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## Gift Tax Considerations for Crowdfunding

*Crowdfunding websites aren't in the business of providing tax advice.*

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While the amounts solicited in many online campaigns are modest, the dollars involved across the spectrum of all charitable-type crowdfunding sites is significant. Considering the aggregate funds involved, it's surprising that some crowdfunding sites appear to provide limited guidance to visitors, donors, those creating campaigns or those benefiting as to the tax consequences.

It's unlikely that many users are even aware of the possible tax issues for the various types of campaigns. This is why guidance from the Internal Revenue Service providing some practical leniency and updating policies to reflect the realities of the crowdfunding phenomena is important.

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## **General Gift Tax Considerations**

It's important to note upfront that the gift tax isn't imposed on the receipt of funds by the beneficiary of the campaign, but rather on the donor. The gift tax is triggered by the donor making a transfer. It may apply whether the transfer is direct or indirect. So, whether or not the campaign organizer holds the funds for an eventual recipient or a trust for the eventual recipient, shouldn't affect the gift tax consequences. The donor is also allowed an annual gift tax exclusion for the first \$14,000 (2017) if that gift is one of a present interest.

### **Is It an Incomplete Gift?**

Does the possibility of a refund make the gift by a donor to a campaign incomplete?

For example, the terms of service for YouCaring provides: "Donations are made through the third-party payment processor associated with each particular Fundraiser, and YouCaring may not refund your donation to a Fundraiser; however, if you contact us, we will put you in touch with the payment processor for the Fundraiser for which you seek a refund. Any refunds will be given in the third-party payment processor's discretion and in accordance with their terms of service."

Tax law provides that a gift is incomplete if the donor has the power to re-vest beneficial title to the property in his/herself. Might it be that the gift is incomplete until disbursed from the campaign for the cause indicated?

There are numerous sources to consider in making this determination: the campaign language itself, the Terms of Service of the crowdfunding site, the possible TOS of a separate payment site and state law, which may vary depending on the TOS agreement. For example, the Fundly terms of service provide: “These Terms of Use will be governed by and construed in accordance with the laws of the State of California, without reference to its conflicts of laws rules.” What if the terms of service of the payment process provide for different state law?

### **Is it a Present Interest Gift?**

For a gift to qualify for the gift tax annual exclusion, it must be a gift of a “present interest,” meaning the recipient must have immediate use, possession or enjoyment of the gift. If the number of eventual donees and the values of their interests can’t be determined, the gift may not qualify as a present interest. For example, a campaign to benefit a victim of the Las Vegas shooting and her family that was traumatized may not qualify because it’s uncertain how much will be distributed to the family or the victim.

The issue of present interest is also relevant to the suggestion below of the campaign organizer holding the funds raised as a nominee for a trust for the recipient (or in a constructive trust for the recipient). If the recipient had the authority to withdraw funds immediately under either scenario, the donations should qualify as a gift of a present interest under Internal Revenue Code Section 2503. However, that position may also taint the funds as not being permissible to hold in a supplemental needs trust, as the funds may already be deemed in the control of the recipient. It would seem that this would be governed by the verbiage on the campaign page and the TOS agreement.

Another situation might be that the campaign organizer may have the right to withdraw the funds donated, which generally seems to be the case under most default TOS agreements. In that case, might it be argued that, because the campaign organizer can withdraw funds at any time, the gifts are made to the campaign director and hence qualify as a gift of a present interest?

However, if the campaign organizer isn't the intended recipient (instead the neighbor or family member that set up the campaign for a friend or loved one), then the campaign organizer would seem to be holding the funds, subject to the TOS as modified by the terms of the campaign, as an agent, nominee or similar capacity. The latter interpretation may be essential to support the transfer of the funds from the campaign to an existing charity for a public campaign or to a trust for a private individuals campaign.

Would a default payment of unused campaign funds transferred over to a qualifying public charity trigger involvement by the state attorney general or the IRS? How might that additional complication be avoided? Should it even be?

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