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CHARITABLE DONATION ANTITRUST IMMUNITY ACT OF 1997

JUNE 23, 1997.—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

R E P O R T

[To accompany H.R. 1902]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1902) to immunize donations made in the form of charitable gift annuities and charitable remainder trusts from the antitrust laws and State laws similar to the antitrust laws, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

The "Charitable Donation Antitrust Immunity Act of 1997" provides antitrust immunity to those involved in raising charitable do-

nations in the form of charitable gift annuities and charitable remainder trusts. The exemption extends to both federal and state law, although a state would have until 1998 to expressly override application of the Act to its state antitrust laws.

BACKGROUND AND NEED FOR THE LEGISLATION

Charitable gift annuities and charitable remainder trusts are fundraising instruments defined and regulated under sections 501(m)(5) and 664(d) of the Internal Revenue Code. A person who enters into a gift annuity or charitable remainder trust 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. *See* 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 "residuum" 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 and charitable trusts continues to be 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, Inc.* (Civ. No. 7:94–CV–128–X). The Richie suit, as originally filed, alleged that the use of the same annuity rate by the various charities constituted price fixing, and thus a violation of the antitrust laws. The complaint sought to enjoin the charities from offering gift annuities using the Council's tables, to obtain a refund, and to recover treble damages.

In recognition of the potential impact of this litigation on charitable giving, Congress enacted (by a vote of 427–0 in the House, and by voice vote in the Senate) the "Charitable Gift Annuity Antitrust Relief Act of 1995" (15 U.S.C. § 37, *et seq.*), which grants antitrust protection to entities described in section 501(c)(3) of the In-

ternal Revenue Code 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.

Enactment of the 1995 Act was anticipated to 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. Unfortunately, that has not proven to be the case. A recent decision by the United States Court of Appeals for the Fifth Circuit, *Ozee* v. *American Council on Gift Annuities, Inc.,* 110 F.3d 1082 (5th Cir. 1997), upheld the denial of a motion to dismiss based on an assertion of the new antitrust exemption. This decision, and the ruling of the District Court, indicates that the Charitable Gift Annuity Antitrust Relief Act of 1995 is not being interpreted as broadly as it was intended by Congress.

H.R. 1902 replaces current law with language drafted in broader terms, so as to ensure that the provision will be interpreted by the courts in a manner which will achieve the goals of the 1995 Act. Enactment of the Act is intended to obviate the need for further litigation over the antitrust portions of the *Richie* case, in that it extends complete immunity to all defendants being sued for participation in the issuance of a charitable gift annuity or charitable remainder trust.

The Committee believes that given the valuable role our charities serve in our communities, the importance of gift annuities and charitable remainder trusts as a source of funding for them, and the tremendous legal and financial uncertainty caused by pending and possibly future antitrust challenges, H.R. 1902 is well justified. The legislation is narrowly crafted and the Antitrust Division of the Department of Justice has voiced no objections to it.

COMMITTEE CONSIDERATION

Chairman Hyde introduced H.R. 1902 on June 17, 1997. Original co-sponsors of the bipartisan measure included Ranking Minority Member Conyers, as well as Mr. Sensenbrenner, Mr. Schiff, Mr. Goodlatte, Mr. Chabot, Mr. Schumer, Mr. Berman, Ms. Lofgren, and Mr. Rothman. On June 18, 1997, the Committee met in open session and ordered the bill reported favorably by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(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(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(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

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 20, 1997.

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

DEAR MR. CHAIRMAN: The Congressional Office has prepared the enclosed cost estimate for H.R. 1902, the Charitable Donation Antitrust Immunity Act of 1997.

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), who can be reached at 226–2860, and Leo Lex (for the state and local impact), who can be reached at 225–3220.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 1902—Charitable Donation Antitrust Immunity Act of 1997

CBO estimates that enacting H.R. 1902 would result in no significant cost or savings to the federal government. Because enactment of H.R. 1902 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill. H.R. 1902 may contain an intergovernmental mandate as defined in the Unfunded Mandates Reform Act of 1995 (UMRA), but CBO estimates that any resulting compliance costs would be minimal. The bill would impose no new private-sector mandates as defined in UMRA.

H.R. 1902 would provide antitrust protection to charitable gift annuities or charitable remainder trusts, and to persons who assist in the issuance of such annuities or trusts. Under current law, it is unclear whether 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 Department of Justice (DOJ), only one lawsuit between two private parties alleging such a violation is currently pending in federal court. Based on information from DOJ, CBO estimates that while enacting this bill could preclude certain antitrust cases from being litigated, any reduction in future cases would not be significant. Thus, enacting H.R. 1902 could result in some savings to the federal court system, but the amount of such savings would not be significant.

