

CHARITABLE GIFT ANNUITY RELIEF ACT OF 1995

NOVEMBER 14, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 2525]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2525) to modify the operation of the antitrust laws, and of State laws similar to the antitrust laws, with respect to charitable gift annuities, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

The “Charitable Gift Annuity Antitrust Relief Act of 1995” (H.R. 2525) provides antitrust protection to organizations which are registered as 501(c)(3) non-profit entities and exempt from taxation, and which issue charitable gift annuities. It specifies that agreeing to use, or using the same annuity rate for the purpose of issuing one or more charitable gift annuity is not unlawful under the antitrust laws. The exemption extends to both Federal and State law,

although a state would have three years after enactment to expressly override application of the bill to its state antitrust laws.

BACKGROUND AND NEED FOR THE LEGISLATION

A charitable gift annuity is a fundraising instrument defined and regulated under section 501(m)(5) of the Internal Revenue Code. A person who enters into a gift annuity agreement with a religious, charitable or educational institution makes a gift to the institution and receives a fixed income for life. Since the value of the gift received is more than the property transferred to the donor, a bargain sale has occurred, and the difference in values is deductible to the donor. 26 U.S.C. § 1011(b).

The annuity rate applied to the value of the gift is the critical element in ensuring that the transaction will result in a meaningful gift to the charity. The American Council on Gift Annuities, a non-profit organization representing more than 1,500 charitable organizations and institutions, provides technical assistance to its members in determining appropriate annuity rates. The rates recommended by the Council are based on actuarial studies of mortality experience among annuitants and a conservative projection of the rate of income to be earned on invested reserve funds. They are computed to produce an average “residium” or gift to the organization of between 40 and 60 percent of the amount originally donated under the agreement. Consequently, the rates are lower than and are not in competition with any rates offered commercially.

The Council promotes the use of its rates for two reasons. First, it protects the fiscal integrity of the charity. Offering gift annuities at rates higher than the recommended rates may jeopardize the gift that is to be available to the charity. If the rate is too high, other funds or the general assets of the organization may be required to carry out the terms of the agreement. Second, it ensures that donative intent rather than financial gain motivates the choice of recipient. Use of consistent annuity rates, and thus equal rates of return, assure a “level playing field” for charities, so that a donor’s choice of the charitable beneficiary of a gift annuity will depend on the relative merits of the institutions under consideration in the subjective judgment of the donor.

Charitable giving through gift annuities is threatened by a lawsuit currently pending in the United States District Court for the Northern District of Texas. *Richie v. American Council on Gift Annuities* (Civ. No. 7:94-CV-128-X). The Richie suit alleges that the use of the same annuity rate by the various charities constitutes price fixing, and thus a violation of the antitrust laws. The complaint seeks to enjoin the charities from offering gift annuities using the Council’s tables, to obtain a refund, and to recover treble damages. The suit also includes several counts alleging violations of securities and insurance laws.¹

The number of potential defendants in the case—which initially included the Lutheran Church, the United Way of America, and Northwestern University—has now been greatly expanded due to certification of the case as a class action. Under the ruling, the

¹ Separate legislation (H.R. 2519) has been introduced which addresses the securities and insurance law aspects of the lawsuit.

plaintiff class can include all those who received gift annuities after December 30, 1990, from past or present members or sponsors of the American Council who followed its recommended rates. This means that virtually every charitable organization in America using the gift annuity device is threatened with losses that could run in the millions of dollars.

The ongoing litigation is causing charities to expend massive amounts of time and resources on defending their positions. It is also forcing these organizations to make public information about their donors, a fact which makes people who guard their privacy reluctant to give. Regardless of the outcome of the suit, it has already had and will continue to have a chilling effect on gift giving and that it is consuming financial resources which would otherwise be allocated to charitable missions.

