

THE DISAPPEARING 60% DEDUCTION—NEW CHARITABLE GIVING LIMITS ARE NOT AS GENEROUS AS THEY APPEAR

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A purported tax benefit in the Tax Cuts and Jobs Act to encourage charitable donations is illusory in many cases.

The Tax Cuts and Jobs Act (TCJA)¹ changed several rules affecting tax incentives for charitable giving. Many of these changes have been seen as negative for the charitable sector—in particular, the increased standard deduction eliminates the need for many taxpayers to itemize deductions, thereby reducing the incentive to make charitable gifts.

Congress did include one incentive to *encourage* more charitable giving, by increasing the annual “contribution base” (similar to adjusted gross income, or AGI) limits for cash gifts to public charities from 50% to 60%. Because of the way in which this increased limit was inserted into the existing Section 170, the 60% limit is unavailable in many cases, in particular when donors are making gifts to both public charities and private foundations, or gifts of both cash and noncash items, such as stock, land or art.

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Many people perceive this rule as simply allowing a taxpayer to make an incremental cash gift of 10% of AGI, on top of whatever deductions would have been allowed under the old rules. As demonstrated below, this is true *only* for years in which the donor has made gifts of up to 60% of AGI *entirely in cash*. With some limited exceptions (discussed below), to the extent that a donor is relying on anything other than cash gifts to public charities to make up the entirety of that 60%, the new higher deductibility limit is unavailable.

Section 170(b) is a complicated labyrinth of cross-references, and the new change in the law only makes things worse. The only way to really appreciate how the new limit operates is with examples, working through the various subparagraphs of Section 170(b) one by one to see how they interact. Before doing that, however, this article reviews some basic principles regarding charitable giving and income taxes, which will be important as the examples are discussed.

Basic principles

Gifts of cash and other property to U.S.-based charitable organizations are generally deductible for income tax purposes, as itemized deductions.² For gifts of capital gain property (i.e., capital assets with a cost basis that may differ from the asset’s fair

market value (FMV)), the amount of the charitable deduction depends in part on how long the property has been held, and in part on the type of charity receiving the property.

For gifts of short-term capital gain property (property held by a donor for less than one year) to any charity, a deduction is allowed only for the lesser of (1) FMV and (2) the donor's cost basis.³ For gifts of long-term capital gain property (property held by a donor for at least one year) to a public charity,⁴ a deduction is generally allowed for FMV.⁵ For gifts of long-term capital gain property to a private foundation, a deduction is generally allowed only for cost basis (or FMV, if less), unless the donor is giving publicly-traded stock.⁶

There are various special rules and restrictions for gifts of tangible property,⁷ intellectual property,⁸ inventory,⁹ scientific research property,¹⁰ gifts involving split interests,¹¹ and certain other specific categories.¹²

General limitations on deductions

The basic principles outlined above generally determine how much of an income tax charitable deduction a donor may receive *overall* with respect to a particular gift. The next question, then, is how much of that deduction may be taken *right away*, in the year of the gift.

The law generally does not allow taxpayers to completely wipe out their AGI through the charitable deduction,¹³ but rather limits the charitable deduction

to certain percentages of the donor's "contribution base" (AGI without regard to any net operating loss carryback) each year.¹⁴ Except in limited circumstances, the annual limitation is either 20%, 30%, 50%, or 60% of the donor's contribution base, with the percentage depending on what kind of property is being given and what kind of charity is receiving it.¹⁵

These limitations are found in different subparagraphs of Section 170(b)(1), and must be applied in a particular order. Prior to the TCJA, these caps were found in subparagraphs A through D. The TCJA adds a new subparagraph G, addressing cash gifts to public charities, and providing certain rules for how such gifts interact with the traditional caps in subparagraphs A through D. To show how these subparagraphs interact with one another, this article refers to gifts subject to the respective caps by reference to their subparagraphs. Each is summarized below.

