

## Internal Revenue Service

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Date:  
August 09, 2018

### Legend

X =

Y =

CRUT #1 =

CRUT #2 =

a =

b =

c =

Dear :

This letter responds to a letter dated February 16, 2018, submitted on your behalf by your authorized representatives, requesting whether certain trust provisions will affect the qualification of proposed trusts as charitable remainder unitrusts (CRUTs) under § 664(d)(2) of the Internal Revenue Code (Code) and the applicable regulations and on the gift and estate tax consequences of the proposed transactions.

### FACTS

The information submitted states that X intends to form two CRUTs, CRUT #1 and CRUT #2, and fund CRUT #1 and CRUT #2 with property worth approximately \$a each. CRUT #1 and CRUT #2 are intended to qualify as valid CRUTs under § 664(d)(2) and the corresponding regulations.

#### CRUT #1

Article 2.01(b) provides that the unitrust amount for each taxable year shall be an amount equal to b% of the net fair market value of the trust property determined as of the first business day of that taxable year.

Article 2.01 provides that until the date of X's death (the "term ending date"), the trustee shall administer the trust property as described in Article 2. Article 2.01(a)(1) provides that in each taxable year including the year in which the term ending date occurs, the trustee shall distribute to X (A) c% of the unitrust amount and (B) such additional portion of the unitrust amount, if any, as the independent trustee determines is necessary to ensure the total portion of the unitrust amount distributed to X in each taxable year shall not be de minimis under the facts and circumstances.

Article 2.01(a)(2) provides that after providing for distribution of the minimum amount (the aggregate of amounts described in Article 2.01(a)(1)(A) and (B)) the trustee shall distribute the balance of the unitrust amount (the "net unitrust amount") to such one or more of X and one or more charitable organizations (as are described in §§ 170(c), 2055(a) and 2522(a) of the Code) included in the charitable class as the independent trustee selects in the independent trustee's sole discretion without the approval or consent of any other person, and in such equal or unequal portions as the independent trustee determines in the independent trustee's sole discretion without the approval or consent of any other person. The independent trustee shall designate by signed irrevocable written instrument delivered to X on or before the date that is thirty (30) days before the payment date, if X is then living, the portion of the net unitrust amount to be paid to the charitable class for the taxable year. Under Article 6.07, the term "payment date" means the last day of each calendar year and the term ending date.

Article 2.01(a)(3) the charitable class means (A) such one or more charitable organizations that X, as an individual and not in any fiduciary capacity, designates as potential recipients of the charitable portion by signed written instrument delivered to the independent trustee, which shall remain revocable until the payment date such that X retains the power to designate the charitable class until such power lapses on the payment date, or if X does not provide such designation on or before the payment date,

(B) such one or more charitable organizations as the independent trustee, in the independent trustee's sole discretion, shall determine.

Article 2.02 provides that as of the term ending date, the trustee shall distribute the trust property remaining after providing for the payment of all unitrust amounts under the preceding provisions of Article 2 to one or more charitable organizations in such proportion among them as X may appoint by will, or to the extent X does not exercise the power of appointment, to Y, if it is a charitable organization on the term ending date, or if not, to such one or more charitable organizations and in such equal or unequal proportions among them as the trustee, in the trustee's sole discretion, decides.

Article 3.02 provides that at all times at least one independent trustee must be acting. "Independent trustee" means a trustee other than X, X's spouse, or a subordinate party as to either X or X's spouse. The term "subordinate party" is defined in Article 6.07(f) to mean any individual or entity that would be a related or subordinate party within the meaning of § 672(c) assuming that the grantor for purposes of § 672 was that person. Article 3.02 further provides that if at any time a vacancy occurs in the office of independent trustee, the appointer shall fill the vacancy by appointing an independent trustee. The authority of the independent trustee shall be solely limited to the actions described in Articles 2.01(a)(1), 2.01(a)(2), 2.01(a)(3) and 3.02.

