NewEdge WEALTH

Well, That's Pretty Crummey!

BY ROBIN PETTY

Each of us has pivotal learning points in our lives: when you learned how to read, when you learned how to drive and when you learned you would be sending Crummey Notices for the rest of your life.

Crummey Notices (also called Crummey Letters) are formal letters to beneficiaries of irrevocable trusts notifying them of their right to withdraw all or some of a recent gift to the trust for a limited period of time. The purpose of the Crummey Notice is to qualify the gift for the gift tax annual exclusion by converting what would be a future interest into a present interest for tax purposes.

A Bit of Background on Trusts

Trusts are a common planning vehicle for many families and are no longer reserved for the ultra-wealthy. Trusts are a great way for a Grantor (the person who establishes the trust) to gift assets yet protect those assets from any unfortunate circumstances that may befall the beneficiary (lawsuits, bankruptcy, divorce, etc.).

The mechanics of a trust are simple: A grantor creates an irrevocable trust for the benefit of beneficiaries, assets are gifted to the trust, a Trustee manages the trust's assets and distributes assets to the beneficiary as the terms of the trust direct.

A Bit of a Background on Gifting

Under current law, each U.S. citizen may gift up to $17,000 per year ($34,000 if you are married and decide to gift split with your spouse) to any person without incurring gift tax. This is known as the annual exclusion amount. If you gift an amount above the annual exclusion amount to any one person in a year, you have made a taxable gift. You do not pay an out-of-pocket gift tax, but the amount above the annual exclusion amount counts against your lifetime exclusion amount. The lifetime exclusion amount for 2023 is $12.92 million. The annual exclusion amount is a "use it or lose it amount," meaning if you give less than the annual exclusion amount in any one year, you do not carry over to the next year. The lifetime exclusion amount is cumulative, what you do not use up during your life will be available at your demise.

A Bit of a Crummey Background

The name Crummey comes from the case that established the precedent for “Crummey Notices,” *Crummey v. Commissioner*[1]. The central issue of that case was whether gifts to irrevocable trusts could ever qualify for the annual exclusion.

The result in that case was that in order for a gift to qualify for the annual exclusion, the gift must be a gift of a present interest. To be a gift of a present interest, the donee (the person receiving the gift) must have unfettered access to the gift. With trusts, that immediate access is typically not the case since the beneficiary/donee will not have access to the gift until some point in the future. As discussed below, the Crummey Notice converts the gift to the trust from a future interest to a present interest, thus qualifying for the annual exclusion.

What Does a Crummey Notice Do and Who Sends It?

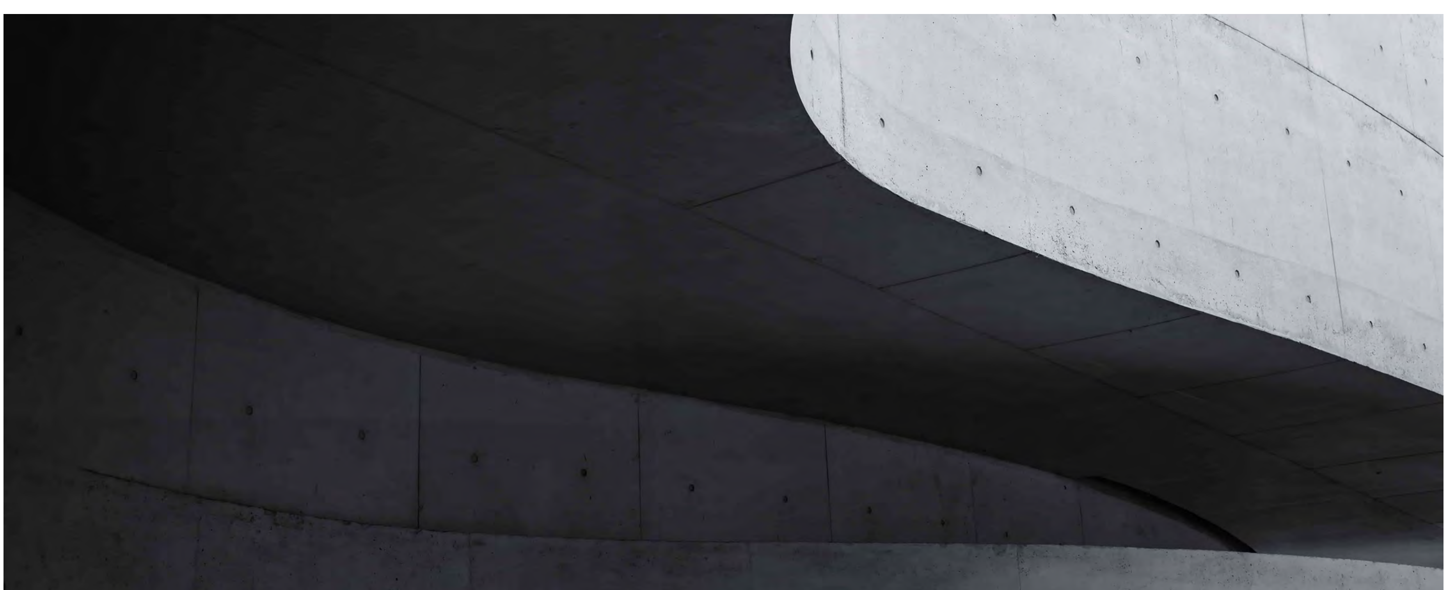
Most Irrevocable Life Insurance Trusts (“ILITs”) contain Crummy Provisions. Additionally, long-term irrevocable trusts that are not exclusively created to own insurance may also contain Crummey provisions. Crummey provisions require that the Trustee notify the beneficiary in writing that a gift has been made to the trust and that the beneficiary has a limited time (usually 30 to 60 days) to withdraw the funds. The Crummey Notice informs the beneficiary that they have unfettered access to the gift and qualifies the gift for the annual exclusion amount.