Subparagraph G gifts

Although it is both the newest subparagraph and the last alphabetically, this is where the calculation begins. Under a new temporary rule enacted as part of the TCJA, for tax years after 2017 and prior to 2026, an individual donor may deduct up to 60% of the donor's contribution base for gifts of cash (and only cash—not short-term or long-term capital gain property) to a public charity.¹⁶ To qualify for the 60% threshold, such gifts must be "to" the public charity, not "for the use of" the public charity.¹⁷

¹ P.L. 115-97, 12/22/17.

² Section 63(d). Taxpayers who do not itemize deductions, but instead elect the standard deduction, do not receive any income tax benefit from making charitable contributions. Under the TCJA, the standard deduction has been temporarily increased (effective from 2018 through 2025), to \$12,000 for single filers (or married filing separately), \$18,000 for head of household, and \$24,000 for married filing jointly (in each case, to be adjusted for inflation in future years). Section 63(c)(2); Rev. Proc. 2018-18, 2018-10 IRB 392. Note that the "Pease" limitations, which reduced the effectiveness of itemized deductions in certain circumstances, have been suspended through 2025. Section 68(f).

³ Section 170(e)(1)(A).

⁴ Gifts to private operating foundations and other organizations listed in Section 170(e)(1)(A) are treated like gifts to public charities for purposes of these deduction rules. For simplicity, this article refers to all such organizations as "public charities."

⁵ Sections 170(a)(1), (e)(1).

⁶ Sections 170(e)(1)(B), (e)(5).

⁷ Sections 170(e)(1)(B)(i) and 170(o). If the public charity disposes of the related-use tangible personal property within the same year as the contribution, the deduction is limited to the donor's basis (Section 170(e)(1)(B)(i)(II)); and if the disposition by the charity takes place within three years of the donation, the donor will have recapture of a portion of the deduction relating to gain in the property (Section 170(e)(7)(A)). In both cases the result can be avoided if the charity certifies that the property's use was in fact related to the charity's exempt purposes. Section 170(e)(7)(B).

⁸ Sections 170(e)(1)(B)(iii) and 170(m).

⁹ Sections 170(e)(1)(A), (3), (6).

¹⁰ Section 170(e)(4).

¹¹ Section 170(f).

¹² See generally Sections 170(e) through (p).

¹³ In limited circumstances, gifts of conservation easements involving property used in agriculture or livestock production may be deducted against 100% of the contribution base in the year of the gift. Section 170(b)(1)(E)(iv). In addition, Congress occasionally passes disaster relief bills which suspend the annual limitations of Section 170(b) for qualifying cash gifts to support affected disaster areas. See, e.g., section 20104 of the Bipartisan Budget Act of 2018 (suspending adjusted gross income limitations for cash gifts made during a certain period for the purpose of relief efforts in the California wildfire disaster area).

¹⁴ Section 170(b) (because AGI is the same as "contribution base" for most individual taxpayers, and because AGI is the more commonly used term, this article uses them interchangeably for purposes of the illustrations below).

¹⁵ Section 170(b)(1).

¹⁶ Section 170(b)(1)(G) (increasing annual limitation to 60% for gifts of cash, enacted as part of the TCJA but expiring on 12/31/25).

¹⁷ Reg. 1.170A-8(a)(2). Many gifts in trust, including gifts to certain charitable lead trusts, are treated as contributions "for the use of" the recipient charity rather than "to" the charity, and therefore are subject to the lower 30% limitation for subparagraph B gifts. However, gifts to public charities of remainder interests in charitable remainder trusts are generally treated as gifts "to" the charity and therefore, to the extent that a charitable remainder trust (where the remainder interest will be distributed exclusively to public charities on termination of the annuity or unitrust interests) is funded with cash, should be eligible for the 60% limitation for subparagraph G gifts (pending further guidance from the Treasury Department on this question).