Article 3.04 provides, in part, that whenever the identity of the appointer is to be determined, the appointer shall be X or if X fails to act, X's wife. A person named as appointer shall not be deemed to have failed to act unless (a) the vacancy in any office is required to be filled and that person has not appointed a successor within 30 days after that person has been notified of the vacancy, or (b) that person declines to act as appointer to fill that vacancy or any vacancy by signed instrument delivered to the individuals or entities named to act as appointer if that person fails to act and to the trustee.

Article 3.05 provides, in part, that at any time or times the remover may remove an independent trustee. X is the initial remover, and when X ceases to act, X's wife is the remover.

Article 5.01 provides that X intends that CRUT #1 be a "CRUT" (meaning a charitable remainder unitrust as defined in § 664(d)(2)) which will qualify for all applicable income, gift and estate tax charitable deductions allowable with respect to charitable remainder unitrusts under the Code. Articles 5.02 through 5.05 include certain provisions relevant to CRUT #1's qualification as a CRUT described in § 664(d)(2), including provisions relating to incorrect payments, valuation of unmarketable assets, investment of trust assets, proration of additional contributions, severance of certain additional contributions, prohibited transactions described in §§ 4941, 4943, 4944 and 4945, and a tax payment clause.

## CRUT #2

Except as identified below, the provisions of CRUT #2 are identical to the provisions of CRUT #1. While CRUT #1 proposes an inter vivos CRUT with one measuring life, X, CRUT #2 proposes an inter vivos CRUT with consecutive interests with two measuring lives, X and X's spouse, subject to X's right to revoke the survivor unitrust interest.

Article 2.01 provides that until the date of the survivor of X's wife and X's death (the "term ending date"), the trustee shall administer the trust property as described in Article 2. Article 2.01(a)(1) provides that in each taxable year including the year in which the term ending date occurs, the trustee shall distribute to X (A) c% of the unitrust amount and (B) such additional portion of the unitrust amount, if any, as the independent trustee determines is necessary to ensure the total portion of the unitrust amount distributed to the recipient in each taxable year shall not be de minimis under the facts and circumstances. The "recipient" means X, or after X's death, X's wife if she survives X and X has not revoked the survivor unitrust interest.

Article 2.01(a)(2) provides that after providing for distribution of the minimum amount (the aggregate of amounts described in Article 2.01(a)(1)(A) and (B)) the trustee shall distribute the balance of the unitrust amount (the "net unitrust amount") to such one or more of the recipient and any one or more charitable organizations (as are described in §§ 170(c), 2055(a) and 2522(a) of the Code) included in the charitable class as the independent trustee selects in the independent trustee's sole discretion without the approval or consent of any other person, and in such equal or unequal portions as the independent trustee determines in the independent trustee's sole discretion without the approval or consent of any other person.

Article 2.01(a)(2) further provides that the independent trustee shall designate by signed irrevocable written instrument delivered to X on or before the date that is thirty (30) days before the payment date, if X is then living, the portion of the net unitrust amount to be paid to the charitable class for the taxable year. Under Article 6.07 the term "payment date" means the last day of each calendar year and the term ending date.

Article 2.01(b) provides that X may revoke the survivor unitrust interest by will specifically referring to this right of revocation. The term "survivor unitrust interest" means the right to receive the unitrust amounts, if any, payable on payment dates following X's death.

Your authorized representatives have requested the following rulings with respect to CRUT #1 and CRUT #2:

1. The independent trustee's power to allocate a portion of the unitrust amount of CRUT #1 between noncharitable and charitable beneficiaries will not prevent CRUT #1 from qualifying as a qualified CRUT under § 664.
2. The independent trustee's power to allocate a portion of the unitrust amount of CRUT #2 between noncharitable and charitable beneficiaries will not prevent CRUT #2 from qualifying as a qualified CRUT under § 664.
3. X and X's wife's powers to replace the independent trustee will not prevent CRUT #1 from qualifying as a qualified CRUT under § 664.
4. X and X's wife's powers to replace the independent trustee will not prevent CRUT #2 from qualifying as a qualified CRUT under § 664.
5. X's power to designate the charitable class of CRUT #1 will not prevent CRUT #1 from qualifying as a qualified CRUT under § 664.
6. X's power to designate the charitable class of CRUT #2 will not prevent CRUT #2 from qualifying as a qualified CRUT under § 664.
7. X's testamentary power to revoke by a provision in his will all interests in the survivor unitrust will not prevent CRUT #2 from qualifying as a qualified CRUT under § 664.
8. Regarding CRUT #1, X's power to designate the charitable class will prevent completion of the gift of the net unitrust amount (defined in Article 2.01(a)(2) of CRUT #1) during X's lifetime until such power lapses. Upon the annual lapse of X's power to designate the charitable class during X's lifetime and to the extent each year the net unitrust amount is distributed to one or more charitable organizations (defined in Article 6.07(a)), the distributions will be completed gifts and will qualify for the gift tax charitable deduction under § 2522(a).
9. Regarding CRUT #2, X's power to designate the charitable class will prevent completion of the gift of the net unitrust amount (defined in Article 2.01(a)(2) of CRUT #2) during X's lifetime until such power lapses. Upon the annual lapse of X's power to designate the charitable class during X's lifetime and to the extent each year the net unitrust amount is distributed to one or more charitable organizations (defined in Article 6.07(a)), the distributions will be completed gifts and will qualify for the gift tax charitable deduction under § 2522(a).

10. Regarding CRUT #2, X's testamentary power to revoke by a provision in his will all interests in the survivor unitrust interest will cause X's gift of the survivor unitrust interest to remain incomplete until X's death.
11. Regarding CRUT #2, if X's spouse survives X and if X does not revoke the survivor unitrust interest at X's death, the entire value of the assets of CRUT #2 included in X's estate will be deductible because of the combined charitable and marital estate tax deductions available under §§ 2055(a) and 2056(a).

### LAW AND ANALYSIS

#### CRUT Issues

Section 664(d)(2) provides that for purposes of § 664, a charitable remainder unitrust is a trust (A) from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c) and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals, (B) from which no amount other than the payments described in § 664(d)(2)(A) and other than qualified gratuitous transfers described in § 664(d)(2)(C) may be paid to or for the use of any person other than an organization described in § 170(c), (C) following the termination of the payments described in § 664(d)(2)(A), the remainder interest is to be transferred to, or for the use of, an organization described in § 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined by § 664(g)), and (D) with respect to each contribution of property to the trust, the value (as determined under § 7520) of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Section 1.664-1(a)(i) of the Income Tax Regulations provides that, generally, a charitable remainder trust is a trust which provides for a specified distribution, at least annually, to one or more beneficiaries, at least one of which is not a charity, for life or for a term of years, with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity. In the case of a charitable remainder unitrust, the specified distribution to be paid at least annually must be a fixed percentage which is not less than 5 percent of the net fair market value of the trust assets, valued annually.

Section 1.664-1(a)(4) provides that in order for a trust to be a charitable remainder trust, it must meet the definition of and function exclusively as a charitable remainder trust from the creation of the trust. Solely for the purposes of § 664 and the regulations

thereunder, the trust will be deemed to be created at the earliest time that neither the grantor nor any other person is treated as the owner of the entire trust under subpart E, part 1, subchapter J, chapter 1, subtitle A of the Code (relating to grantors and other treated as substantial owners), but in no event prior to the time property is first transferred to the trust. For purposes of the preceding sentence, neither the grantor nor his spouse shall be treated as the owner of the trust under such subpart E merely because the grantor or his spouse is named as a recipient.

Section 1.664-3(a)(1)(i) requires that the governing instrument provides that the trust will pay not less often than annually a fixed percentage of the net fair market value of the trust assets determined annually to a person or persons described in § 1.664-3(a)(3) for each taxable year of the period specified in § 1.664-3(a)(5).