In addition, enacting H.R. 1902 would require the Attorney General to conduct a study to determine the effect of this Act on markets for noncharitable annuities, charitable gift annuities, and charitable remainder trusts. Based on information from DOJ, CBO does not expect that the cost to conduct such a study would exceed $500,000.

H.R. 1902 would exempt from state antitrust laws specific charitable organizations and entities involved in establishing charitable remainder trusts and charitable gift annuities. Such a preemption would constitute a mandate under UMRA. However, states are given the authority to enact legislation which would reestablish state antitrust laws governing these entities (assuming the legislation is passed before December 8, 1998). Even in the absence of state legislation that would overturn this preemption and mandate, CBO estimates that the cost of the provisions in H.R. 1902 to state governments would be minimal.

The CBO staff contacts for this estimate are Susanne S. Mehlman (for federal costs), who can be reached at 226–2860, and Leo Lex (for the state and local impact), who can be reached at 225–3220. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

CONGRESSIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article 1, section 8, clause 3 of the United States Constitution.

SECTION-BY-SECTION ANALYSIS

Section 1.—Short Title

The Act may be cited as the "Charitable Donation Antitrust Immunity Act of 1997."

Section 2.—Immunity From Antitrust Laws

Section 2 of the bill replaces subsection (a) and (b) in 15 U.S.C. § 37 with four new subsections. It also deletes the definition of "annuity rate" in paragraph (1) of 15 U.S.C. § 37a, and adds to that section the definitions of "charitable remainder trust" and "final determination."

New subsection (a) of 15 U.S.C. § 37 provides that the antitrust laws, or state laws similar to the antitrust laws, shall not apply to charitable gift annuities or charitable remainder trusts.

New subsection (b) provides immunity from suit under the antitrust laws for any person subject to legal proceedings where the alleged conduct involves a charitable gift annuity or a charitable remainder trust. This immunity will protect defendants from the cost, burden, and risk of having to participate in discovery and trial. A defendant unsuccessful in obtaining dismissal or summary judgment based on the immunity granted by this subsection will have the right to interlocutory appeal of that ruling. *See Behrens* v. *Pelletier,* 116 S.Ct. 834 (1996).

New subsection (c) creates a conclusive presumption that a particular annuity or trust is a charitable gift annuity or charitable re-

mainder trust, and is thus excluded from coverage of the antitrust laws under subsection (a). This conclusive presumption can be satisfied in two ways. The first is by a showing that the annuity or trust was treated as a charitable gift annuity or charitable remainder trust in any filing by the donor with the Internal Revenue Service. This would include having claimed the annuity or trust as a charitable deduction on a tax return. The second is by a showing that the annuity or trust was treated as a charitable gift annuity or charitable remainder trust in any schedule, form, or written document provided by or on behalf of the donee to the donor. However, a litigant would not be entitled to a conclusive presumption under this subsection if the Internal Revenue Service has made a final determination that the annuity or trust at issue did not qualify as a charitable gift annuity or charitable remainder trust.

The antitrust protection granted under subsection (a) is limited to charitable gift annuities and charitable remainder trusts, instruments which are described and governed by Internal Revenue Service statutes and regulations. The Committee firmly believes that the determination as to whether an annuity or trust meets those rules should be made by the agency of competence, the Internal Revenue Service. That agency is best situated to analyze, for example, whether the donee organization met the criteria for designation as a section 501(c)(3) organization, or whether the annuity or trust met the criteria established by the Internal Revenue Service for treatment as a tax-deductible instrument.

The Committee recognizes that the Richie amended complaint alleges that, despite having obtained a section 501(c)(3) determination letter from the Internal Revenue Service, certain defendants are not qualified under section 501(c)(3). If this were the case, any annuity or trust issued by that defendant would not qualify as a charitable gift annuity or charitable remainder trust. The Committee has no views on the accuracy of these allegations, but believes that the proper forum for resolving the issue is before the Internal Revenue Service, not in an antitrust suit. The requirement that the Internal Revenue Service be the arbiter of these issues of fact will not preclude a donor from bringing suit under the antitrust laws where the annuity or trust was invalid. In the event that the Internal Revenue Service were to find that a particular donee was not properly qualified, it would issue a final determination to that effect. Upon issuance of that final determination, the annuities and trusts issued by that donee would no longer be entitled to the conclusive presumption granted under subsection (c).

New subsection (d) would allow each of the states to override the provisions of H.R. 1902 as to its state antitrust laws by enacting legislation to that effect on or before December 8, 1998.

The definition of "final determination" is added to make it clear that the term includes a determination of the Internal Revenue Service disallowing the donor's charitable deduction for the year in which the initial contribution was made, on the grounds that the annuity or trust did not qualify as a charitable gift annuity or a charitable remainder trust at that time. This determination becomes final when all administrative remedies are exhausted as to the disallowance.

Section 3.—Application of Act

The Act, and any amendments made by the Act, shall apply with respect to all conduct occurring before, on, or after the date of the enactment of this Act and shall apply in all administrative and judicial actions pending on or commenced after the date of enactment of this Act.

Section 4.—Study and Report

Section 4 requires the Attorney General to undertake a study to determine the effect of the Act on markets for non-charitable annuities, charitable gift annuities, and charitable remainder trusts. The use of the term "market" for charitable gift annuities and charitable gift annuities should not be interpreted as dispositive of the Committee's view on whether these instruments constitute "pure charity" or "commercial transactions with a public service aspect." *See DELTA* v. *Humane Society,* 50 F.3d 710 (9th Cir. 1995). As the Committee noted in its report on the Charitable Gift Annuity Antitrust Relief Act of 1995, "[w]hether the issuance of a charitable gift annuity will be deemed 'pure charity' or a 'commercial transaction with a public service aspect' is unclear." H.R. Rep. No 104–336 (1995), p. 3.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

CHARITABLE GIFT ANNUITY ANTITRUST RELIEF ACT OF 1995

* * * * * * *

[SEC. 2. MODIFICATION OF ANTITRUST LAWS.

[(a) EXEMPT CONDUCT.—Except as provided in subsection (b), it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) 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 1 or more charitable gift annuities.

[(b) LIMITATION.—Subsection (a) shall not apply with respect to the enforcement of a State law similar to any of the antitrust laws, with respect to conduct described in subsection (a) occurring after the State enacts a statute, not later than 3 years after the date of the enactment of this Act, that expressly provides that subsection (a) shall not apply with respect to such conduct.]

SEC. 2. IMMUNITY FROM ANTITRUST LAWS.

(a) INAPPLICABILITY OF ANTITRUST LAWS.—Except as provided in subsection (d), the antitrust laws, and any State law similar to

any of the antitrust laws, shall not apply to charitable gift annuities or charitable remainder trusts.

(b) IMMUNITY.—Except as provided in subsection (d), any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws, or any State law similar to any of the antitrust laws, on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities or charitable remainder trusts shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for the conduct set forth in this subsection.

(c) TREATMENT OF CERTAIN ANNUITIES AND TRUSTS.—Any annuity treated as a charitable gift annuity, or any trust treated as a charitable remainder trust, either—

(1) in any filing by the donor with the Internal Revenue Service; or

(2) in any schedule, form, or written document provided by or on behalf of the donee to the donor;

shall be conclusively presumed for the purposes of this Act to be respectively a charitable gift annuity or a charitable remainder trust, unless there has been a final determination by the Internal Revenue Service that, for fraud or otherwise, the donor's annuity or trust did not qualify respectively as a charitable gift annuity or charitable remainder trust when created.

(d) LIMITATION.—Subsections (a) and (b) shall not apply with respect to the enforcement of a State law similar to any of the antitrust laws, with respect to charitable gift annuities, or charitable remainder trusts, created after the State enacts a statute, not later than December 8, 1998, that expressly provides that subsections (a) and (b) shall not apply with respect to such charitable gift annuities and such charitable remainder trusts.

SEC. 3. DEFINITIONS.

For purposes of this Act:

[(1) ANNUITY RATE.—The term "annuity rate" means the percentage of the fair market value of a gift (determined as of the date of the 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 give such gift in exchange for such annuity.]

[(2)] *(1)* ANTITRUST LAWS.—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 such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(2) CHARITABLE REMAINDER TRUST.—The term "charitable remainder trust" has the meaning given it in section 664(d) of the Internal Revenue Code of 1986 (26 U.S.C. 664(d)).

(3) CHARITABLE GIFT ANNUITY.—The term "charitable gift annuity" has the meaning given it in section 501(m)(5) of the Internal Revenue Code of 1986 (26 U.S.C. 501(m)(5)).

(4) FINAL DETERMINATION.—The term "final determination" includes an Internal Revenue Service determination, after exhaustion of donor's and donee's administrative remedies, disallowing the donor's charitable deduction for the year in which the initial contribution was made because of the donee's failure to comply at such time with the requirements of section 501(m)(5) or 664(d), respectively, of the Internal Revenue Code of 1986 (26 U.S.C. 501(m)(5), 664(d)).

[(4)**]** *(5)* PERSON.—The term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

[(5)**]** *(6)* STATE.—The term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

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