EXHIBIT 1
AGI Limitations for Each Category of Gift

	<i>Public Charity(PC)/ Private Foundation(PF)</i>	<i>Cash</i>	<i>Short-Term Capital Gain Property (Cost Basis Only)</i>	<i>Long Term Capital Gain Property</i>
Sub. G	PC	60%	See Sub. A	See Sub. A
Sub. A	PC	50% minus Sub. G gifts	50% minus Sub. G gifts	50% (if cost basis elected) minus Sub. G gifts
Sub. B	PF	Lesser of (i) 30% and (ii) 50% minus Sub. G gifts minus Sub. A gifts	Lesser of (i) 30% and (ii) 50% minus Sub. G gifts minus Sub. A gifts	See Sub D
Sub. C	PC	See Sub. G	See Sub. A	30%
Sub. D	PF	See Sub. B	See Sub. B	Lesser of (i) 20% and (ii) 30% minus Sub. C gifts

Subparagraph A gifts¹⁸

Traditionally, all gifts to (not “for the use of”) a public charity are subparagraph A gifts, provided that (as noted in the basic principles outlined above) deductibility of gifts of short-term capital gain property is limited to the donor’s cost basis, and deductibility of subparagraph C gifts (gifts of long-term capital gain property) is limited as described below. Under the TCJA, deductibility of cash gifts to public charities is now provided for primarily under subparagraph G. Other gifts (including gifts of short-term capital gain property) to public charities continue to fall under subparagraph A.

A donor may also make an election to deduct long-term capital gain property at the lesser of cost basis and fair market value (rather than at fair market value alone), in which case that gift will be treated as a subparagraph A gift.¹⁹ An individual donor may deduct up to 50% of her contribution base, reduced by the amount of any subparagraph G deduction allowed, for subparagraph A gifts.²⁰

Subparagraph B gifts²¹

For gifts of cash or short-term capital gain property to a private foundation, and for gifts that are “for the use of” rather than “to” a public charity, an individual donor may deduct up to the lesser of (1) 30% of the donor’s contribution base or (2) the excess of 50% (not 60%) of the donor’s contribution base for the year over the combined amount of subparagraph G gifts and subparagraph A gifts.²²

Subparagraph C gifts²³

Subparagraph C of Section 170(b)(1) operates as a limitation on deductibility of subparagraph A gifts involving long-term capital gain property. Except for gifts of qualified conservation easements,²⁴ an individual donor may deduct up to 30% of his contribution base for gifts of long-term capital gain property to a public charity.

Subparagraph D gifts²⁵

For gifts of long-term capital gain property to a private foundation, an individual donor may deduct up to the lesser of (1) 20% of her contribution base and (2) the excess of 30% of the donor’s contribution base for the year over the amount of subparagraph C gifts.

Excess contributions from each category generally may be carried forward for up to five tax years, but may only be used within the same category in those future years.²⁶

Exhibit 1 shows the AGI limitations (as percentages of the donor’s contribution base) for each category of gift:

Examples

When a donor gives one type of gift in one year, the rules are fairly simple. A donor giving nothing but cash to public charities absolutely may deduct up to 60% of the donor’s contribution base. Things become much more complicated, however, when a donor makes gifts of different kinds of assets to

different kinds of charities. In that case, it is necessary to determine the order in which these different limitations apply. The following are two examples of how this would work under the TCJA.

Example 1 (cash and short-term capital gain property).

Maya has AGI of \$100,000, and contributes \$35,000 cash to a public charity (a subparagraph G gift), \$20,000 of short-term capital gain property to a public charity (a subparagraph A gift), and \$10,000 cash to a private foundation (a subparagraph B gift), for a total of \$65,000 of charitable contributions.

- The \$35,000 cash contribution to the public charity is deductible in full during the year of the gift under subparagraph G, as it is less than 60% of Maya's contribution base.
- The \$20,000 contribution of short-term capital gain property to a public charity is only deductible in the year of the gift up to \$15,000, as the subparagraph A maximum (\$50,000, or 50% of Maya's contribution base) is reduced under the subparagraph G rules by the \$35,000 subparagraph G deduction, leaving only \$15,000 of subparagraph A deduction left to be used.
- The \$10,000 cash contribution to the private foundation is not deductible *at all* in the year of the gift under subparagraph B, even though the public charity donation is \$5,000 below the 60% threshold. This is because the rule for mixed gifts to public charities and private foundations in subparagraph B limits deductibility of the private foundation gift to the lesser of \$30,000 (30% of Maya's contribution base) and \$0 (the difference between (1) Maya's combined subparagraph G and subparagraph A gifts and (2) 50%, not 60%, of Maya's contribution base).
- In all, only \$50,000 of the \$65,000 contributed (or 50% of the donor's contribution base) is allowed as a deduction in the tax year of the contribution. The unused subparagraph A and subparagraph B contributions may be rolled over and used as subparagraph A and subparagraph B deductions, respectively, for up to five subsequent years.