Section 1.664-3(a)(3)(i) provides that the amount described in § 1.664-3(a)(1) must be payable to or for the use of a named person or persons, at least one of which is not an organization described in § 170(c). If the amount described in § 1.664-3(a)(1) is to be paid to an individual or individuals, all such individuals must be living at the time of creation of the trust. A named person or persons may include members of a named class except in the case of a class which includes an individual, all such individuals must be alive and ascertainable at the time of the creation of the trust unless the period for which the unitrust amount is to be paid to such class consists solely of a term of years.

Section 1.664-3(a)(3)(ii) provides that a trust is not a charitable remainder unitrust if any person has the power to alter the amount to be paid to any named person other than an organization described in § 170(c) if such power would cause any person to be treated as the owner of the trust, or any portion thereof, if subpart E, part 1, subchapter J, chapter 1, subtitle A of the Code were applicable to such trust. The governing instrument may not grant the trustee the power to allocate the fixed percentage among members of a class unless such power falls within one of the exceptions to § 674(a).

Section 674(a) provides the general rule that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of an adverse party.

Section 674(b)(3) provides § 674(a) shall not apply to a power exercisable only by will, other than a power in the grantor to appoint by will the income of the trust where the income is accumulated for such disposition by the grantor or may be so accumulated in the discretion of the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

Section 674(b)(4) provides that § 674(a) shall not apply to a power to determine the beneficial enjoyment of the corpus or the income therefrom if the corpus or income is

irrevocably payable for a purpose specified in § 170(c) (relating to the definition of charitable contributions) or to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined in § 664(g)(1)).

Section 1.674(b)-1(b)(4) provides that under § 674(b)(4) a power in any person to determine the beneficial enjoyment of corpus or income which is irrevocably payable (currently or in the future) for purposes specified in § 170(c) (relating to the definition of charitable contributions) will not cause the grantor to be treated as an owner under § 674(a). For example, if a grantor creates a trust, the income of which is irrevocably payable solely to educational or other organizations that qualify under § 170(c), he is not treated as an owner under § 674 although he retains the power to allocate the income among such organizations.

Section 674(c) provides that § 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor (1) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or (2) to pay out corpus to or for a beneficiary, or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries).

Section 1.674(c)-1 provides that the powers to which § 674(c) applies are powers (a) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, or (b) to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries). In order for such a power to fall within the exception of § 674(c) it must be exercisable solely (without the approval or consent of any other person) by a trustee or trustees none of whom is the grantor and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor.

Section 1.674(d)-2(a) provides that a power in the grantor to remove, substitute, or add trustees may prevent a trust from qualifying under § 674(c) or (d). On the other hand, if the grantor's power to remove, substitute, or add trustees is limited so that its exercise could not alter the trust in a manner that would disqualify it under § 674(c) or (d), as the case may be, the power itself does not disqualify the trust. Thus, for example, a power in the grantor to remove or discharge an independent trustee on the condition that he substitute another independent trustee will not prevent the trust from qualifying under § 674(c).

#### Ruling #1 and Ruling #2

In the present case, with respect to CRUT #1 and CRUT #2, Article 2.01(a)(2) provides that after providing for distribution of the minimum amount (the aggregate of amounts described in Article 2.01(a)(1)(A) and (B)) the trustee shall distribute the balance of the



unitrust amount to such one or more of X and one or more charitable organizations (organization described in §§ 170(c), 2055(a) and 2522(a)) included in the charitable class as the independent trustee selects in the independent trustee's sole discretion without the approval or consent of any other person, and in such equal or unequal portions as the independent trustee determines in the independent trustee's sole discretion without the approval or consent of any other person.

As noted above, § 674(c) provides an exception to the general rule of § 674(a) with regard to certain powers to apportion trust income or principal among classes of beneficiaries. Thus, a provision that gives an independent trustee the power to allocate the unitrust amount among the charitable and noncharitable beneficiaries on an annual basis is not inconsistent with the provisions of the Code and regulations governing charitable remainder trusts, provided that the governing instrument requires that a portion of the unitrust amount must be allocated and paid to the noncharitable beneficiaries each year and provided that the portion of the unitrust amount so paid is not de minimis under the facts and circumstances for each year.