I Have an ILIT and My Annual Premiums Are More Than the $17,000 Annual Exclusion Amount. How Does That Impact Me?

Typically, ILITs and other trusts have more than one beneficiary. In the case of a gift being made to a trust, each of the beneficiaries would receive a Crummey Notice that a gift had been made in his or her name and there is a certain timeframe within which to withdraw the property from the trust.

Most Crummey provisions contained in a trust state that the amount of any gift made to a trust that a beneficiary may withdraw shall be the lesser of the beneficiary’s pro-rata share of the gift to the trust or the annual exclusion amount.

1 397 F. 2d 82 (9th Cir. 1968)



Example: Let's say an ILIT owns a life insurance policy, and the annual premium is $30,000. The beneficiaries of the trust are the grantor's three children. When the funds are gifted to the trust in order for the trust to pay the premium, each of the children would have the ability to withdraw $10,000.

When Does a Crummey Notice Need to Be Sent Out?

Crummey Notices should be sent out right after a gift is made to a trust. The terms of the trust will inform the Trustee about the timeframe within which the Crummey Notices need to be sent out. Some language states, "as soon as practical," others may provide a specified number of days within which to send the notice to the beneficiary.

Many times, a parent is a Trustee of a trust of which their minor child may be a beneficiary. As guardian of that child, a best practice is that the parent, as Trustee, should send a Crummey Notice to themself as the guardian of that child to acknowledge the gift.

What Does a Crummey Notice Need to Contain?

At a minimum, a basic Crummey Notice to the beneficiary should contain:

1. The name of the trust to which the gift was made
2. The date of the gift to the trust
3. The amount of the gift the beneficiary has the right to withdraw
4. The timeframe in which the beneficiary may withdraw the gift
5. Instructions on how to withdraw the gift, i.e., who to contact, if the withdrawal needs to be in writing, etc.
6. A statement indicating that if the beneficiary does not exercise their right to withdraw, the property remains in the trust
7. Contact information for the Trustee
8. Signature lines for both the Trustee and a receipt of acknowledgment signature line for the beneficiary to acknowledge receipt

At the end of this article, we have included a sample Crummey Notice.

What Does the Trustee Do After the Beneficiary Receives the Crummey Notice?

After the Crummey Notice is sent and acknowledged by the beneficiary, one of the most important responsibilities for the Trustee is to keep records. The records should include signed Crummey Notices, the date the notices were sent, acknowledged, and the amount of the gift involved.

The records demonstrate evidence that the Trustee has fulfilled his or her fiduciary duty. If the IRS ever questions the validity of a gift qualifying for the gift tax exclusion, keeping a record of sent Crummey Notices can demonstrate that the gifts were of a present interest, and thus qualify for the annual exclusion. Additionally, the records can protect against claims, comply with the statute of limitations, assuage beneficiary concerns, and be helpful for successor Trustees.