Example 2 (cash and long-term capital gain property).

Maya has AGI of \$100,000, and contributes \$20,000 cash to a public charity (a subparagraph G gift), \$35,000 of long-term capital gain property to a public charity (a subparagraph C gift), \$5,000 cash to a private foundation (a subparagraph B gift), and \$5,000 of long-term capital gain property in the form of publicly traded stock to a private foundation (a subparagraph D gift).

- The \$20,000 in cash contributions to the public charity is deductible in full under subparagraph

G, as it is well below \$60,000 (60% of Maya's contribution base).

- The \$35,000 of long-term capital gain property is deductible only up to \$30,000 in the year of the gift. Subparagraph A only allows up to \$30,000 of additional deductibility for gifts to a public charity, as the 50% limitation of subparagraph A (\$50,000) must be reduced by the amount of any subparagraph G deduction (\$20,000). Separately, the subparagraph C limitation (30% of Maya's contribution base) would also limit this deduction to \$30,000.
- The \$5,000 cash contribution to the private foundation is not deductible *at all* in the year of the gift, as subparagraph B limits that deduction to the lesser of \$30,000 (30% of Maya's contribution base) and \$0 (the excess of 50% of Maya's contribution base, or \$50,000, over the combined subparagraph G and subparagraph A gifts, or \$55,000).
- Similarly, the \$5,000 contribution of long-term capital gain property to the private foundation is not deductible in the year of the gift, as subparagraph D limits that deduction to the lesser of \$20,000 (20% of Maya's contribution base) and \$0 (the excess of \$30,000, or 30% of Maya's contribution base, over \$30,000, the amount of allowed subparagraph C deductions).
- In all, only \$50,000 of the \$65,000 contributed (or 50% of the donor's contribution base) is allowed as a deduction in the tax year of the contribution. As with Example 1, the unused contribution amounts may be rolled over and used as deductions for up to five subsequent years, subject to the same contribution limits for such gifts in those future years.

¹⁸ Section 170(b)(1)(A).

¹⁹ Section 170(b)(1)(C)(iii) and (e)(1). Notably, electing to take a deduction at cost basis does not convert a gift into a subparagraph G gift (with the potentially higher AGI limitation), as subparagraph G only applies to cash gifts. This election merely removes the lower AGI limitation of subparagraph C as it applies to subparagraph A gifts.

²⁰ Section 170(b)(1)(C)(iii)(I) (providing that contributions taken into account under subparagraph G will not be taken into account under subparagraph A) and (II) (providing that subparagraph A will be applied by reducing the contribution limitation allowed under subparagraph A by the aggregate amount of subparagraph G contributions).

²¹ Section 170(b)(1)(B).

²² Section 170(b)(1)(C)(iii)(II) (providing that subparagraph B shall be applied by treating any reference to subparagraph A as a reference to both subparagraph A and subparagraph G).

²³ Section 170(b)(1)(C).

²⁴ Donors of qualified conservation easements may deduct up to 50% or, in certain circumstances, up to 100% of their contribution base. Unused deductions of qualified conservation easements may be carried forward for up to 15 years. Section 170(b)(1)(E).

²⁵ Section 170(b)(1)(D).

²⁶ Sections 170(d) and 170(b); Reg. 1.170A-10.

²⁷ See Note 13, *supra* (regarding gifts of certain qualified conservation contributions and certain cash gifts for disaster relief under special legislation).