Based on the foregoing, and based solely on the information submitted and representations made, we conclude that the provisions in CRUT #1 and CRUT #2 that give the independent trustee the power to allocate a portion of the unitrust amount between noncharitable and charitable beneficiaries will not prevent CRUT #1 or CRUT #2 from qualifying as a CRUT under § 664(d)(2).

#### Ruling #3 and Ruling #4

With respect to both CRUT #1 and CRUT #2, Article 3.02 provides that at all times at least one independent trustee must be acting. "Independent trustee" means a trustee other than X, X's spouse, or a subordinate party as to either X or X's spouse. If at any time a vacancy occurs in the office of independent trustee, the appointer shall fill the vacancy by appointing an independent trustee.

Article 3.04 provides, in part, that the appointer shall be X or if X fails to act, X's wife. Article 3.05 provides, in part, that at any time or times the remover may remove an independent trustee. X is the initial remover, and when X ceases to act, X's wife is the remover.

Based solely on the information submitted and representations made, with respect to CRUT #1 and CRUT #2, we conclude that X and X's wife have not retained a power to remove the independent trustee that would allow either of them to substitute any person, including themselves, as independent trustee, or that would subordinate the independent trustee to X or X's wife. Article 3.02 and Article 3.04 of CRUT #1 and CRUT #2 provide that the independent trustee can be replaced only by the persons named in the trust agreements and in the order they are named. In no event will the independent trustee be a person or entity related to or subordinate to X or X's wife. For

these reasons, we conclude that X and X's wife's powers to replace the independent trustee will not prevent CRUT #1 or CRUT #2 from qualifying as a CRUT under § 664(d)(2).

#### Ruling #5 and Ruling #6

Article 2.01(a)(3) of both CRUT #1 and CRUT #2 defines the charitable class as one or more charitable organizations that X designates or, if X does not designate a charitable class before the payment date, one or more charitable organizations as the independent trustee in the independent trustee's sole discretion shall determine.

Article 2.01(a)(2) of both CRUT #1 and CRUT #2 provides, in part, that the independent trustee shall designate by signed irrevocable written instrument delivered to X on or before the date that is thirty (30) days before the payment date, if X is then living, the portion of the net unitrust amount to be paid to the charitable class for the taxable year. Under Article 6.07, the term "payment date" means the last day of each calendar year and the term ending date.

Section 674(b)(4) provides that § 674(a) shall not apply to a power to determine the beneficial enjoyment of the corpus or the income therefrom if the corpus or income is irrevocably payable for a purpose specified in § 170(c) (relating to the definition of charitable contributions) or to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined in § 664(g)(1)).

Based solely on the information submitted and representations made, we conclude that X's power to designate the charitable class of CRUT #1 and CRUT #2 will not prevent CRUT #1 or CRUT #2 from qualifying as a CRUT under § 664(d)(2).

#### Ruling #7

Article 2.01(b) of CRUT #2 provides that X may revoke the survivor unitrust interest by will specifically referring to this right of revocation. "Survivor unitrust interest" means the right to receive the unitrust amounts, if any, payable on dates following X's death.

As mentioned above, § 674(b)(3) provides an exception to the application of § 674(a) where a power is exercisable only by will, other than a power in the grantor to appoint by will the income of the trust where the income is accumulated for such disposition by the grantor or may be so accumulated in the discretion of the grantor or a nonadverse party, or both, without the approval or consent of the adverse party. Section 1.664-3(a)(4) provides, in part, that the trust may not be subject to a power to invade, alter, amend, or revoke for the beneficial use of a person other than an organization described in § 170(c). Notwithstanding the preceding sentence, the grantor may retain the power exercisable only by will to revoke or terminate the interest of any recipient other than an organization described in § 170(c).

For these reasons, and based solely on the information submitted and representations made, we conclude that X's testamentary power to revoke by a provision in X's will all interests in the survivor unitrust in CRUT #2 will not prevent CRUT #2 from qualifying as a CRUT under § 664(d)(2).