Courts are now finding that charitable and educational organizations can violate the antitrust laws. "There is no doubt that the sweeping language of section 1 [of the Sherman Act] applies to non-profit entities." *NCAA v. University of Oklahoma*, 468 U.S. 85, 100 n.22 (1984). The antitrust theory is that the absence of profit is no guarantee that an entity will act in the best interest of consumers. "Pure charity" is beyond the reach of antitrust law, *United States v. Brown University*, 5 F.3d 658, 666 (3d Cir. 1993), but "commercial transactions with a 'public service aspect'" are not. *Id.*

Drawing the line between "pure charity" and "commercial transactions with a 'public service aspect'" can be difficult. Increasing the percentage of minority-group students at Ivy League schools through a "need blind" admissions program is too commercial because even reduced tuition is a commercial payment for educational services. *Id.* Soliciting funds from donors, however, is not engaging in trade or commerce and is not covered by the Sherman Act. *DELTA v. Humane Society*, 50 F.3d 710, 714 (9th Cir. 1995).

Whether the issuance of a charitable gift annuity will be deemed "pure charity" or a "commercial transaction with a 'public service aspect'" is unclear. If it is found to be a commercial transaction, the court will apply a rule of reason analysis to determine whether the charities' use of particular annuity rates is necessary to achieve their purported goal. *Brown University, supra*, 5 F.3d at 678.

The Committee believes that there are strong public policy arguments which favor the enactment of this legislation. Congress encourages private gift giving through legitimate means, and particularly through instruments which the IRS approves and regulates. Gift annuities carry this imprimatur. Allowing litigants to use the antitrust laws as an impediment to these beneficial activities should not be countenanced where, as here, there is no detriment associated with the conduct. It is particularly difficult to see what anticompetitive effect the supposed setting of prices has in a context where the decision to give is motivated not by price but by interest in and commitment to a charitable mission.

Furthermore, it is a misnomer to use the term "price" to describe the selection of an annuity rate: in this context an annuity rate merely determines the portion of the donation to be returned to the donor, and the portion the charity will retain. Donors are not primarily buying an annuity; they are making a gift. It is the idea of

helping the charity, not maximizing return, which stimulates the transaction.

The Judiciary Committee believes in the vigorous and non-discriminatory application of the antitrust laws. As a general matter it does not favor exemptions or exclusions from the antitrust laws. However, in this limited instance it would serve no public policy purpose to subject the calculation of charitable gifts to antitrust scrutiny. H.R. 2525 has been crafted in an extremely narrow manner, so as to protect only this limited conduct and to avoid application to any potential anti-competitive conduct.

Enactment of H.R. 2525 will provide a complete defense to the antitrust portions of *Richie*, as well as protection from future suits based on the use of agreed-upon annuity rates. The exemption granted extends to both Federal and State law, although a state would have three years after enactment to expressly override application of the bill to its state antitrust laws.

COMMITTEE CONSIDERATION

Chairman Hyde introduced H.R. 2525 on October 24, 1995. Original co-sponsors of the measure included Ranking Minority Member Conyers, as well as Messrs. Sensenbrenner, McCollum, Gekas, Smith of Texas, Schiff, Canady of Florida, Inglis of South Carolina, Goodlatte, Bono, Bryant of Texas, and Ramstad.

VOTE OF THE COMMITTEE

The Committee on the Judiciary met in open session on October 31, 1995. A quorum being present, it ordered H.R. 2525 favorably reported to the House of Representatives by unanimous voice vote.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2525, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, November 8, 1995.

Hon. HENRY J. HYDE,
 Chairman, Committee on the Judiciary, House of Representatives,
 Washington, DC.

DEAR MR. CHAIRMAN. The Congressional Budget Office has reviewed H.R. 2525, the Charitable Gift Annuity Antitrust Relief Act of 1995, as ordered reported by the House Committee on the Judiciary on October 31, 1995. CBO estimates that enacting H.R. 2525 would not result in any significant cost to the federal government. Because enactment of H.R. 2525 would not affect direct spending or receipts pay-as-you-go procedures would not apply to the bill.

This bill would provide antitrust protection to certain non-profit organizations which issue charitable gift annuities. Under current law, it is a violation of the antitrust laws for two or more charitable organizations to use or agree to use the same annuity rate for the purpose of issuing one or more charitable gift annuities. According to the Administrative Office of the United States Courts (AOUSC), only one lawsuit alleging such a violation is currently pending in federal court. Based on information from the AOUSC, CBO estimates that while enacting this bill would preclude certain antitrust cases from being litigated, any reduction in future cases would not be significant. Thus, this bill could result in some savings to the federal governments, but the amount of such savings would not be significant.

