CARING ABOUT CHARITABLE GIVING:

THE CARES ACT IN 2021

The Coronavirus Aid, Relief and Economic Security (CARES) Act, passed on March 27, 2020 provided much needed economic assistance to Americans for the 2020 year. Some of those benefits intended to encourage charitable giving have been extended to apply for 2021, via the Consolidated Appropriations Act signed into law on December 27, 2020; the purpose of this article is to provide a brief overview of those charitable giving incentives and other impacts this extension has on the exempt organizations landscape.

1. Above the Line Deduction

What's new: The 2021 extension slightly modifies the 2020 CARES Act above-the-line deduction granted to non-itemizers. For the 2021 year, gifts of cash to a public charity entitle an individual of up to $300 in an above the line income tax charitable deduction.[1] For a married couple filing jointly, the limit is $600 in cash gifts made to public charity. Under the 2020 version, the limit was $300 per tax return, so this change has allowed married couples filing jointly to effectively take double the deduction.[2] This above the line deduction appears to be permanent, as the language in the 2021 Act begins "[i]n the case of any taxable year beginning in 2021…".[3]

Taxpayers who overstate their cash contributions when claiming this deduction are now subject to a harsher penalty: If the IRS determines the value of the charitable gift has been overstated (and thus, the tax liability underpaid), the taxpayer can be assessed a penalty of 50% of the total deduction amount, an increase from 20% under prior law.[4]

Why it matters: This provision means a taxpayer can claim this ($300 or $600) amount as a deduction without having to itemize deductions. Under the Tax Cut and Jobs Act of 2017 (the "2017 Tax Act"), the standard deduction was increased, and as a result, much fewer people are itemizing their deductions, including those for gifts made to charity.[5] This deduction provides those who don't itemize an extra bump: you can take the standard deduction and give $300 (or $600 if married, filing jointly) to charity, and take the $300 or $600 tax break in addition to your standard deduction. This also helps because it reduces the donor's adjusted gross income, potentially allowing the taxpayer to then qualify for other tax breaks.[6]

Proceed with caution: Note that gifts to supporting organizations, donor advised funds and private foundations do not qualify for this deduction. The gift must be of cash – including those made by

[1] P.L. 116-260, Consolidated Appropriations Act, 2021.
[2] Ashlea Ebeling, "New Bigger Charitable Tax Break for 2021 in Year-End Spending Package", Forbes, https://www.forbes.com/sites/ashleaebeling/2020/12/22/new-bigger-charitable-tax-break-for-2021-in-year-end-spending-package/?sh=3e35e5c85710.
[3] P.L. 116-260, Consolidated Appropriations Act, 2021.
[4] *Id.;* Ashlea Ebeling, note 2.
[5] According to the IRS, almost 9 out of 10 taxpayers choose not to itemize their deductions, choosing instead to take the standard deduction. https://www.irs.gov/newsroom/special-300-tax-deduction-helps-most-people-give-to-charity-this-year-even-if-they-dont-itemize
[6] *See* note 2.

check, credit card, debit card or electronic fund transfer, but not securities, household items or other property.[7]

This benefit is not available for those individuals who itemize, rather, it is a benefit provided exclusively to those who claim the standard deduction. Further, no carryover is applied, meaning, it does not include any carryover of excess charitable contributions from previous years.[8] Likewise, any amount exceeding the $300 (or $600) limit can not be carried forward to future years or claimed as an itemized deduction.[9]

As with all charitable contributions, remember to obtain and maintain the proper forms of substantiation for all charitable gifts, particularly when they are at least $250 in amount.

2. For Those Who Itemize

We know that for charitable gifts made during lifetime, the actual amount of the deduction taken doesn't necessarily match the amount of the gift made, due to the various limitations based on the taxpayer donor's adjusted gross income ("AGI"), the type of property gifted and the type of charitable donee. A full chart of the application of AGI limits is included at the end of this article for reference. For those who itemize their deductions, the 2017 Tax Act increased the limit for gifts of cash made to public charities and private operating foundations from 50% of AGI to 60% of AGI, until January 1, 2026 (or until other legislation is enacted), with any excess carried over for up to the succeeding five years.

For years 2020 and 2021, this 60% AGI limit is increased to a 100% AGI limit, with any excess subject to the same 5-year carryforward rule (which would then be subject to the 60% AGI limit). This 100% AGI provision must be elected into – thus, there are some planning opportunities available if the value of the deduction would be more beneficial in a future year.[10]

Proceed with caution: This provision does not apply to gifts made to supporting organizations, donor advised funds ("DAF") or private non-operating foundations. Congress intended this law to increase charitable giving in this time of great need, and for the funds to have an immediate impact. Thus, the rule is not available for charitable gifts to organizations which facilitate deferred charitable spending (such as a DAF).[11] Although there is not much in the way of guidance, it is unlikely this 100% AGI limit would apply to a charitable remainder trust and it is unclear if it would apply to a gift of cash to a public charity in exchange for a charitable gift annuity.[12]

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[7] IRS Publication 526, Charitable Contributions; https://www.irs.gov/newsroom/special-300-tax-deduction-helps-most-people-give-to-charity-this-year-even-if-they-dont-itemize

[8] Abbey M. Magnuson & Jason J. Kohout, "CARES Act Changes to the Charitable Income Tax Deduction", https://www.foley.com/en/insights/publications/2020/05/cares-act-changes-charitable-income-tax-deduction.