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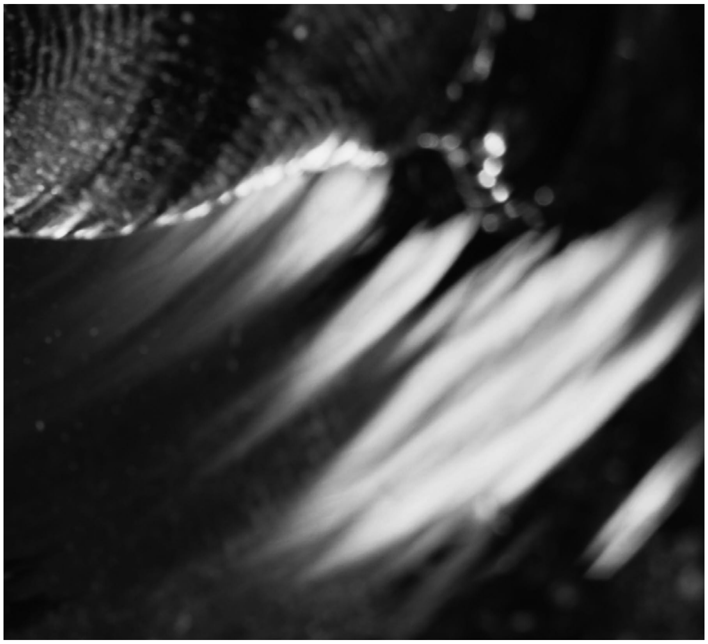
Oops, I forgot to Send a Notice, and I Feel Crummey!

Unsurprisingly, this happens. The Trustee's inclination may be to just backdate the Crummey Notice, but this is a very bad idea for many reasons. Backdating involves misrepresenting the timing of a transaction, which can lead to legal consequences. Additionally, backdating could open the trust up to IRS scrutiny and gift tax issues.

Backdating a Crummey Notice is risky and unethical and can have serious legal and ethical consequences. If you forget to send a Crummey Notice, below are some steps you can follow instead.

1. Send the Notice as soon as possible. It's better to send it than not to send it at all.
2. Document everything including noting the oversight and when the notice was eventually sent. This can be helpful if the IRS ever questions the validity of the gift.
3. Consult with an attorney because a missed Crummey Notice could disqualify the gift from the annual exclusion and incur gift tax consequences.
4. Enlist the beneficiary's cooperation because they might be willing to sign a document confirming that they were made aware of the withdrawal rights, even if the notice was late.
5. Additionally, some trusts contain language that addresses missed or late notices, so it's always best to review the document with your trusted advisors.



Best Practices for Trustees Who Have to Send out Crummey Notices

Being a Trustee can be a time-consuming (and sometimes crummy) role. Below we have included some best practices in order to help Trustees navigate those responsibilities.

1. Send Crummey Notices promptly after a gift is made to the trust.
2. Ensure that the Crummey Notices are clear about the amount of the gift, the time period to withdraw, and instructions on how to exercise the withdrawal right.
3. Document everything and keep detailed records.
4. Use a consistent delivery method, such as certified mail with a return receipt, to ensure the beneficiary receives the Crummey Notice and ensure the Trustee has a record of delivery. Some trusts may specify the method of delivery.
5. If the Grantor tends to make gifts to the trust around the same time each year, the Trustee should consider setting up a calendar reminder.
6. Stay updated by seeking professional assistance to keep up to date on tax law changes and how those changes may impact the trust.
7. Periodically review your process for issuing Crummey Notices. Always make sure that you are not missing any beneficiaries.
8. Maintain confidentiality between the beneficiaries. The decision of one beneficiary need not be shared with another beneficiary.

Your NewEdge Wealth team is here to support you in your role as Trustee. We can assist with record keeping by organizing and maintaining detailed records of all trust contributions and withdrawals. We can serve as a reminder to you to send out Crummey Notices as new gifts are made to the trust. We can keep you up to date on any tax law changes that impact the trust and how best to comply with those changes. We also can help educate beneficiaries about trusts, including the purpose and implications of Crummey Notices.

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Sample Crummey Notice

Date of Notice

Trust Name, Trust Date

To: **Beneficiary's Full Name and Address**

Re: Notice of right to withdraw funds

Dear **Beneficiary,**

This letter is to notify you that on **date**, a gift in the amount of **amount** was made to the **Trust Name** of which you are a beneficiary.

Under the terms of the trust, you have the right to withdraw a portion or all of this gift. Your withdrawal right will lapse after **the time period contained in the trust, i.e., 30 days** from the date of this notice. If you do not exercise your withdrawal right within this period, the gift will remain in trust and will be managed and distributed in accordance with the trust's terms.

To exercise your right to withdraw, please contact **Trustee's name** at **contact information** no later than **the exact date the gift lapses.**

This notice is provided as a requirement under the trust agreement and tax regulations. It is not intended to encourage or discourage you from withdrawing the funds. If you have questions or need further clarification, please consult your personal attorney or advisor.

Sincerely,

Trustee, Full Name, Address, Phone Number and Email Address

Beneficiary's Signature Acknowledgement

Date

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