Because the 50% limitations embedded in subparagraphs A and B were not increased to 60%, and because application of these subparagraphs requires first reducing the amount subject to them by the amount of any subparagraph G gifts, the higher 60% limitation disappears to the extent that a taxpayer is relying on anything other than subparagraph G to get all the way up to 60%.

It would be going too far to say that *any* mixing of gifts (in terms of type, or foundation classification of recipient) destroys the higher 60% limitation. For example, Maya could give \$60,000 in cash to a public charity, and then a mix of other gifts (cash and other property to public charities and private foundations) in addition to that, and she would still be able to deduct the full \$60,000 of cash (60% of her contribution base) in the year of the gift. This is because she is not relying on any of the other paragraphs to get her to 60% in the year of the gift. The other donations, however, would be carried forward to the extent permitted. Similarly, Maya could give \$55,000 cash to a public charity, and the same mix of other gifts, and she would get the full \$55,000 (55% of her contribution base) in the year of the gift, as she is relying only on subparagraph G for the cash gift. Again, Maya would have to carry forward the deduction for all of the other gifts, as she could not use any of them to make up that additional 5%.

In addition, as noted above, there are a couple of situations in which a donor may make gifts deductible up to 100% of the donor's contribution base, which may be taken effectively "on top" of the donor's aggregate subparagraph A through D

and subparagraph G deductions.²⁷ While contributions of qualified conservation easements are generally limited to the excess of 50% of the donor's contribution base over other charitable contributions (which would allow for no additional immediate deduction in the examples above), contributions of certain qualified conservation easements by farmers or ranchers may be deductible up to the excess of 100% of the donor's contribution base over other charitable contributions, which would allow a taxpayer to "stack" this deduction on top of any others made during the year.²⁸

Qualified disaster relief payments under special legislation (such as section 20104 of the Bipartisan Budget Act of 2018, regarding qualifying cash gifts made between 10/8/17 and 12/31/18 to certain public charities²⁹ for relief efforts in the California wildlife disaster) work similarly, providing the ability to "stack" qualified deductions on top of any Subparagraph A, B, C, D or G deductions.³⁰ Example 3 shows how this "stacking" works:

Example 3 (regular cash donations, short-term capital gain property, and qualified disaster relief cash donations). Maya has AGI of \$100,000, and contributes \$55,000 cash to a public charity (a subparagraph G gift), \$10,000 of short-term capital gain property to a public charity (a subparagraph A gift), and \$35,000 in qualified disaster relief cash gifts.

- The \$55,000 in regular cash contributions to public charities (not qualified disaster relief gifts) is deductible in full under subparagraph G, as it is below \$60,000 (60% of Maya's contribution base).

¹⁸ Section 170(b)(1)(A).

¹⁹ Section 170(b)(1)(C)(iii) and (e)(1). Notably, electing to take a deduction at cost basis does not convert a gift into a subparagraph G gift (with the potentially higher AGI limitation), as subparagraph G only applies to cash gifts. This election merely removes the lower AGI limitation of subparagraph C as it applies to subparagraph A gifts.

²⁰ Section 170(b)(1)(C)(iii)(I) (providing that contributions taken into account under subparagraph G will not be taken into account under subparagraph A) and (II) (providing that subparagraph A will be applied by reducing the contribution limitation allowed under subparagraph A by the aggregate amount of subparagraph G contributions).

²¹ Section 170(b)(1)(B).

²² Section 170(b)(1)(G)(iii)(II) (providing that subparagraph B shall be applied by treating any reference to subparagraph A as a reference to both subparagraph A and subparagraph C).

²³ Section 170(b)(1)(C).

²⁴ Donors of qualified conservation easements may deduct up to 50% or, in certain circumstances, up to 100% of their contribution base. Unused deductions of qualified conservation easements may be carried forward for up to 15 years. Section 170(b)(1)(E).

²⁵ Section 170(b)(1)(D).

²⁶ Sections 170(d) and 170(b); Reg. 1.170A-10.

²⁷ See Note 13, *supra* (regarding gifts of certain qualified conservation contributions and certain cash gifts for disaster relief under special legislation).

²⁸ Section 170(b)(1)(E)(iv).

²⁹ Contributions to supporting organizations or donor-advised funds do not qualify. See section 20104(a)(4)(B) of the Bipartisan Budget Act of 2018.

³⁰ See section 20104 of the Bipartisan Budget Act of 2018. Qualified disaster relief payments do not have their own subparagraph of the Code. They instead constitute special legislation that allows certain deductions outside the confines of Section 170(b)(1) on a discrete and temporary basis. Such deductions are applied last, after any deductions that are subject to Section 170(b)(1) (including qualified conservation easement deductions).

³¹ Note that while the subparagraph G cash gifts reduce the available subparagraph A deduction, qualified disaster relief cash gifts do not have any effect on the subparagraph A deduction. Accordingly, had Maya made all \$90,000 of her cash gifts that year as qualified disaster relief payments, the \$10,000 of short-term capital gain property would have been deductible in full under subparagraph A.

³² Interestingly, if Maya had given more than her contribution base in the aggregate, any unused deductions for qualified disaster relief payments would have carried forward as subparagraph A contributions (not subparagraph G contributions), subject to the aggregate 50% threshold in future years. See section 20104(a)(2)(A)(ii) of the Bipartisan Budget Act of 2018. Accordingly, if Maya wanted to give more than her contribution base as qualified disaster relief payments in a given year, she would actually be better off giving that excess amount as regular subparagraph G cash gifts (not qualified disaster relief payments), which may be eligible for the higher 60% limitation in future years.

- The \$10,000 of short-term capital gain property to the public charity is not deductible at all in the year of the gift, as subparagraph A limits that deduction to \$0 (50% of Maya's contribution base, or \$50,000, reduced by the amount of any subparagraph G deduction, in this case \$55,000).³¹ This deduction may be carried forward for up to five years as a subparagraph A deduction (subject to the same 50% limitation in each future year).
- The \$35,000 in qualified disaster relief cash gifts is allowed in full in the year of the gift. Under section 20104 of the Bipartisan Budget Act of 2018, those payments are not subject to Section 170(b)(1), but under special rules are allowed in the year of the gift to the extent of the excess of Maya's contribution base (\$100,000) over the amount of all other charitable contributions allowed under Section 170(b)(1) (in this case, \$55,000).
- In all, \$90,000 of the \$100,000 contributed is allowed as a deduction in the tax year of the contribution. If Maya had given \$10,000 more in cash for qualified disaster relief, she could have deducted the entire \$100,000 of her contribution base.³²

Opportunities to make gifts of qualified disaster relief payments are not widely advertised, as these special provisions tend to be nestled in other legislation and are not made part of Section 170. However, where available, this option can provide powerful additional tax incentives for a taxpayer who wants to make charitable gifts of a large portion of her contribution base.

However, setting those less common sorts of gifts aside, a donor must rely *solely* on cash gifts to public charities to reach that higher 60% limitation

afforded by subparagraph G. This need to rely solely on cash gifts to public charities significantly undermines the usefulness of the higher 60% threshold. It is common for donors who are gifting that much of their income in a given year to give property other than cash, for a variety of reasons (including avoidance of capital gains tax on sale of the property). Accordingly, in many situations, the higher 60% threshold may be of limited use to most taxpayers.

Conclusion

A donor may deduct more than 50% of her contribution base only when:

- Making cash gifts to public charities of more than 50% of her contribution base (all qualifying under subparagraph G, without relying on any subparagraph A through D contributions, up to a maximum limit of 60% of her contribution base).
- Making a gift of a qualified rancher or farmer conservation easement, which allows for "stacking" of the deductible amount on top of other contributions (up to an aggregate of 100% of her contribution base);
- Making a qualified disaster relief cash gift, which likewise allows for "stacking" of the deductible amount on top of other contributions (up to an aggregate of 100% of her contribution base).

Many have urged Congress to change subparagraph G to allow this new 60% threshold to "stack" on top of other contributions the way that qualified disaster relief cash gifts do. In the meantime, however, donors should understand that in many cases this purported new tax benefit is illusory. ■