

Give & Take

News and Ideas for Development Executives of Nonprofit Organizations

Is There 'Security' in Planned Giving?

The Tax Reform Act of 1969 is now widely considered a cornerstone of fund-raising governance. This landmark legislation established specific guidelines for structuring charitable remainder trusts and other planned gifts in such a way as to qualify for income, capital gains, estate, and gift tax benefits. This guidance brought a welcome and necessary end to the confusion that had previously surrounded these gift plans.

During the 1960s, planned gifts had become increasingly popular, but attorneys and others who worked with donors to structure these gifts often had to guess at what payout rates and deduction formulas would ultimately be approved if a gift were examined by the IRS during a taxpayer audit.

Over the past 34 years, gift planners in both the nonprofit and for-profit arenas have become familiar with the 1969 Act, and subsequent regulations and court decisions have clarified issues to the point that few can remember when these guidelines did not exist.

Questions remained

In the years immediately following the passage of the 1969 Act, practitioners who closely examined the pooled income fund and certain other gift plans began to reflect on their similarity to mutual funds and other investments that had become subject to Securities and Exchange Commission (SEC) regulation beginning in the 1930s. In 1972, the SEC announced in a ruling that the pooled income fund was, in fact, a security under federal law. However, the SEC staff concluded that while the pooled income fund was technically a security, it was primarily a gift vehicle and thus need not be subject to full-blown securities regulation. Those who marketed this plan therefore did not have to be registered as securities dealers.

However, the SEC position was not without certain caveats. In order for a charity to be exempt from securities registration, the SEC set several requirements:

- Only volunteers or staff of a charity could market pooled income funds.
- They could not be paid commissions based on the amount of the contribution to a pooled income fund.
- Each donor or prospective donor had to be given full and fair disclosure of the workings of the fund.

Beginning in 1972, therefore, charities were required to send donors disclosure statements along with proposals for pooled income fund gifts. Depending on the charity, these documents varied in content from a few paragraphs to many pages in length. The problem drafters of these statements encountered was that the SEC never issued any guidelines regarding what to include in the statements. Many chose to err on the side of providing more information than others believed was necessary and, in some cases, produced documents that donors and advisors found confusing and less than helpful in deciding whether to complete a gift.

Throughout the 1970s and 1980s, charities also began to wonder what other gift plans might be considered securities, especially gifts that involved a transfer of assets that would be managed by charities or others that returned income to a donor. Over the years, staff opinions published by the SEC made it clear that certain types of charitable remainder trusts and other gift plans may in fact be considered securities.

Many charities were confused by vaguely worded SEC statements, and others ignored them because their attorneys advised them that they were not binding since they represented only the opinion of SEC staff.

Enter the "Texas Lawsuit"

Some will remember a notorious lawsuit in Texas known variously as the "Ozee" case or simply the "Texas Lawsuit." In this case a class action suit claimed that gift annuities, charitable remainder trusts, and other plans that were issued by a charity were, in fact, unregistered securities. The suit also claimed that charities were violating antitrust laws by acting through the American Council on Gift Annuities to set recommended gift annuity rates.

Inside:

- Keeping planned giving in perspective p. 2
- How one college helped turn tragedy into hope for the future p. 4

Continued on page 5

Planning Matters



Gaining
perspective
on gifts

When a donor first approaches a charity about a potential gift, those in the charity's development office may be tempted to view the gift solely from their own perspective. But a failure to consider the impact a large gift may have on other interested parties—such as the donor's family, other potential heirs, or other offices within the charity—may lead to less than favorable results. Understanding and accommodating various points of view from the outset may save everyone involved from unwelcome surprises later on.

Consider the donor's perspective

Remember that a donor may have family, friends, or professional advisors that have a potential interest in a gift under consideration. If a gift is too large or is structured in a peculiar fashion, it may have a detrimental impact on one of these parties and could keep the gift from being completed.

For example, friends or family members may be adversely affected by the size or timing of a gift, while the donor's professional advisors, such as a lawyer, bank trust office, or financial consultant, may have a particular interest in the way a gift is structured.

The charity's perspective

While such considerations may be relatively commonplace, it is crucial to also consider the impact of a particular gift on the institution as a whole. Not every gift is a good gift. Fundraisers should always ask themselves these questions: Will the gift be restricted or unrestricted? Can we credit it in a campaign? Is there a need to involve legal counsel? Will the gift require more work than it is worth? What impact will this gift have on the business office? On the legal department?

Cooperation is vital

Suppose a donor has included a provision for your charity in a will or trust. Depending upon the circum-

stances, such a gift may qualify for inclusion in your planned gift recognition society and be counted as a planned gift expectancy. While the bequest notification originated in the development office, recognition and other issues may dictate that others within the institution be consulted before and after the gift is completed.

For example, the finance office may be required under financial accounting standards to recognize irrevocable deferred gifts as income and reflect them on the institution's balance sheet, yet it may be difficult in practice to ascertain the required information from the donor.

The legal office may want to keep copies of wills and trusts in official documents files and review them periodically to make sure that there are no troublesome restrictions or provisions. They may also be of help in the settlement process and may facilitate the transfer of assets to the charity. In other cases the legal and financial aspects of the gift may be handled by experts in the charity's development or business office.

In some cases, colleagues may exert influence over the development office to give priority in their work to gifts of an irrevocable nature. Each department within an organization has its own agenda, but they should also have the same ultimate goal—to see their institution be the best it can be.

United we stand

The best results may well be achieved by acknowledging and utilizing the perspectives, and vested interests, of all of the parties—both on the donor's side and the charity's. Doing so may involve putting your legal counsel in touch with the donor's attorney to assist with a legal question. Or your finance office may need to assist the donor's financial advisor with the transfer and subsequent sale of a gift of stock.

Wise fundraisers do not operate in a vacuum. They understand that charities that pool their resources from development, business, legal, and administrative offices—rather than allowing themselves to be pulled apart—will be the ones that enjoy the greatest success in the long-term. **G&T**

Give & Take:

A client service publication published monthly since 1968 by The Sharpe Group, 6410 Poplar Avenue, Suite 700, Memphis, TN 38119, (901) 680-5300. Fax (901) 761-4268.

E-mail info@rfsco.com or through our Web site at <http://www.sharpenet.com>.

The publisher of *Give & Take* is not engaged in rendering legal or tax advisory service. For advice and assistance in specific cases, the services of your own counsel should be obtained.

Articles in *Give & Take* may generally be reprinted for distribution to board members and staff of nonprofit institutions and other non-donor groups. Proper credit must be given. Call for details.

© 2003 The Sharpe Group



Editor:
Elaine Gumbert

Design:
Kelley Carter
Amy Criswell

Sharpe Seminar Series

Featured Seminar: An Introduction to Planned Giving

For a comprehensive, in-depth training experience, consider attending Sharpe's seminar "An Introduction to Planned Giving."

Presenters Timothy Sharpe, Barlow Mann, and other experts combine their experience to guide participants through the basics of charitable gift planning, from explanations of gift planning techniques, to organizing and implementing an effective gift planning program, to communicating benefits of more effective charitable gift planning in the most efficient manner for your constituency.

Empower yourself with a wealth of gift planning knowledge that your donors will appreciate and will help your organization or institution benefit from the unprecedented intergenerational wealth transfer that is now on the horizon. This seminar is especially helpful for those who are planning to specialize in planned giving or have multiple responsibilities that include incorporating gift planning capabilities into other development efforts. [G&T](#)



Upcoming Seminar Training Dates

Major Gift Planning
New York
November 6-7
St. Petersburg, FL
December 4-5

An Introduction to
Planned Giving
Orlando
November 17-18
Memphis
December 15-16
Washington, D.C.
January 26-27

Managing Planned
Giving Relationships
Orlando
November 19-20
Washington, D.C.
January 28-29

Strategic Gift Planning
New York
January 12-13
Chicago
February 19-20

Multiple registration discounts are available. For more information or to register, please contact the Sharpe company.
Phone 1-800-238-3253, ext. 5360
Fax 901-761-4268
Web site:
www.sharpenet.com
E-mail: seminars@rfSCO.com

On the Agenda for 'An Introduction to Planned Giving'

Day One

- Introduction to the Planned Giving Process
- Understanding the Life Cycle of Donors
- Basic Planning Considerations
- The Charitable Tool Box—Part One
- The Charitable Tool Box—Part Two
- The Gift Planning Matrix

Day Two

- Introduction to Property Gifts
- What Is the Gift Worth?
- Gift Acceptance Policies
- Marketing Planned Gifts
- Cost-Effective Planned Giving
- Putting It All Together

See www.sharpenet.com/seminars for a complete agenda and dates for this and other Sharpe seminars.

What Attendees Are Saying About 'An Introduction to Planned Giving'

"RFSCO and their professionals have opened my eyes to the complete 'big picture' of how to, what to do, and what to expect in planned giving."
—H.C. "Buzz" Dixon, Family Connection, Inc. Anderson, IN

"The speakers knew their subjects and had good examples based on their experiences; content material was well integrated and reinforced from speaker to speaker."
—Karen Crenshaw, University of Pittsburgh, School of Dental Medicine, Pittsburgh, PA

"This is the most worthwhile professional conference I can remember attending."
—Mr. Chandler Battaile, Assoc. for the Preservation of Virginia Antiquities Richmond, VA

"The personal experience of the presenters is invaluable. Their ease and confidence make it very easy to pay attention."
—Kate Hoffman, Foundation for LSU Health Sciences, New Orleans, LA

Passing on a Legacy of Scholarship



Jo Ann MacKenzie

This month's Gift Planner Profile features Jo Ann MacKenzie, Director of Planned and Special Gifts at Saint Mary's College in South Bend, Indiana. An alumna of Saint Mary's and a fundraiser for 15 years, Ms. MacKenzie recently received news of a very special gift in honor of a young woman who suffered life-altering injuries on her way to begin her freshman year at Saint Mary's. Here Ms. MacKenzie shares with Give & Take how Saint Mary's handled this difficult situation and helped this student's parents establish a gift in honor of their only child and the school she loved.

Give & Take: I understand that Saint Mary's has recently received a gift in honor of a young woman who, because of a serious automobile accident, was never able to attend the College.

MacKenzie: Yes. In August of 1998, Sarah, an entering freshman, had packed her belongings and was ready to make the short trip from her home to the Saint Mary's campus. She was a top student at her high school, as well as a golfer, volleyball player, and accomplished pianist, and had plans for a career in medicine. Her excitement and love of Saint Mary's were contagious.

But before Sarah ever reached campus, the car in which she was a passenger was involved in a terrible accident. Five years later, Sarah is still suffering from the effects of a serious closed-head injury. Although she has made steady progress, she is still unable to speak and requires around-the-clock medical attention.

Although Sarah's hopes for her time at Saint Mary's were drastically changed by her injuries, her parents have made plans to help fulfill the dreams of other young women. Just this year they established the Sarah A. Foundation Trust.

Give & Take: What is the nature of the trust?

MacKenzie: As you can imagine, the donors' main concern is for their daughter's well-being. This trust primarily ensures that their only child will always have access to the best in medical care, even after they are no longer able to care for her. As a tribute to the school their daughter loved but was unable to attend, Sarah's parents have named Saint

Mary's College as the primary charitable beneficiary of the trust. The trust will provide funds for the scholarships on which the dreams of so many future students depend. Sarah's mother feels that giving a Saint Mary's education to other young women is like giving it to Sarah.

Give & Take: This must have been a difficult situation for everyone. How did you manage your relationship with Sarah's parents?

MacKenzie: It was actually the admissions office that initially established the College's relationship with Sarah's parents. After the accident, the College admissions office was extraordinarily sensitive and responsive. They followed the parents' lead in establishing a caring, thoughtful, and considerate relationship that has helped Sarah's parents transition into this new and unexpected reality.

As parents on our mailing list, they received the development office's mailings and one day called us to talk about making a gift. After they first contacted us, we immediately called our consultant at the Sharpe Group and asked him how to proceed with this sensitive situation. Our Sharpe consultant reminded us that, though Sarah's parents remain optimistic, they have had to come to terms with a grim reality. He urged us to simply focus on Sarah's love of Saint Mary's and to keep in mind what the parents are really trying to accomplish through this gift, which is to pass on a legacy of scholarship and opportunity to a group of women who have essentially become their surrogate daughters.

Give & Take: What is the most rewarding aspect of your job?

MacKenzie: It's twofold. Initially, it is getting to know the donors—people like Sarah's parents. People who make gifts at that level are extraordinary, and I am honored to be able to help them fulfill their desire to give.

Then, I love watching the effect that these gifts have on our own College. To see it thrive and become self-determining and deliver an excellent product to remarkable young women is very satisfying. The gifts that our development office helps to generate perpetuate the College's legacy in the world and the legacy of those who have benefited from it.

Is There 'Security' ...Continued from page 1

After a period of intense lobbying, Congress was persuaded to pass legislation that exempted gift annuity rates from antitrust regulation and to enact the Philanthropy Protection Act of 1995 (PPA), legislation that was designed to clarify the securities law treatment of planned gifts. Under the terms of the PPA, Congress essentially followed the guidelines set out in previous SEC staff opinions. The statute provides that gift annuities, pooled income funds, and charitable remainder trusts where funds are commingled are, in fact, securities but are not subject to registration so long as they are marketed by staff and/or volunteers and certain other persons, no commissions are paid, and each donor is given full written disclosure.

Once again, however, Congress gave no indication regarding what must be included in the disclosure statements it mandated in the PPA. Since 1995, most charities have developed disclosure statements that have been approved by counsel and the PPA has not proven to be a major impediment to the active marketing of gift annuities, pooled income funds, and charitable remainder trusts.

A material omission

In recent years, however, another aspect of securities law and regulation has begun to surface in litigation brought by donors who were not satisfied with the way gift plans had functioned in practice. In some cases, donors claimed that securities laws were violated in marketing the gifts. How was this possible if donors were given disclosure statements?

It is important to note that there are aspects of securities laws other than active disclosure requirements. The law also provides penalties for fraudulent statements or omissions from statements describing the workings of a plan. Legislative history indicates that the antifraud provisions of federal securities laws were still intended to apply to gift annuities and other planned gifts covered under the PPA.

While no reputable charity would actively seek to fraudulently mislead a donor regarding the way a gift functions, it is nevertheless possible for a charity to relay information in such a way that it is misconstrued by a donor. In addition to material misstatements, a material "omission" could be construed after the fact to have led a donor to make an unwise decision.

For example, in one case a donor called a charity in November of 2001 and asked what tax benefits he would receive if he established a \$200,000 gift annuity with the charity. He was told in writing by a development officer that his deduction would be

just over \$100,000 but was advised to check with his advisor to verify the figure provided via a software printout. Thinking that the donor's advisor would provide additional guidance, the development officer decided that it was not necessary to include language describing the 50% of adjusted gross income deduction limit—language that would have alerted the donor to the possibility that he might not be able to use the entire deduction.

Unfortunately for everyone involved, the donor did not seek advice and completed the gift without knowing that he was limited to a \$50,000 deduction because of his \$100,000 AGI. Because he was planning to deduct the entire amount and eliminate his tax liability for the year, he was very upset and threatened to sue the charity for securities fraud claiming there was a "material omission" in the marketing materials that was designed to mislead him into thinking he could take a \$100,000 tax deduction. The charity refunded the gift annuity on advice of its counsel that the donor's position was undoubtedly correct.

Keep it simple

This is just one example of why marketing materials, proposals, and other documents related to planned giving programs should be carefully prepared in light of disclosure and antifraud concerns.

The best advice in preparing these documents is to keep the material simple and basic and to read it from the perspective of a donor who knows nothing about the workings of the plan. If you decide to give exact numbers when relaying specific information about tax deductions and other technical information, make sure applicable qualifications are included as well. In the case above, for example, the charity should have told the donor he would be entitled to a tax deduction of approximately 50% of the amount donated and then advised him to see his accountant for the exact number.

Here is a partial list of points to consider when communicating with donors about the tax and other benefits of planned gifts:

- Watch the language of statements about avoidance of capital gain taxes. It is rarely true to state that a donor avoids capital gains tax when funding a planned gift. The tier structure of income reporting for charitable remainder trusts and rules regarding reporting income from gift annuities both require "recapture" of capital gain taxes received as part of the donor's income payments.



• • • • •
 News and ideas
 about Robert
 F. Sharpe and
 Company's
 services.

Footnotes

Time for giving thanks

Sharpe's "Thanks for Giving" brochures have long been a staple for fundraisers who understand that the likeliest prospects for a future gift are often among those who have recently given. By helping you both acknowledge donors for their generosity and introduce other ways of making substantial charitable gifts, this 6-panel brochure encourages one-time donors to develop a tradition of giving.

"Thanks for Giving" brochures are especially effective at year-end. As donors contemplate the end of 2003, many are anticipating their April 15 tax liability and will welcome the chance to learn of additional ways to lessen their tax burden this year. The "Tax Planning Tips" that are included on the brochure's back panel (directly above your institution's contact information) alert your donors to important tax considerations that may impact a decision to give again before December 31.

"Thanks for Giving" brochures also include information about planned gifts for those who may not be able to make another outright gift this year-end. In a section entitled "Considering the Future," this brochure offers giving options that your donors may not have originally considered, including bequests, life income gifts, and gifts of retirement assets and life insurance.

These brochures also include a built-in response device that allows your donors to request more information about ways to include your organization in their long-range estate plans.

And this year, thanking your best donors just got even easier. In addition to the original brochures, Sharpe now features a new version specifically for educational institutions.

Include "Thanks for Giving" with your gift receipts this year-end and throughout the coming year as well. Your donors will appreciate your heart-felt thanks for past gifts and your concern for the future.

Samples of "Thanks for Giving" are included along with this issue of *Give & Take*. Fax or mail the enclosed order form to place your order. For additional information, go online at www.sharpenet.com or call a Sharpe customer service representative at 1-800-238-3253. [G&T](#)



Is There 'Security' ...Continued from page 5

- Beware of direct comparisons of payments from gift annuities and other plans to investment vehicles that pay interest or dividends. Annuity and trust payments can be partially comprised of return of the donor's own money and thus a comparison to other investments that are purely interest or dividends may be seen as misleading.
- Where tax deductions are emphasized, point out that limitations apply on the use of deductions for some taxpayers.
- Be careful when illustrating future growth in income from charitable trusts or other gift vehicles. Make sure that all illustrations state that the "buildup" amounts are only estimates and may not occur.

- Failure to disclose gift tax ramifications of certain gifts may be seen as a "material omission."

These are just a few of the "red flags" that should be watched for in this area. They should not stop charities from communicating the benefits of planned gifts, but care should be taken that donors are, in fact, receiving accurate information on which to base their plans. [G&T](#)

Editor's note: This article is excerpted from the Sharpe seminar Strategic Gift Planning 2004. For dates and locations of this and other Sharpe seminars, see page 8 of this issue of Give & Take or call a Sharpe representative at 1-800-238-3253, ext. 5360.

Legacy of Scholarship

...Continued from page 4

Give & Take: As someone who has worked for a number of years in planned, major, and special gifts, what fund-raising techniques work best for you?

MacKenzie: In planned giving, we depend heavily on direct marketing. Still, as there is no substitute for personal contact, we spend about 50% of our time in the field. Our prospect research department generates a portfolio of prospective donors to help us determine which of our 16,000 active alumnae to visit.

Although Saint Mary's College has a history that spans 160 years, we are relatively new to the personal visit aspect of fund raising. As a result, we have combined major, special, and planned giving into one department and everyone who meets with donors is equally well versed in each of these fields. Because of that, when prospective donors are unable or unwilling to make an outright gift, we are prepared to ask them if they would consider including Saint Mary's in their estate plans.

As you can see from the story of Sarah's parents, everyone at the College shares the primary goal of helping the College become the best it can be, and we work together to achieve that goal.

Give & Take: What advice do you have for someone who is just starting out in development work?

MacKenzie: Don't be afraid to ask for help! Those who work in development are an extraordinarily giving group of people. I am never afraid to call someone to ask for advice. People are without fail wonderfully helpful and generous with their time and experience. [G&T](#)

More From Washington

This summer the Internal Revenue Service released revised sample charitable remainder *annuity* trust language in Revenue Procedures 2003-53 through 2003-60. The IRS also indicated that revised sample charitable remainder unitrust forms are in the works, but no specific release date has yet been announced.

The new sample CRAT documents and provisions are a marked improvement over earlier forms from the IRS and address many more common situations. The new revenue procedures include annotations and alternative covering for variations of inter vivos and testamentary charitable remainder annuity trusts. They include sample trust provisions for the following payment schedules—one measuring life, consecutive interests for two lives, concurrent interests for two lives, and a term of years. The new revenue procedures may be found in the Internal Revenue Bulletin number 2003-31 (August 4, 2003) on the IRS Web site at www.irs.gov. [G&T](#)

THE SHARPE SEMINAR SERIES

2004 Training Opportunities

For over 35 years the Sharpe Group has provided premier training opportunities for thousands of nonprofit managers, volunteers, and others whose responsibilities include helping donors complete larger charitable gifts.

There are five parts to every gift, whether the gift is unrestricted or designated for capital or endowment needs: Who makes the gift? Why do they make it? What is given? When is it given? And how is the gift completed? Sharpe seminar participants learn

to balance these elements in light of a donor's needs. Sharpe seminars also address the process of structuring gifts from the perspective of various members of the fund development team.

We invite you to join the thousands of development executives who have relied on Sharpe training to help them realize the full funding potential of their programs. For agendas and more information on each seminar, please call 1-800-238-3253, ext. 5360, or visit www.sharpenet.com/seminars.

Introduction to Planned Giving

Education



Washington, D.C.
January 26-27

Chicago
April 13-14

Bryn Mawr
June 24-25

New York
August 2-3

Tampa
November 8-9

Managing Planned Giving Relationships



Washington, D.C.
January 28-29

Chicago
April 15-16

New York
August 4-5

Implementation

Major Gift Planning



Seattle
February 9-10

Washington, D.C.
March

Chicago
May 17-18

New York
September 9-10

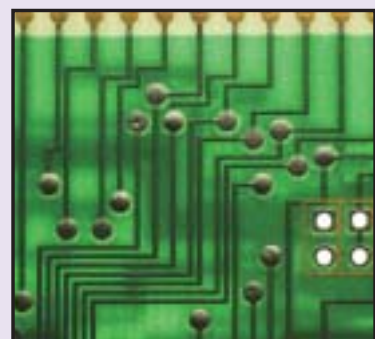
Strategic Gift Planning

New York
January 12-13

Chicago
February 19-20

Washington, D.C.
March

Memphis
December 13-14



Communication

Organization