While enacting H.R. 2525 could reduce the future antitrust caseload in state courts, CBO estimates that any reduction in litigation would not result in any significant savings to states or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman, for federal costs, and Karen McVey, for state and local costs.

Sincerely,

JAMES L. BLUM
 (For June E. O'Neill, *Director*).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 2525 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section states that this Act may be cited as the "Charitable Gift Annuity Antitrust Relief Act of 1995."

Section 2. Modification of antitrust laws

Section 2(a) makes it lawful under any of the antitrust laws, or under any State law similar to the antitrust laws, for two or more persons described in section 501(c)(3) of the Internal Revenue Code that are exempt from taxation under section 501(a) of such Code

to use, or to agree to use, the same annuity rate for the purpose of issuing one or more charitable gift annuities.

The Committee intends the protections of the Act to extend to attorneys, accountants, actuaries, consultants and others retained or employed by a person described in section 501(c)(3) of the Internal Revenue Code of 1986, when assisting in the issuance of a charitable gift annuity or the setting of charitable annuity rates.

The antitrust exemption provided in section 2(a) is intended to include the act of publishing suggested annuity rates. Thus, a non-profit organization such as the American Council on Gift Annuities could not be in violation of the antitrust laws due to its publication of actuarial tables or annuity rates for use in issuing gift annuities.

Section 2(b) establishes limited conditions under which a State may override the provisions of section 2(a) with regard to its State antitrust laws. To obtain this result, within 3 years of enactment of this Act, the State must enact a law which expressly provides that section 2(a) shall not apply with respect to the conduct described in that subsection. A State statute in effect on the date of enactment of this Act would not qualify for treatment under section 2(b), because it could not have expressly referenced the provisions of this Act.

Section 3. Definitions

Section 3 defines various terms used in the bill.

“Annuity rate” is defined as the percentage of the fair market value of a gift given in exchange for a charitable gift annuity, that represents the amount of the annual payment to be made to 1 or 2 annuitants over the life of either or both under the terms of the agreement to be determined as of the date of the gift.

The term “annuity rate” is intended to describe only the calculation which would be required in order to offer an annuity described in section 514(c)(5)(B) of the Internal Revenue Code.

The term “antitrust laws” has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12), except that it also includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section applies to unfair methods of competition.

A “charitable gift annuity” has the same meaning given it in section 501(m)(5) of the Internal Revenue Code of 1986. That section reads as follows:

(5) CHARITABLE GIFT ANNUITY.—For purposes of paragraph (3)(E), the term ‘charitable gift annuity’ means an annuity if—

(A) a portion of the amount paid in connection with the issuance of the annuity is allowable as a deduction under section 170 or 2055, and

(B) the annuity is described in section 514(c)(5) (determined as if any amount paid in cash in connection with such issuance were property).

Section 514(c)(5) of the Internal Revenue Code further describes the terms of a charitable gift annuity under section 501(m)(5):

(5) ANNUITIES.—For purposes of this section, the term ‘acquisition indebtedness’ does not include an obligation to pay an annuity which—

(A) is the sole consideration (other than a mortgage to which paragraph (2)(B) applies) issued in exchange for property if, at the time of the exchange, the value of the annuity is less than 90 percent of the value of the property received in the exchange,

(B) is payable over the life of one individual in being at the time the annuity is issued, or over the lives of two individuals in being at such time, and

(C) is payable under a contract which—

(i) does not guarantee a minimum amount of payments or specify a maximum amount of payments, and

(ii) does not provide for any adjustment of the amount of the annuity payments by reference to the income received from the transferred property or any other property.

The terms “person” and “State” are defined with reference to the definition of those terms in section 12(a) and section 4G(2), respectively, of the Clayton Act.

Section 4. Application of the act

The provisions of this bill shall apply to conduct occurring before, on, or after the date of enactment. In the instance of conduct which occurred before the date of enactment, or continuing conduct which began prior to the date of enactment, the provisions of this bill shall apply regardless of whether that conduct is the subject of a pending administrative or judicial proceeding.