[9] John McKinley, "The new charitable deduction for nonitemizers", Journal of Accountancy, September 1, 2020, https://www.journalofaccountancy.com/issues/2020/sep/cares-act-charitable-deduction-for-nonitemizers.html.

[10] Abbey M. Magnuson, note 8.

[11] Bernie Kent, "Giving More Than 60% of Income to Charity? CARES Act Says Deduct It!", Forbes, https://www.forbes.com/sites/berniekent/2020/04/03/giving-more-than-60-of-income-to-charity-cares-act-says-deduct-it/?sh=657b37e8b34f.

[12] Abbey M. Magnuson, note 8.

Stacking: This limit can be stacked with the other AGI limits we are used to applying. For example, a donor can contribute long term capital gain property to a public charity, subject to a deduction of 30% of his AGI, and can additionally make a cash gift (to a qualified public charity) of 70% of his AGI, receiving a full 100% AGI deduction.

Although this 100% AGI limit doesn't apply to DAF gifts, because stacking is allowed, donors who exhaust the 60% AGI limit with cash contributions to their DAFs in 2021 can make additional (cash) donations outside their DAF (to a qualified public charity) and still get take the deduction this year, up to the 100% AGI limit.[13]

Planning Opportunities: Depending on the donor's tax situation, he/she may want to consider bunching charitable contributions in the same year, to take advantage of this higher AGI limit. Similarly, taxpayers with a zero-ed out estate and with no concern over having an estate tax liability at death, may want to accelerate their charitable gifts to occur during lifetime to get these income tax benefits.

On the other hand, it is possible that a 100% AGI limit is not the most advantageous strategy for a donor and his/her tax situation. The 100% AGI limit is an election that is made with respect to each gift, on the individual's income tax return. Failure to make the election would convert the cash contribution to the 60% AGI limitation, with the excess to be carried forward for the next five years, rather than utilized completely in 2021. If the donor has other itemized deductions, for example expenses resulting in a net operating loss that cannot be carried forward or back to other years, a charitable contribution of 100% of AGI may not receive a full tax benefit.[14] Thus, it may be more advantageous to limit qualifying charitable contributions to the donor's taxable income after all itemized deductions are taken into account – i.e. not electing the 100% AGI limit for (all of) his cash gifts made to qualified public charities.

3. Relief for Nonprofit Organizations

Nonprofit organizations with less than 500 employees may be eligible for loans under the second installment of the Paycheck Protection Program ("PPP"). The program is open to nonprofit organizations who previously received PPP support as well as those that have not, although additional requirements and limits apply to those organizations who have received previous PPP support. The Consolidated Appropriations Act expanded PPP eligibility to include 501(c)(6) organizations and destination marketing organizations. If you have a client who may be eligible, it is worth looking into these provisions.[15] The Consolidated Appropriations Act also includes targeted relief (in the form of grants) to "shuttered venues," including museums, theaters, and performing arts organization.[16] An organization that obtains a PPP loan is not eligible for a shuttered venue grant. An organization that qualifies for both programs should carefully consider which program is the better fit for its needs.

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[13] https://www.vanguardcharitable.org/news/how-the-cares-act-affects-your-giving#:~:text=This%20means%20that%20Vanguard%20Charitable,reaching%20the%20100%25%20limit.

[14] Bernie Kent, note 11.

[15] See: https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program.

[16] P.L. 116-260, Consolidated Appropriations Act Sec. 324 et seq.

	Donee: Public Charity or Private Operating Foundation		Donee: Private Non-operating Foundation	
Property	Value of Deduction	Deduction limit as % of AGI	Value of Deduction	Deduction limit as % of AGI
Cash	Amount of cash	Can elect 100% if to PC; 60% to SO or DAF	Amount of cash	30%
Ordinary income	Cost Basis	50%	Cost Basis	30%
S/T Capital Gain Property ("CG")	Cost Basis	50%	Cost Basis	30%
L/T CG (other than TPP)	FMV	30%*	Qualified appreciated stock: FMV	20%
L/T CG/TPP (related use)	FMV**	30%	All other LTCG: Cost Basis	20%

*Donor can elect to claim deduction equal to cost basis and use the 50% AGI limit.

**If tangible personal property ("TPP") is unrelated to the donee's exempt purposes, donor is limited to deducting cost basis.[17]

[17] Chart adapted from Abbey M. Magnuson, note 8.