### Gift and Estate Tax Issues

#### Rulings #8 - #10

Section 2501 imposes a tax for each calendar year on the transfer of property by gift by any individual. Section 2511(a) provides, in part, that subject to limitations contained in chapter 12, the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(a) of the Gift Tax Regulations provides that the gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer. The tax is a primary and personal liability of the donor, is measured by the value of the property passing from the donor, and attaches at the time the property passes, regardless of the fact that the identity of the donee may not then be known or ascertainable.

Section 25.2511-2(b) provides, in relevant part, that a gift is complete and subject to the gift tax when the donor has so parted with dominion and control over the property transferred as to leave in the donor no power to change its disposition, whether for the donor's own benefit or for the benefit of another.

Section 25.2511-2(c) provides, in relevant part, that a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves.

Section 25.2511-2(d) provides, in relevant part, that a gift is not considered incomplete merely because the donor reserves the power to change the manner or time of enjoyment.

Section 25.2511-2(e) provides that a donor is considered to have a power if it is exercisable by the donor in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property, such as a trustee.

Section 25.2511-2(f) provides, in relevant part, that the relinquishment or termination of the power to change the beneficiaries of transferred property, occurring otherwise than

by the death of the donor, is regarded as the event which completes the gift and causes the gift tax to apply.

Section 2522(a) provides, in part, that, in computing taxable gifts for the calendar year, there is allowed a deduction for the amount of: all gifts to or for the use of a corporation or trust organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Section 2522(c)(2)(B) provides that, where a donor transfers an interest in property to both a charitable and a noncharitable person or entity, no deduction shall be allowed for the charitable portion of the gift, unless the interest is in the form of a guaranteed annuity or is a fixed percentage distributed annually of the fair market value of the property determined on an annual basis.

Section 25.2522(c)-3(c)(2)(vii) defines the term “unitrust interest” to mean an irrevocable right pursuant to an instrument of transfer to receive payment, not less often than annually, of a fixed percentage of the net fair market value, determined annually, of the property which funds the unitrust interest.

Section 25.2522(c)-3(d)(1) provides that the amount of the deduction for a unitrust interest is limited to the fair market value of the unitrust interest on the date of the gift. The fair market value of a unitrust interest is its present value.

Section 25.2522(c)-3(d)(2)(v) provides that the present value of a unitrust interest is determined by subtracting the present value of all interests in the transferred property other than the unitrust interest from the fair market value of the transferred property.

In *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939), the taxpayer created a trust for the benefit of named beneficiaries and reserved the power to revoke the trust in whole or in part, and to designate new beneficiaries other than himself. Six years later, in 1919, the taxpayer relinquished the power to revoke the trust, but retained the right to change the beneficiaries. In 1924, the taxpayer relinquished the right to change the beneficiaries. The Court stated that the taxpayer’s gift is not complete, for purposes of the gift tax, when the donor has reserved the power to determine those others who would ultimately receive the property. Accordingly, the Court held that the taxpayer’s gift was complete in 1924, when he relinquished his right to change the beneficiaries of the trust. A grantor’s retention of a power to change the beneficial interests in a trust causes the transfer to the trust to be incomplete for gift tax purposes, even though the power may be defeated by the actions of third parties. *Goldstein v. Commissioner*, 37 T.C. 897 (1962). See also *Estate of Goelet v. Commissioner*, 51 T.C. 352 (1968).

