o a description and good faith estimate of the fair market value of any such goods or services provided by the donee -- or if the goods or services consist solely of intangible religious benefits, a statement to that effect 2/

In addition, either the acknowledgment must state the date of contribution for a cash contribution or the donor must have a

bank record showing the date of such contribution. 3/ "Bank record" includes a credit card statement. 4/

Note that out-of-pocket expenditures incurred in performing services for a charity are considered cash contributions to the charity and need to be substantiated in a particular way. 5/

Also note that the contemporaneous written acknowledgment for a charitable gift annuity must state whether the donee furnished to the donor any goods or services in addition to the annuity (Reg. section 1.170A-f(16)).

A written acknowledgment is "contemporaneous" if the donor obtains it before whichever is earlier: the date the donor files his or her original (not amended) federal income tax return for the year of the gift or the due date of the return. 6/

The new Regs do not expressly require that a contemporaneous written acknowledgment for a non-cash contribution contain a statement as to the date of contribution.

The old Regs (Reg. section 1.170A-13(b)(1)), however, require a donor of publicly traded stock or other non-cash property as to which a qualified appraisal is not required to obtain from the donee a receipt showing the "date and location of the contribution". The conclusion I reach is that the old Regs continue to apply as to the date-of-contribution statement for non-cash contributions.

THE CRIMI CASE

The Tax Court issued an important Memorandum Opinion on gift substantiation in Crimi v. Comm'r, T.C. Memo 2013-51 (Feb. 14, 2013). The opinion deals with both [a] contemporaneous written acknowledgment issues, and [b] qualified appraisal issues. The SUMMARY that precedes the new Regs in T.D. 9836 discusses Crimi.

On June 30, 2004, Crimi transferred undeveloped land to a county in exchange for a cash payment of \$1,550,000. At that time, Crimi had a 2000 appraisal for the land, which stated an appraised value of \$2,950,000. Crimi reported the transfer for federal income tax purposes as a bargain sale -- part sale, part gift. 7/

This case involves two main questions: [1] Did Crimi have a contemporaneous written acknowledgment? [2] Was Crimi's appraisal any good for federal tax purposes? This article addresses the appraisal question hereinbelow.

The first question arose because:

- o Crimi had a letter that he claimed was sufficient as an acknowledgment which was prepared by and sent to him by a Mr. Lewis, who was not a county employee but who purported to act on behalf of the county.
- o The letter was dated August 16, 2004.
- o The letter stated the consideration paid to Crimi but did not state whether Crimi was furnished any

additional consideration.

- o The letter stated that the transferred property was "Block 703, Lot 12" whereas in fact the transferred property was "Block 702, Lot 12".

The Tax Court found that the letter did satisfy the definition of a contemporaneous written acknowledgment under Code section 170(f)(8)(B).

The Tax Court began by noting that the doctrine of substantial compliance does not apply to the requirements of section 170(f)(8)(B), because these requirements are not merely procedural. 8/

The Tax Court, however, found that:

- o The letter was "contemporaneous".
- o Mr. Lewis, who prepared the letter on county letterhead stationery, had both actual authority and apparent authority as the county's agent to prepare the letter.
- o It was unnecessary for the letter to state whether Crimi received any consideration in addition to the \$1,550,000 cash payment he received. If the letter had stated that Crimi received "other good and valuable consideration", the letter would have had to describe such consideration. 9/
- o The misstatement in the letter as to "Block 703"

was a harmless typographical error. It was harmless because both the 2000 appraisal and the Form 8283 attached to Crimi's 2004 federal income tax return correctly stated "Block 702", meaning that the IRS could easily see that the misstatement was a typographical error. Thus the letter met the description requirement of Code section 170(f)(8)(B)(i). 10/

Although the Crimi case was decided five years before the new Regs were issued, it's consistent with the new Regs and provides valuable insight into application of the contemporaneous written acknowledgment requirements.

THE NEW QUALIFIED APPRAISAL RULES

The new qualified appraisal regs are located in Regulation section 1.170A-17. These new regs maintain many of the rules that have tripped up appraisers over the years and introduce some subtle new twists. To give appraisers a chance to come to grips with these new regs, IRS has made the regs effective January 1, 2019. 11/

To substantiate a claimed charitable contribution of more than \$5,000 of non-cash property, other than publicly traded securities and certain other assets, the donor must obtain a qualified appraisal. 12/ Failure to obtain such an appraisal

can lead to disallowance of any charitable deduction for the gift. Failure is the rule, not the exception, in my experience.

In order for an appraisal to be a qualified appraisal, it has to be prepared by a qualified appraiser; has to be prepared within a certain time frame; and has to contain certain statements, many of which are not part of an ordinary appraisal. In addition, the appraisal has to conform to the substance and principles of the Uniform Standards of Professional Appraisal Practice (USPAP).

WHO IS A QUALIFIED APPRAISER?

The new Regs say a lot about who is a qualified appraiser. A qualified appraiser is

an individual with verifiable education and experience in valuing the type of property for which the appraisal is performed. 13/

The new Regs proceed at length to describe what is meant by "verifiable education and experience" and "the type of property".

An appraiser has the required education and experience if he or she --

[a] has successfully completed a college-level or professional course in valuing the type of property and has at least two years experience in valuing such property; or

[b] has earned a recognized appraiser designation
for the type of property. 14/

The coursework in [a] must be obtained from

***an educational organization, generally recognized
professional trade or appraiser organization, or
employer educational program. 15/***

The education and experience are "verifiable", according to
Reg. section 1.170A-17(b)(4), if [a] the appraiser specifies in
the appraisal his or her education and experience in valuing the
type of property involved, and [b] the appraiser declares in the
appraisal that because of such education and experience, he or
she is qualified to appraise the type of property.

There is a definition for "the type of property". The
definition is:

***The type of property means the category of property
customary in the appraisal field for an appraiser to
value. 16/***

The key word on which to focus in this definition is
"customary". If it is customary for appraisers in a certain
appraisal field to appraise X property, it is not necessary for
an appraiser in such field to show actual experience in valuing
X property. I suspect there will be litigation as to what's
customary in a given appraisal field.

EXAMPLES AND OBSERVATIONS

A personal property appraiser is deemed to satisfy the coursework requirement for appraising widgets if [a] the appraiser has successfully completed the coursework necessary to become a personal property appraiser; [b] the coursework did not include a course on appraising widgets because there were no such courses; but [c] personal property appraisers customarily appraise widgets. 17/

An antiques appraiser is deemed to satisfy the experience requirement for appraising antique widgets if [a] antiques appraisers customarily appraise antique widgets, and [b] the appraiser has appraised antiques for at least two years. 18/

Note that in the example just given, the fact that antiques appraisers customarily appraise antique widgets satisfies the actual experience in appraising antique widgets requirement on the part of the appraiser. If antiques appraisers did not customarily appraise antique widgets, the appraiser would have to have at least two years of actual experience in appraising antique widgets. 19/

The level of detail in Reg. section 1.170A-17 on the new requirements for being a qualified appraiser for a particular type of property tells me that the requirements are not merely procedural; they're substantive. If my thinking is correct, the doctrine of substantial compliance does not apply to these

requirements, which means the burden of compliance on the donor is heavy.

A final note for this section of the article: Certain parties cannot, by definition, be qualified appraisers. The list of excluded parties is found in Reg. section 1.170A-17(b)(5). This list essentially contains no change from prior Regulations.

WHAT ARE THE CONTENT REQUIREMENTS FOR A QUALIFIED APPRAISAL?

The content requirements for a qualified appraisal are mostly unchanged from prior law. I'm going to focus here on [a] new requirements, and on [b] the "old" requirements that have caused the most problems.

The new Regs contain three new provisions regarding the contributed property:

- [1] The appraisal must state the physical condition of the property if the property is real property or tangible personal property. 20/
- [2] The appraisal must state the valuation effective date (defined hereinbelow). 21/
- [3] The appraisal must state the fair market value (FMV) of the contributed property on (i.e., as of) the valuation effective date. 22/

The valuation effective date is a new concept. It is [a] the date of gift if the appraisal report date is after the date

of gift; and [b] if the appraisal report date is before the date of gift, it's a date no earlier than 60 days before the date of gift and no later than the date of gift. 23/

The appraisal report date, also a new concept, is the date the appraiser signs the appraisal. 24/ It is not the date the appraiser inspected the subject property.

The old Regs require the appraiser to state the FMV as of the date of gift or as of the expected date of gift. 25/ In my experience, appraisers routinely have failed to do this. The approach of the new Regs, which is to state the FMV as of the valuation effective date, is likely I believe to continue to cause problems for appraisers.

In any event, both the old and the new Regs require that the appraiser state the date of gift or the expected date of gift. 26/ In 33 years of dealing with the qualified appraisal rules, I've seen exactly one appraisal (an art appraisal) that contains such a statement.

Other required content statements include:

- o the terms of any agreement or understanding between the donor and the donee that relate to the use, sale, or other disposition of the donated property; 27/
- o a statement that the appraisal was prepared for (federal) income tax purposes; 28/
- o the method used to determine FMV; 29/

- o the specific basis for the valuation -- e.g., comparable sales or statistical sampling; 30/
- o information about the appraiser:
 - name, address, and tax ID number
 - qualifications to value the type of property (education and experience)
 - if the appraiser is employed or engaged by another (partnership, corporation, individual) that party's name, address, and tax ID number; 31/
- o the appraiser's signature and the date signed by the appraiser (appraisal report date); 32/ and
- o this declaration by the appraiser:

"I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under [section 6695A](#) of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. section 330(c)." 33/

OBSERVATIONS ABOUT THE CONTENT REQUIREMENTS

In my experience, appraisers always have tripped over the date of gift/expected date of gift requirement. It isn't taught in appraisal courses.

Appraisers also often miss the appraised-for-federal-income-tax-purposes requirement. The appraiser will state something like, "This appraisal is prepared in connection with a charitable gift." That sort of statement misses the mark.

The new requirements as to valuation effective date and appraisal report date will trip up some appraisers. These requirements will not match with their experience and training.

The required appraiser declaration will scare some appraisers, who will take the position, "Penalties? Get me out of here." I've seen this happen under the old Regs.

The new regs as well as the old regs assume the appraiser will do what I as a tax lawyer have tried to do, which is grasp fully the qualified appraisal rules. My experience teaches me this assumption is misplaced. Appraisers are experts in appraising, not the tax law.

The Tax Court has said that the content requirements for qualified appraisals come within the substantial compliance doctrine. 34/ Yet recent Tax Court cases on qualified appraisal content flaws appear very much to require strict compliance with the content requirements. 35/ Appraisers as a group have not

come even close to the Tax Court's compliance standard, as the Crimi case, discussed infra, demonstrates.

TIMELINESS REQUIREMENTS FOR QUALIFIED APPRAISALS

Qualified appraisals are subject to timeliness requirements different from those for contemporaneous written acknowledgments.

To be a qualified appraisal, an appraisal must be received by the donor before whichever is earlier -- the filing of the return on which the appraised gift is first reported or the due date of that return. If the gift is first reported on an amended return, the appraisal must be received by the donor before the filing date of the amended return. 36/

As noted above, a contemporaneous written acknowledgment must be received by the donor before the filing date or the due date (whichever is earlier) of the original return for the year in which the gift was made.

THE CRIMI CASE CONTINUED -- THE APPRAISAL

Crimi transferred real estate to a county in 2004. At the time, he had a 2000 appraisal. Under both the old and the new Regs, the appraisal was not timely and therefore failed to meet the definition of a qualified appraisal. 37/ The appraisal also failed to meet the definition of a qualified appraisal because, among other reasons offered by the IRS:

- o The appraisal did not state the date or expected date of gift.
- o The appraised value was not as of the date of gift.
- o The appraisal did not state that it was prepared for federal income tax purposes.

Nonetheless, the Tax Court refused to hold that the appraisal failed the substantial compliance standard and held instead that any shortcomings in the appraisal were excused under the reasonable cause exception of old Reg. section 1.170A-13(f) (11) (A) (ii) (II). 38/

The Tax Court noted that neither the Code nor the Regulations define "reasonable cause". The Court also noted that

...the concept of "reasonable cause" pervades the part of the Code relating to the imposition of additions to tax and penalties for failures to comply with certain sections of the Code.

Having laid down this predicate, the Court said:

Reasonable cause requires that the taxpayer have exercised ordinary business care and prudence as to the challenged item.

The Court proceeded to hold that Crimi had exercised ordinary business care and prudence. Why? Because the facts showed that:

- o Crimi was advised by his CPA that the 2000 appraisal was good for tax purposes.
- o Crimi had no reason to believe the CPA's advice was erroneous and relied on the advice in good faith.
- o Crimi had been honest and forthcoming with the CPA.
- o Crimi had relied on the CPA and the CPA's firm for tax advice for more than 20 years.

So Crimi prevailed in the Tax Court as to the appraisal. He prevailed because both he and his CPA were unaware of the requirements for a qualified appraisal.

The new Regs do not contain a reasonable cause exception. Instead, the SUMMARY preceding the new Regs in T.D. 9836 makes clear that IRS will follow Crimi -- which calls for a case-by-case factual analysis -- as to reasonable cause.

APPRAISALS OF PARTIAL INTERESTS

The new Regs provide:

If the contributed property is a partial interest, the appraisal must be of the partial interest. 39/

I'm puzzled and perplexed by this requirement. On its face, it appears [a] to require a qualified appraisal for a lead or remainder interest in a cash-funded split-interest trust, and [b] not to require a qualified appraisal for underlying non-cash property from which a lead or remainder interest is created and given to charity.

The new Regs do say that a qualified appraisal is not required for a remainder interest in a cash-funded charitable remainder annuity trust or unitrust; but the new Regs also say that such an appraisal is required as to the remainder interest generated by a cash transfer to a pooled income fund. 40/ This requirement as to pooled income funds is bizarre. The determination of the fair market value of a remainder interest in a pooled income fund is purely a mechanical procedure carried out by a computer based on IRS tables and the fund's recent earnings history. Why the need for, what is the purpose of, a qualified appraisal in this situation?

If I understand correctly the new Regs as to contributions of partial interests, the new Regs are a complete game changer. No longer will a qualified appraisal be required, for example, for real estate transferred to a charitable remainder unitrust. After all, the real estate isn't the property contributed to charity; the contributed property is the remainder interest in the unitrust. Which apparently means a qualified appraisal will be required for the remainder interest. Again, bizarre; and also scary. Scary, because if my concerns are justified, lawyers, accountants, charities, and charitable gift planners are going to have to refashion their thinking altogether about how split-interest gifts need to be substantiated.

CONCLUSION

Tax advisers should consider this article an introduction. The old and new Regs contain details not discussed here.

FOOTNOTES

1. IRC § 170(f)(8)
2. IRC § 170(f)(8)(B)
3. Reg. § 1.170A-15(a)(1), (2)
4. Reg. § 1.170A-15(b)(2)
5. Reg. § 1.170A-13(f)(10)
6. Reg. § 1.170A-15(c)
7. Bargain sales are covered in Reg. § 1.1011-2(b).
8. Substantial compliance means "close enough is good enough." The Tax Court means here that the requirement for a contemporaneous written acknowledgment is subject to a strict compliance standard (no wiggle room allowed).
9. Given the Tax Court's position here, I believe it's wise not to include the "...and other good and valuable consideration" boilerplate in any document to be offered on audit or in court as a contemporaneous written acknowledgment. For a case on point, see Schrimsher v. Comm'r, T.C. Memo 2011-71 (March 28, 2011).
10. As to the fact that the correct description was contained in documents, extrinsic to the written acknowledgment, that

had been provided to the IRS, see Scheidelman v. Comm'r, 682 F.3d 189 (2d Cir. 2012), where the court held that the doctrine of substantial compliance may excuse a technical deficiency in a written acknowledgment.

11. Reg. § 1.170A-17(c)
12. The assets for which a qualified appraisal is not required are [a] publicly traded stock, [b] patents, [c] a qualified vehicle, and [d] inventory. Reg. § 1.170A-16(d) (2)
13. Reg. § 1.170A-17(b) (1)
14. Reg. § 1.170A-17(b) (2) (i)
15. Reg. § 1.170A-17(b) (2) (ii)
16. Reg. § 1.170A-17(b) (3) (i)
17. Reg. § 1.170A-17(b) (3) (ii), Example (1)
18. Reg. § 1.170A-17(b) (3) (ii), Example (2)
19. Reg. § 1.170A-17(b) (3) (ii), Example (3)
20. Reg. § 1.170A-17(a) (3) (i) (B)
21. Reg. § 1.170A-17(a) (3) (i) (C)
22. Reg. § 1.170A-17(a) (3) (i) (D)
23. Reg. § 1.170A-17(a) (5)
24. Reg. § 1.170A-17(a) (3) (v)
25. Reg. § 1.170A-13(c) (3) (ii) (I)
26. Reg. § 1.170A-17(a) (3) (ii)
27. Reg. § 1.170A-17(a) (3) (i) (E)

28. Reg. § 1.170A-17(a) (3) (vii)
29. Reg. § 1.170A-17(a) (3) (viii)
30. Reg. § 1.170A-17(a) (3) (ix)
31. Reg. § 1.170A-17(a) (3) (i) (iv)
32. Reg. § 1.170A-17(a) (3) (v)
33. Reg. § 1.170A-17(a) (3) (vi)
34. Lord v. Comm'r, T.C. Memo 210-196 (September 8, 2010)
35. id
36. Reg. § 1.170A-17(a) (8)
37. Reg. § 1.170A-17(a) (4)
38. The new Regs don't include a reasonable cause exception.
The IRS has said, however, that it will adhere to the
fact-specific approach to reasonable cause in Crimi.
39. Reg. § 1.170A-17(a) (12)
40. Reg. § 1.170A-15(g)

IRS's GIFT SUBSTANTIATION REGS

Presented to the

DALLAS ESTATE PLANNING COUNCIL

February 3, 2022

Jonathan G. Tidd
Attorney
West Simsbury, Connecticut

I. OVERVIEW

- o IRS released new Regs on gift substantiation at the end of July 2018.
- o The new Regs generally took effect July 30, 2018.
- o New Regs applicable to qualified appraisals, however, took effect January 1, 2019.
- o This stuff is important.
- o Without the correct form of gift receipt or appraisal the donor is at risk of having his or her federal income tax charitable deduction disallowed.
- o Chief risks to a charity's gift planning officer:
 - being drawn into giving legal advice
 - being accused by the donor of not providing a heads-up
 - issuing flawed gift receipts because "that's the way we've always done it"

II. GIFT RECEIPTS -- JUST A FEW CHANGES, SO LET'S REVIEW THE BASICS AND SOME HIGHLIGHTS

A. Basic Rules as to Gifts of \$250 or More

1. Donor must have what the tax law calls a "contemporaneous written acknowledgment".
2. Contemporaneous: Donor must have it before he or she files (or, if earlier, the due date of) his or her original return for the year of the gift.
3. \$250 or More: Separate gifts are not aggregated.
4. **Basic** required contents
 - a statement as to whether the donee provided any goods or services to Donor in consideration of the gift
 - a statement as to the amount of cash given or a description of any non-cash item given
5. Additional required contents so that a separate document isn't needed by donor
 - date of contribution for a cash gift (tricky for credit card gifts)
 - date of contribution for a non-cash gift as to which a qualified appraisal is not needed (tricky for a gift of stock wired DTC)

B. Special Rule for Gift Annuities

The acknowledgment must state whether the donee provided any goods or services to the Donor in addition to the annuity.

C. Unreimbursed Out-of-Pocket Expenditures

1. Example: A volunteer's expenses in providing services to a charity.
2. These are considered cash gifts to charity.

3. Correct procedure
 - a. Donor furnishes to charity receipts or mileage log showing date(s), amount expended, purpose of expenditure.
 - b. Charity issues an itemized receipt of expenditures reflecting information Donor has provided.

III. NEW RULES APPLICABLE TO QUALIFIED APPRAISALS

A. New Required Statements

1. If the donated item is tangible personal property or real estate, there must be a statement as to its condition.
2. There must be a statement as to the **appraisal report date**.

This is the date the appraiser signs the appraisal report.

3. There must be a statement as to the **valuation effective date**.
 - a. If the appraisal report date is on or after the date of gift, the valuation effective date is the date of gift.
 - b. If the appraisal report date is before the date of gift, the valuation effective date is a date, chosen by the appraiser, that is no earlier than 60 days before the date of gift and no later than the date of gift.
 - c. The appraisal must state the FMV of the donated item as of the valuation effective date.

B. Two other Required Statements

1. There must be a statement as to the date of gift or expected date of gift.

2. There must be a statement that the appraisal was performed for federal income tax purposes.

C. New Rules as to "Qualified Appraisers"

1. A bunch of new rules as to education and experience.
2. The appraiser must state that because of his or her education and experience, he or she is qualified to appraise the donated item.
3. The appraiser must also make this statement:

"I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. section 330(c)."

D. Gifts of Partial Interests

1. If a partial interest is given to charity, there needs to be a qualified appraisal of the partial interest. **What does this mean?**
2. Example: Donor creates a charitable remainder unitrust: payments to Donor for life, remainder to ABC Charity. Donor funds the unitrust with undeveloped land.

Question: What is the property Donor has contributed to ABC?

IV. FOOTNOTE: THE CRIMI CASE

A. Key Facts

1. Crimi gave land to a county in 2004.
2. He had a 2000 appraisal that his CPA assured him was good for tax purposes.
3. The appraisal not only was stale but also lacked important statements, including the date or expected date of gift.

B. Yet the Tax Court Gives Crimi a Pass on the Appraisal

1. Why?
2. Because it found Crimi had reasonable cause to rely on the appraisal.

C. Explanation

1. The then tax regulations provided a reasonable cause exception to the qualified appraisal rules.
2. The Tax Court said "reasonable cause" exists if the facts show the taxpayer exercised reasonable business care and prudence as to the challenged item.
3. The facts here
 - a. Crimi had relied on his CPA for tax advice for more than 20 years.
 - b. Crimi had no reason to believe the CPA's advice re the appraisal was erroneous.
 - c. Crimi had been honest and forthcoming with the CPA.
 - d. The CPA was a partner in a well-known and well-respected regional accounting firm.

V. ETHICS ISSUES FOR A CHARITY'S GIFT OFFICER IN THE WAKE OF CRIMI

A. Situation for Discussion

- o You have received from Donor a copy of Donor's appraisal.
- o The appraisal is of non-cash asset Donor gave to your charity earlier this year.
- o You consult with your organization's lawyer and learn that the appraisal is badly flawed...isn't a qualified appraisal.
- o You ask the lawyer how to play this.
- o Donor is important and is advised by big-league attorneys and accountants.

B. Questions

- o Is it a good idea to tell Donor that the appraisal is no good for tax purposes?
- o What should you, the gift officer, do?
- o What important information is lacking?

**Citations and more details can be found in my article on gift substantiation in the January 2019 issue of *Trusts & Estates*.
IRS's GIFT SUBSTANTIATION REGS**

Presented to the

DALLAS ESTATE PLANNING COUNCIL

February 3, 2022

Jonathan G. Tidd
Attorney
West Simsbury, Connecticut

I. OVERVIEW

- o IRS released new Regs on gift substantiation at the end of July 2018.
- o The new Regs generally took effect July 30, 2018.
- o New Regs applicable to qualified appraisals, however, took effect January 1, 2019.
- o This stuff is important.
- o Without the correct form of gift receipt or appraisal the donor is at risk of having his or her federal income tax charitable deduction disallowed.
- o Chief risks to a charity's gift planning officer:
 - being drawn into giving legal advice
 - being accused by the donor of not providing a heads-up
 - issuing flawed gift receipts because "that's the way we've always done it"

II. GIFT RECEIPTS -- JUST A FEW CHANGES, SO LET'S REVIEW THE BASICS AND SOME HIGHLIGHTS

A. Basic Rules as to Gifts of \$250 or More

1. Donor must have what the tax law calls a "contemporaneous written acknowledgment".

2. Contemporaneous: Donor must have it before he or she files (or, if earlier, the due date of) his or her original return for the year of the gift.
3. \$250 or More: Separate gifts are not aggregated.
4. Basic required contents
 - a statement as to whether the donee provided any goods or services to Donor in consideration of the gift
 - a statement as to the amount of cash given or a description of any non-cash item given
5. Additional required contents so that a separate document isn't needed by donor
 - date of contribution for a cash gift (tricky for credit card gifts)
 - date of contribution for a non-cash gift as to which a qualified appraisal is not needed (tricky for a gift of stock wired DTC)

B. Special Rule for Gift Annuities

The acknowledgment must state whether the donee provided any goods or services to the Donor in addition to the annuity.

C. Unreimbursed Out-of-Pocket Expenditures

1. Example: A volunteer's expenses in providing services to a charity.
2. These are considered cash gifts to charity.
3. Correct procedure
 - a. Donor furnishes to charity receipts or mileage log showing date(s), amount

expended, purpose of expenditure.

- b. Charity issues an itemized receipt of expenditures reflecting information Donor has provided.

III. NEW RULES APPLICABLE TO QUALIFIED APPRAISALS

A. New Required Statements

1. If the donated item is tangible personal property or real estate, there must be a statement as to its condition.
2. There must be a statement as to the **appraisal report date**.

This is the date the appraiser signs the appraisal report.

3. There must be a statement as to the **valuation effective date**.
 - a. If the appraisal report date is on or after the date of gift, the valuation effective date is the date of gift.
 - b. If the appraisal report date is before the date of gift, the valuation effective date is a date, chosen by the appraiser, that is no earlier than 60 days before the date of gift and no later than the date of gift.
 - c. The appraisal must state the FMV of the donated item as of the valuation effective date.

B. Two other Required Statements

1. There must be a statement as to the date of gift or expected date of gift.
2. There must be a statement that the appraisal was performed for federal income tax purposes.

C. New Rules as to "Qualified Appraisers"

1. A bunch of new rules as to education and experience.
2. The appraiser must state that because of his or her education and experience, he or she is qualified to appraise the donated item.
3. The appraiser must also make this statement:

"I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. section 330(c)."

D. Gifts of Partial Interests

1. If a partial interest is given to charity, there needs to be a qualified appraisal of the partial interest. **What does this mean?**
2. Example: Donor creates a charitable remainder unitrust: payments to Donor for life, remainder to ABC Charity. Donor funds the unitrust with undeveloped land.

Question: What is the property Donor has contributed to ABC?

IV. FOOTNOTE: THE CRIMI CASE

A. Key Facts

1. Crimi gave land to a county in 2004.

2. He had a 2000 appraisal that his CPA assured him was good for tax purposes.
3. The appraisal not only was stale but also lacked important statements, including the date or expected date of gift.

B. Yet the Tax Court Gives Crimi a Pass on the Appraisal

1. Why?
2. Because it found Crimi had reasonable cause to rely on the appraisal.

C. Explanation

1. The then tax regulations provided a reasonable cause exception to the qualified appraisal rules.
2. The Tax Court said "reasonable cause" exists if the facts show the taxpayer exercised reasonable business care and prudence as to the challenged item.
3. The facts here
 - a. Crimi had relied on his CPA for tax advice for more than 20 years.
 - b. Crimi had no reason to believe the CPA's advice re the appraisal was erroneous.
 - c. Crimi had been honest and forthcoming with the CPA.
 - d. The CPA was a partner in a well-known and well-respected regional accounting firm.

V. ETHICS ISSUES FOR A CHARITY'S GIFT OFFICER IN THE WAKE OF CRIMI

A. Situation for Discussion

- o You have received from Donor a copy of Donor's

appraisal.

- o The appraisal is of non-cash asset Donor gave to your charity earlier this year.
- o You consult with your organization's lawyer and learn that the appraisal is badly flawed...isn't a qualified appraisal.
- o You ask the lawyer how to play this.
- o Donor is important and is advised by big-league attorneys and accountants.

B. Questions

- o Is it a good idea to tell Donor that the appraisal is no good for tax purposes?
- o What should you, the gift officer, do?
- o What important information is lacking?

Citations and more details can be found in my article on gift substantiation in the January 2019 issue of *Trusts & Estates*.