In Rev. Rul. 77-275, 1977-2 C.B. 346, the settlor created a trust that provided for the distribution of the annual income therefrom to charitable organizations described in §§ 170(c) and 2522. Settlor reserved the power to designate the charitable

organizations which would receive the income for the year. If the settlor did not make the designation prior to the beginning of the year, the trustee was empowered to select the charitable organizations at the end of the year and distribute the year's income to the selected organizations. The trust provided for reversion of principal to the settlor or the settlor's estate after ten years and one month. The revenue ruling concludes that the gift of the income interest is incomplete upon creation of the trust, in view of § 25.2511-2(c). Further, although a completed gift of future income results from the settlor's exercise or lapse of his beneficial power of designation, no deduction is allowable for the present value of the interest since the trust is not in the form required under § 2522(c)(2). The revenue ruling states that if the trust had provided for the settlor's designation to be made after the end of the year in which the income was earned, the gift occurring by reason of such designation, or by the lapse of the right to designate, would be a gift of money, separate from the trust property itself, and thus a deduction would be allowable under § 2522.

In the present case, the situation is similar to that in Rev. Rul. 77-275, except that X's designation power here extends until the time income is actually distributed to the charitable organizations on the payment date. Prior to actual distribution, X may revoke any previously-made designation of the charitable class and will retain the power to designate the charitable class until the payment date, when the power lapses. Therefore, during X's lifetime, a completed gift occurs when the distribution of the net unitrust amount is actually made to the charitable organizations, rather than upon the creation and funding of CRUT #1 or CRUT #2 or upon any designation of the charitable class by X. Pursuant to Rev. Rul. 77-275, a deduction is allowable under § 2522 for this gift of money, which is separate from the trust property itself.

Accordingly, based on the facts submitted and the representations made, we conclude that X's power to designate the charitable class will prevent completion of the gift of the net unitrust amount of CRUT #1 and the net unitrust amount of CRUT #2 during X's lifetime until such power lapses. Furthermore, upon the annual lapse of X's power to designate the charitable class during X's lifetime and to the extent each year the net unitrust amount is distributed to one or more charitable organizations within the meaning of Article 6.07(a) of each of CRUT #1 and CRUT #2, the distributions will be completed gifts and will qualify for the gift tax charitable deduction under § 2522(a).

With regard to X's testamentary power to revoke by a provision in his will all interests in the survivor unitrust interest of CRUT #2 (to include both the minimum unitrust amount and the net unitrust amount), retention of this power will cause X's gift of the survivor unitrust interest to remain incomplete until his death. See § 25.2511-2.

#### Ruling #11

Section 1.664-3(c) indicates that § 1.664-4 provides the rules relating to the calculation of the fair market value of the remainder interest of a charitable remainder unitrust.

Section 1.664-4(a) provides that for purposes of §§ 170, 2055, 2106, and 2522, the fair market value of a remainder interest in a charitable remainder unitrust is its present value determined under § 1.664-4(d), to be computed, in part, on the assumption that the amount described in § 1.664-3(a)(1)(i)(a) is distributed in accordance with the payout sequence described in the governing instrument. Under § 1.664-4(a)(3), if the governing instrument does not prescribe when the distribution is made during the period for which the payment is made, the distribution is considered payable on the first day of the period for which the payment is made.

Section 1.664-4(c) provides that any claim for a deduction on any return for the value of a remainder interest in a charitable remainder unitrust must be supported by a full statement attached to the return showing the computation of the present value of such interest.

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2055(a) provides that for purposes of the tax imposed by § 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers to or for the use of charitable, religious, scientific, literary, or educational organizations described in § 2055(a)(1)-(a)(4) of the Estate Tax Regulations.

Section 20.2055-2(e)(1) provides that where an interest in property passes or has passed from the decedent for charitable purposes and an interest in the same property passes or has passed from the decedent for private purposes (for less than an adequate and full consideration in money or money's worth) no deduction is allowed under § 2055 for the value of the interest which passes or has passed for charitable purposes unless the interest in property is a deductible interest described in § 20.2055-2(e)(2).

Section 20.2055-2(e)(2)(v) provides, in part, that a remainder interest in a trust that is a charitable remainder unitrust, as defined in § 664(d)(2) and (3) and § 1.664-3, is a deductible interest.

Section 20.2055-2(e)(2)(vii) provides, in part, that a unitrust interest is a deductible interest. For purposes of § 20.2055-2(e)(2)(vii), the term "unitrust interest" means the right pursuant to the instrument of transfer to receive payment, not less often than annually, of a fixed percentage of the net fair market value, determined annually, of the property which funds the unitrust interest.

Section 2056(a) provides that for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in

property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Section 2056(b)(1) provides, in pertinent part, that no deduction shall be allowed under § 2056(a) where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, and on such termination, the property passes to a person other than the surviving spouse or the spouse's estate.

Section 2056(b)(8) provides that, if the surviving spouse of a decedent is the only noncharitable beneficiary of a qualified charitable remainder trust, then § 2056(b)(1), which disallows a deduction for certain terminable interests passing to a surviving spouse, shall not apply to any interest in such trust that passes or has passed from the decedent to the surviving spouse.

Section 2056(b)(8)(B)(iii) provides that the term “qualified charitable remainder trust” means a charitable remainder annuity trust or charitable remainder unitrust described in § 664.

Section 20.2056(b)-8(a)(1) provides, in part, that if the surviving spouse of the decedent is the only noncharitable beneficiary of a charitable remainder unitrust described in § 664, § 2056(b)(1) does not apply to the interest in the trust that is transferred to the surviving spouse. Thus, the value of the unitrust interest passing to the spouse qualifies for a marital deduction under § 2056(b)(8) and the value of the remainder interest qualifies for a charitable deduction under § 2055.

In the legislative history to the Economic Recovery Tax Act of 1981, the House Ways and Means Committee stated:

If an individual transfers property outright to charity, no transfer taxes generally are imposed. Similarly, under the unlimited marital deduction provided in the committee bill, no tax generally will be imposed on an outright gift to the decedent's spouse. As a result, the committee finds no justification for imposing transfer taxes on a transfer split between a spouse and a qualifying charity. Accordingly, the bill provides a special rule for transfers of interests in the same property to a spouse and a qualifying charity.

Under the bill, if an individual creates a qualified charitable remainder annuity trust or a qualified charitable remainder unitrust, and the only noncharitable beneficiaries are donor and his spouse, the disallowance rule for terminable interests does not apply. Therefore, the individual will receive a charitable deduction (under § 2055 or 2522) for the amount of

the remainder interest and a marital deduction (under § 2056 or 2523) for the value of the annuity or unitrust interest; no transfer tax will be imposed.

H.R. Rep. No. 97-201, at 162 (1981).

In this case, the entire value of CRUT #2 as of X's date of death will be includible in X's gross estate. If CRUT #2 satisfies the requirements of § 664, the value of the charitable remainder interest will qualify for a charitable deduction under § 2055(e)(2)(A) because the remainder interest is in a charitable remainder unitrust described in § 664. If CRUT #2 satisfies the requirements of § 664, the value of X's spouse's interest in the survivor unitrust interest qualifies for a marital deduction under § 2056(b)(8). However, in this case, the value of X's spouse's interest in the survivor unitrust interest for purposes of determining the deduction available pursuant to § 2056(b)(8) is unclear as only a portion of the unitrust amount (the minimum amount) is required to be paid to X's spouse's under the instrument, with a larger portion of the unitrust amount (the net unitrust amount) payable to either X's spouse or the charitable beneficiaries, a determination made after the death of X by the independent trustee, as the independent trustee may annually decide. In light of the legislative history noted above, we conclude that under these facts, where X's spouse is the only noncharitable beneficiary of the survivor unitrust interest, the estate tax marital deduction under § 2056(a) will completely offset the value of the assets of CRUT #2 included in the gross estate of X after deducting the value of the remainder interest of CRUT #2 qualifying for a charitable deduction under § 2055(a).

Except as specifically ruled upon above, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed or implied concerning whether CRUT #1 or CRUT #2 will be valid CRUTs.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to the power of attorney on file with this office, we are sending a copy of this letter to X's authorized representatives.



The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the ruling request, it is subject to verification on examination.

Sincerely,

James A. Quinn  
Senior Counsel, Branch 3  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures (2):

Copy of this letter

Copy for § 6110 purposes

cc: