



STATE REGULATION OF CGAs: FROM SIMPLE TO DOWNRIGHT COMPLEX

PG CALC WEBINAR

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State Gift Annuity Regulation – What is it?

At their essence, the state laws governing issuance of charitable gift annuities are providing an exemption from the insurance code (except in Alabama, where it is instead regulated by the state securities commission). To fall under that exemption, a charity must comply with all the requirements set forth in the statute. If it does not, then it has no exemption from the insurance code; and, since the charity is unlikely to have registered as an insurance company, by issuing gift annuities without the exemption it is technically operating as an unauthorized insurance company.

Does My Organization Need to Register?

There is general consensus that a charity should register in the state(s) in which it is doing business. A difference of opinion, however, can arise over what “doing business” means. From the states’ perspectives, it includes sending marketing materials into the state, visiting with prospective donors in the state, or any kind of communication with prospective donors within the state regarding a contribution for a gift annuity. As viewed by the states, a physical presence – an office or a permanent staff person – is not the sole determinant that a charity is doing business in the state and subject to its regulation. The contrasting opinion is that “doing business” in a state requires a physical presence. Under this analysis, if a charity has a single office location, then it is operating its gift annuity “business” in only one state, regardless of where its donors reside, and thus is subject only to regulation by that state.

Defining “doing business” and determining whether a charity is subject to a given state’s regulation are matters of legal interpretation. For this reason, a charity is wise to seek an opinion from legal counsel, particularly if it is inclined to disregard the states’ viewpoint on the matter. An organization should not make a decision about whether to register based on what another charity may have decided, or because not registering is viewed as the easier path to take.

Apart from whether a charity is subject to a state’s regulation at all, a common misperception is that there is a certain minimum number of annuities an organization can issue in a state before the regulation is applicable. Unfortunately for charities, this is not the case, and in all states in which registration is mandatory, a charity must either apply for and obtain a permit prior to issuing any gift annuities in the state or submit a notification no later than concurrent with entering into the first annuity in the state. This is true even in New York, where the statute provides an exemption when a charity’s reserves are less than \$1,000,000. This exemption is not self-executing, however, meaning a charity must still register with the insurance department and then be advised whether it falls under the exemption. In essence the exemption eliminates the need for a charity that falls under it from having to file an annual report, but it does not eliminate the need to obtain authorization to issue gift annuities in the state.

Another misperception is that certain types of charitable organizations are categorically exempt from gift annuity registration. This view likely derives from the fact that many states do exempt certain types of charities (most typically religious and/or educational) from general solicitation

registration requirements. However, the laws governing issuance of charitable gift annuities do not provide for any such categorical exemptions.

Finally, some organizations base their decision not to register on the perceived lack of enforcement by the states. It is true that insurance departments have not aggressively sought out non-compliant charities, focusing instead primarily on commercial insurers. And while most states do have the ability to impose fines for non-compliant issuance, so far only two (Maryland and Washington) have done so. It is interesting to note, however, that despite a majority of charities typically viewing the risk of detection by the state agencies to be very low, the most commonly stated reason for registering has little to do with state enforcement. Instead, it is more commonly associated with donor relations and the sense that non-compliance is not the public face the organization wants to put forward.

Obtaining the Exemption

What is required to fall under the exemption varies widely among the states. It truly does range from the simple to the complex. While for some organizations their donor base is such that they need to be able to issue gift annuities in all states, for many it will make sense to weigh the cost (both in time and dollars) of compliance with the benefit of expected gifts. A charity can issue in half of the states without being subject to any gift annuity-specific registration and could bring that total to 39 states by registering in the 14 states requiring a notice of intent to issue. The complexity really comes with the 11 more highly regulated states, and that is where the cost/benefit analysis is beneficial. A charity will want to be able to issue in states where doing so will further the success of its gift annuity program, but that may exclude one or more states with a high degree of regulation and where the charity has less than a handful of potential prospects.

Looking at the regulation, all states require the issuing organization to be a tax-exempt organization (with the state statute generally citing Section 170(c) or 501(c)(3) of the Internal Revenue Code) and that it be issuing what are defined as charitable gift annuities, under Section 501(m)(5) of the Code. What follows is a grouping of states by degree of regulation, with a description of the specific requirements. (See Appendix I for a summary view.)

Silent states (3 states + District of Columbia)

(Ohio, Rhode Island, Wyoming)

None of these states have specific laws spelling out an exemption from insurance regulation for gift annuities. As such, it is possible that a charity could be subject to the insurance code, though the insurance departments have shown no inclination to take that position. Along those lines, an Ohio appellate court held that the absence of a specific statutory provision governing gift annuities did not mean that their issuance was subject to insurance regulation.

Action required: With no specific laws addressing issuance of gift annuities, there are no set criteria that must be met and no gift annuity-specific filing to be made to the states. Although a

charity could opt to register as an insurance company, this would be quite a burdensome process, and it does not appear that the states view this as necessary.

Statutory criteria to meet, but no notification (22 states)

(Arizona, Colorado, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Vermont, Wisconsin)

Within this grouping, a charity needs to meet certain requirements, varying from state to state, to qualify for the exemption from insurance regulation provided by state law. Those with requirements beyond an organization's being tax exempt and issuing what is defined as a gift annuity are:

Years-in-operation

(AZ, CO, IL, ME, MT, NE, OR, PA, SC, SD, VA, VT, WI)

This requirement is a matter of the charity having been in existence for a certain period of time. Among the states in this group, the requisite number of years ranges from 3 to 20. A charity that does not meet the requisite years requirement in Illinois and Montana may still issue in those states if it reinsures its gift annuities with an appropriately licensed insurance company.

While, generally speaking, once the years requirement has been met it requires no further attention, it can resurface when a change is made in the entity that will issue gift annuities. For example, if a long-operating charity has recently created a Foundation with the intent to have it handle all fundraising for the organization, it may discover that the Foundation is not able to issue gift annuities in all states. The statutory language for Colorado, Illinois, South Carolina, and South Dakota may preclude a newly formed Foundation from "piggy backing" on the years of operation of the main organization, requiring it instead to meet the years of operation requirement on its own. This can result in the Foundation issuing annuities in most states, while the main organization issues in others in which the Foundation is not yet qualified. In such a circumstance, the organization would want to monitor the years requirement. As the Foundation reaches the requisite number of years, it could then qualify in those additional states so that issuance by the underlying organization could cease.

Unrestricted assets

(AZ, IL, MT, OR, PA, SD, VA, VT)

At the time a charity enters into any annuity agreement in one of these states, a certain level of unrestricted assets is required, ranging from \$100,000 to \$2 million. These are general assets of the charity and do not need to be segregated from other assets or placed in the reserve fund. While the statutory language varies, the most common definition is

“unrestricted cash, cash equivalents or publicly traded securities, exclusive of the assets funding the annuity.” The unrestricted designation is to ensure that the assets are not limited to another purpose (such as an endowment, scholarships, building fund, etc.) that would be inconsistent with using the assets to make annuity payments if needed. In all instances, the asset requirement is not simply one to be met at the time of registration, but on an ongoing basis. While these states are not overseeing compliance by way of any filing with the state, a charity should monitor its own compliance and suspend its activity in any state in which it no longer meets the minimum asset requirement. Such action should be taken not just as a matter of regulatory compliance but to ensure that the organization is not putting annuitants at risk. Similar to the years in operation requirement, a charity that does not meet the asset requirement in Illinois and Montana may issue in the state if it reinsures its gift annuities.

Disclosure language

(CO, OR, PA, SD, VA, VT, WI)

These seven states require that specific disclosure language be included in the annuity agreement, and one (South Dakota) requires that the same language be included in marketing materials. If a charity is using its own form of agreement, it will need to have a system in place to draw attention to the states with disclosure requirements, so that the appropriate agreement is created when a gift is received from a donor in that state. If a charity opts to use the agreements contained within its gift calculation software, the appropriate disclosure language will be drawn into the agreement upon selection of the donor’s state of residence.

Disclosure statement

(AZ)

Primarily, the need to provide a disclosure statement to a prospective gift annuity donor is a requirement of Federal law (the Philanthropy Protection Act of 1995). However, Arizona has specific requirements regarding such disclosure, including content requirements and the need to provide it to the donor before the contribution is received by the charity.

Non-gift annuity registrations with state agencies

(KY, ME, PA, SD)

None of the states in this “exempt, non-notification” grouping require a gift-annuity specific registration. However, in four of the states, to be a “qualified” charity under the gift annuity law, a charity must be registered as a foreign corporation to do business in the state or be registered for charitable solicitation purposes, unless it is specifically exempt from such registration. Since these registrations are not exclusive to issuance of gift annuities, a charity may already be registered to solicit and/or to do business in the

applicable states. If it is not, though, it must do so to be qualified to issue gift annuities in the state.

Segregated reserve fund
(MT, OR, PA)

Though a common requirement for the more highly regulated states, just three states in this category direct that a charity maintain gift annuity reserves. Montana requires that a charity maintain a separate annuity fund with at least one-half of the gift annuity contribution, though this requirement is waived if a charity reinsures its Montana gift annuities. Oregon also requires that the reserves be held in a segregated fund, while Pennsylvania's statute directs that a charity maintain one-half of the principal value of annuities issued, but does not specifically indicate that such assets be segregated.

Action required: Because no gift annuity-specific filing is required, the action with these states is primarily internal. Depending on which of the above criteria are required in a particular state, a charity needs to:

- ✓ confirm that it has been in operation for the requisite period of time;
- ✓ determine that the organization has sufficient unrestricted assets (should be readily apparent by a quick review of its most recent financial statements);
- ✓ determine a process for ensuring disclosure language will appear in agreements;
- ✓ create an Arizona-specific disclosure statement (or indicate in its standard disclosure statement what specific revisions are necessary for an Arizona donor);
- ✓ determine if the organization is already appropriately registered to solicit or do business; if not, complete such registrations;
- ✓ establish appropriate gift annuity reserves.

Statutory criteria to meet and notification to state (gift annuity-specific filing) (14 states)

(Alaska, Connecticut, Georgia, Idaho, Iowa, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Texas, West Virginia)

Many of the same criteria discussed previously are applicable to this grouping as well. The one significant addition, however, is that states in this group require a charity to file a notice of its intention to issue gift annuities and confirming compliance with the statutory requirements. The notifications are fairly streamlined filings, requiring relatively little in the way of documents. Many of the states have a specific form that can be used, while for others the notice would be done in the form of a letter. Where supporting materials are required, they are tied with providing proof of a charity's compliance with certain criteria, i.e., tax-exempt status, minimum assets, disclosure language in agreement, etc.

Years-in-operation

(AK, CT, GA, ID, IA, MS, MO, NV, NH, NM, NC, OK, TX, WV)

All states in this grouping require the charity to have been in existence for three years. As noted before, while, generally speaking, once this requirement has been met it requires no further attention, it can resurface when a change is made in the entity that will issue gift annuities.

Unrestricted assets

(AK, CT, GA, ID, IA, MS, MO, NV, NH, NM, NC, OK, TX, WV)

All states in this grouping require a charity to have a minimum amount of unrestricted assets, ranging from \$100,000 to \$300,000, at the time it enters into any annuity agreement. These are general assets of the charity and do not need to be segregated from other assets or placed in the reserve fund, though New Mexico allows the requirement to be met either by an unrestricted fund balance (assets in excess of liabilities) or unencumbered assets in a gift annuity fund. As noted previously, the most common definition is “unrestricted cash, cash equivalents or publicly traded securities, exclusive of the assets funding the annuity.”

Disclosure language

(AK, CT, GA, ID, IA, MS, MO, NV, NH, NM, NC, OK, TX, WV)

All the states in this group require that specific disclosure language be included in the annuity agreement. Oklahoma requires that the same disclosure be included in marketing materials and, if a charity makes use of an application form, in that form as well. As noted previously, a charity will need to ensure the applicable language is included, whether by adapting its own agreement forms or through use of the agreements contained in its gift calculation software.

Non-gift annuity registrations with state agencies

(MS, NH)

In addition to the gift annuity-specific notification, Mississippi and New Hampshire require proof that the charity is also registered for charitable solicitation in the state or proof that it is exempt from such registration.

Segregated reserve fund

(NH)

New Hampshire is the only state in this category of registration requiring maintenance of gift annuity reserves. A charity must retain 100 percent of the contributions received for

gift annuities (increased by earnings and decreased by annuity payments and properly allocated expenses), with such contributions to be invested in accordance with the general standards of prudent investment.

Gift annuity rates

(NH)

For annuities issued in New Hampshire, a charity may not exceed the American Council on Gift Annuities' ("ACGA") suggested rates in effect at the time of the gift.

Action required: A charity needs to file a notification indicating its intent to issue in the state and noting its compliance with the applicable criteria. The notification will either be on a form prescribed by the state, or in a letter. (Note: The ACGA maintains state by state information on its website, including links to applicable state forms: www.acga-web.org.) Depending on which of the above-noted criteria are required in a particular state, the charity will be confirming that it:

- ✓ has been in operation for the requisite period of time;
- ✓ has sufficient unrestricted assets (should be readily apparent by a quick review of its most recent financial statements);
- ✓ will include the applicable disclosure language in the annuity agreement, and in the case of Oklahoma in marketing materials (internally, the organization will need to determine a process for ensuring this happens);
- ✓ is already appropriately registered to solicit in the state or is exempt from such registration (if it is not, such registration will need to be completed);
- ✓ will maintain the appropriate gift annuity reserves;
- ✓ will not exceed the ACGA suggested rates (applicable only in New Hampshire).

In addition to the notification, some states require supporting documentation. To issue in these states, the organization would need to gather some or all of the following:

- ✓ an IRS tax-exempt letter;
- ✓ audited financial statements (up to 3 years);
- ✓ a sample gift annuity agreement;
- ✓ a gift annuity application form (no state requires that a charity make use of such a form, but some ask for a copy if a charity makes use of one);
- ✓ representative gift annuity marketing pieces;
- ✓ proof of registration (or exemption) with other applicable state agencies.

Application for a certificate of authority/permit (11 states)

(Alabama, Arkansas, California, Florida, Hawaii, Maryland, New Jersey, New York, North Dakota, Tennessee, Washington)

In this grouping there are not only some additional criteria to be met, but even those that have been discussed previously have more complexity. The registration process itself is also more involved, requiring submission of significantly more in the way of supporting documents.

Years-in-operation

(AR, CA, FL, HI, MD, NJ, NY, WA)

Of the states in this group requiring a specific number of years, the number ranges from 3 to 10. Five of these states (CA, FL, HI, NY, WA) do not allow for “piggybacking” of years between related organizations, meaning that the organization that registers to issue gift annuities must, on its own, have operated the requisite number of years. There are also two states where the requirement relates to activity in the state, rather than simply years of existence. In Maryland, a charity must provide proof of activity related to the applicable registration category, which for an out-of-state charity would be either educational or religious (given the limited categories available). As an example, a University located outside of Maryland might offer information relating to its recruitment activity in the state, presentations made by University staff to Maryland alumni, and/or collaborative programs or research conducted with Maryland-based institutions. This need for in-state activity is ongoing, and so the University needs to be sure that it continues to maintain these or similar activities in Maryland. In Hawaii, the in-state activity requirement may be met with either program services or fundraising, so that in addition to the activities mentioned previously, the same University could also utilize donor contacts (in-person, or by phone or mail) in support. Like Maryland, the need for activity in Hawaii is an ongoing requirement, and so a charity needs to be sure to maintain that connection.

Unrestricted assets

(HI, WA)

Given the degree of regulation in this category of states, it is interesting that only two have a specific asset requirement. However, the financial health of a charity is still typically looked at by the other states when reviewing the application, as audited financial statements are generally among the required supporting documents to be submitted. In Hawaii, a charity must have a specific net-worth in the state – \$200,000 in cash, cash equivalents, or publicly traded securities held in Hawaii – resulting in the need to establish a bank or brokerage account in the state. Washington requires \$500,000 in unrestricted net assets, and specifically focuses on the unrestricted net asset line in the audited financials for determining compliance. If a charity has consolidated financials, it will need to include a supplemental schedule that provides a breakout showing the financial position of just the entity issuing gift annuities.

Disclosure language/annuity agreement content
(AL, AR, CA, FL, HI, MD, NJ, NY, ND, TN, WA)

While in previous categories the only agreement content requirement was inclusion of specific disclosure language, states in this grouping may have other required agreement provisions. There are six (AL, CA, FL, HI, MD, TN) that do require disclosure language. California requires that the same disclosure be included in marketing materials as well (along with a disclaimer directing the donor to seek independent legal advice). The other agreement content requirements involve things such as payment correction language, a statement of the reasonable value of benefits, the nearest age or date of birth of the annuitant, which law must be named as governing, or the fact that the donor must sign the agreement. As a charity contemplates compliance with multiple states, a review of its existing agreements should be done to determine to what degree they need to be modified to meet state-specific requirements, and whether it would make sense to switch to agreement forms integrated in the charity's gift calculation software (if such agreements are not already being used).

Nine of the 11 states (with Florida and Hawaii being the exceptions) require a charity to put on file the forms of annuity agreements it will be using. Once agreement forms have been submitted and approved, if a charity wishes to make changes it must submit new forms for review and approval prior to beginning to use them.

Disclosure statement
(AL)

As noted previously, the need to provide a disclosure statement to a prospective gift annuity donor is a requirement of Federal law. However, Alabama (like Arizona) has specific requirements regarding such disclosure, including content requirements and the need for it to be signed by the donor.

Non-gift annuity registrations with state agencies
(NJ, WA)

When registering to issue gift annuities in New Jersey, a charity will need to provide proof that it is registered in the state for charitable solicitation and registered as a foreign corporation or provide proof that it is exempt from these registrations. In Washington, the charity must provide proof that it is registered as a charitable organization in the state.

Segregated reserve fund

(AL, AR, CA, FL, HI, MD, NJ, NY, ND, TN, WA)

The reserve fund must be held separate and distinct from other assets of the organization, and its assets may not be used to pay any obligations other than annuity payments. While typically the segregated fund would hold reserve assets for all annuities, not just those issued in the state requiring the fund, California requires a state-specific fund, holding reserves for annuities issued only in that state. The amount required to be held in the reserve fund is generally calculated based on an actuarial methodology, utilizing mortality tables and interest rates that can vary from state to state. Some states require a surplus, most often an additional 10 percent of the calculated reserve. New York is the one state with a higher surplus requirement, either 26.5 percent or 43.75 percent depending on whether a charity holds a permit or is in the exempt stage. In two states (Hawaii and New Jersey) the surplus is the greater of 10 percent or \$100,000. (Thus, until a charity's calculated reserves exceed \$1 million, the required surplus will be \$100,000.)

The reserve fund requirement can impact a charity differently as it looks to register in these states, depending on where the charity is in the operation of its gift annuity program. For a charity just launching a program, the minimum surplus requirement noted above in effect creates a minimum reserve fund balance of \$100,000. (Arkansas and New York are the other states with minimums, requiring that the fund hold \$50,000 and \$100,000, respectively.) The charity must be able and willing to move funds from another source to establish the segregated reserve fund. A charity need only transfer \$100,000 since a single segregated fund would meet the requirements of all the states with a minimum balance requirement.

A charity that has been issuing gift annuities has other considerations as it looks at being subject to specific states' reserve requirements. In many instances, such a charity has not registered in any state requiring a segregated fund, and so the gift annuity assets may be commingled with other assets of the organization, frequently in the endowment. Because of the typically large size of endowments, this arrangement is viewed as providing a higher return on the gift annuity assets than could be realized in a segregated gift annuity fund. If there is internal reluctance to shift the assets, this must be overcome to become compliant. Also, depending on whether or how a charity has been tracking gift annuity assets, it can be difficult to determine precisely the amount of such assets held in the larger fund. Since the reserve fund will need to meet the requirements of the state(s) in which the charity will register, often the amount to be transferred to the reserve fund is determined by doing a calculation in accordance with the applicable states' methodologies, adding in any required surplus and then allowing a certain additional percentage as a "hedge" against market fluctuation.

Limitations on investment of reserve fund

(CA, FL)

A majority of the more regulated states (AR, HI, MD, NJ, NY, TN, WA) provide for investment of the gift annuity reserves in accordance with a prudent investor standard, with two others (AL and ND) being silent as to investment of reserves. However, California and Florida place specific limitations on how the segregated reserve fund is invested. (Arkansas provides an option to either follow a prudent investor standard or specific limitations, with the choice making a difference in annual reporting requirements, but most charities opt for the prudent investor approach.)

In general, the investment limitations imposed by California and Florida are:

- government bonds allowed without limit;
- corporate bonds generally limited only as to percent in any one company, except in California where they are included in a limit on publicly traded securities;
- stock limited to 50 percent of required reserve assets;
- mutual funds limited to no more than 10 percent in any one fund (Florida), or considered as part of the stock limitation (California);
- real estate not permitted as a reserve investment in California and limited to 5 percent by Florida.

Because California requires a “California only” reserve fund, the restrictions imposed by that state apply only to reserves held for California residents. Florida allows a charity the option of creating a state-specific fund, which can make it easier to monitor and maintain compliance with the particular restrictions. If Florida reserves are held within a larger “all states” fund, the charity must ensure that there are sufficient assets in that fund invested in accordance with Florida’s limitations to cover the required reserve for Florida annuities.

Gift annuity rates

(AL, AR, CA, MD, NJ, NY, WA)

As part of the application in these seven states, a charity must put on file its schedule of maximum rates – meaning the charity cannot issue an annuity that exceeds the stated rate for a given age. A charity is free to reach an agreement with the donor for a lower rate. However, in such an instance California specifically requires there to be an addendum to the agreement, signed by both parties, reflecting the donor’s awareness of the rate he or she would be entitled to under the rate schedule, and indicating agreement to accept a lower rate. Adopting use of the addendum would be a good practice for gift annuities issued in other states as well, but at a minimum discussion of the rates and agreement to a lower one should be documented in some fashion, preferably in written communication with the donor.

It should be noted that New York is unique among the states in publishing its own schedule of maximum rates, and a charity registered to issue in the state must not exceed the state's maximum when issuing an annuity to a resident of New York. Historically, New York's rates have been higher than the maximum rates suggested by the American Council on Gift Annuities (ACGA). However, the methodology used by New York to establish its maximum rates changed in accordance with a new valuation method (VM-22) put forth by the National Association of Insurance Commissioners. (As an aside, the methodology used in setting the rate schedule is the same one used by New York in setting the parameters for calculating the required reserve a charity needs to hold.) This change in methodology has resulted in New York's maximum rates being lower than the ACGA's; as of the first quarter of 2021 the discrepancy affects rates for males ages 46 through 86, and females ages 46 through 91 (New York now publishes rates quarterly and its schedule is gender-specific). New York does not currently publish rate schedules for 2-life gift annuities, or for any type of deferred gift annuity.

The ACGA and the New York Department of Financial Services have been working to resolve the rates issue, which will require legislative action to amend New York's gift annuity statute (Section 1110 of the Insurance Code). It is unclear at this point whether the legislature will be able to take action during its 2021 session.

Adoption of Board resolutions

(AR, CA, NJ, NY)

As part of the registration process, four states require passage of a board resolution regarding the reserve fund. These resolutions make specific reference to the state requirements and would be distinct from any general resolution adopted by a charity's board authorizing the establishment of a gift annuity program.

Appointing an in-state agent

(AL, CA, TN, WA)

As part of the registration process in California a charity must designate an in-state agent for service of process. While many organizations make use of a commercial service for this purpose, for which there is an associated cost, some opt to name an individual connected with it in some way (e.g., a former or current board member, staff of an in-state affiliate). Note that an appointment of agent may also be required for purposes of other state registrations, as a foreign corporation or for charitable solicitation.

Alabama, Tennessee, and Washington require that a charity appoint a state agency as its agent for service of process. In these appointments, the charity then indicates a person to whom the process should be forwarded. A charity might direct it to be sent to its in-house or outside legal counsel, to its chief executive or finance officer, or to some other staff person.

Information from individuals

(AL, CA)

A charity submitting an application in Alabama will need to register as “restricted agents” the people who will market gift annuities in the state and who will sign the gift annuity agreements on behalf of the charity. The form used to register these “agents” is one used in the securities industry, and is akin to a background check, requiring information on the individual’s education, employment, and residential history, and posing questions relating to involvement in civil, criminal, or bankruptcy proceedings. This agent registration must be renewed each year through payment of a fee, though the form itself need not be completed annually unless there has been some change to the information provided with the initial registration. However, should there be a change in those who market annuities or sign the agreements, the new person would need to complete the agent registration in its entirety.

California is the only other state that requires such detailed information from individuals at the charity. As part of the registration, it is necessary for certain people to complete an “Individual Affidavit” which is similar in content to the form required by Alabama of restricted agents. People needing to complete an “Affidavit” would be those within the organization who manage the day-to-day annuity activity, manage or have access to the annuity reserve fund, or make investment decisions pertaining to the reserve fund, as well as those officers who will be signing the various application documents. Typically, this will include at least certain people within the development office, along with chief operating and/or financial officers. Whether any board members need to complete affidavits depends on whether the board is involved in any of the defined activity. If it is, affidavits would be required only from selected members (such as the Board chair, treasurer, and finance or investment committee members), not the entire Board. These “Affidavits” are required only as part of the initial application and do not require renewal by the people that have completed them, nor are new ones required if there is a change in personnel.

Action required: A charity needs to apply for authorization to issue gift annuities, and the state will review and approve the application. With the exception of Florida, where a charity is primarily affirming its compliance with the requisite criteria, the applications will be comprised of more detailed statements and supporting documentation that provide proof of the charity’s compliance. All these states have at least one specific form that must be completed as part of the application (again, see www.acga-web.org for links to specific states) and some have multiple forms.

Depending on which of the above criteria are required in a particular state, the charity will need to show it:

- ✓ has been in operation for the requisite period of time;
- ✓ has sufficient unrestricted assets ;

- ✓ will include the applicable disclosure language or other content in the annuity agreement, and in the case of California, in marketing materials (internally the organization will need to determine a process for ensuring this happens);
- ✓ is already appropriately registered to solicit or do business in the state, or is exempt from such registration; (if it is not, such registration will need to be completed);
- ✓ has segregated its gift annuity reserves and maintains a sufficient amount in the reserve fund;
- ✓ has its reserve fund appropriately invested;
- ✓ has a schedule of gift annuity rates it adheres to;
- ✓ has adopted the applicable board resolution;
- ✓ has designated an in-state agent for service of process, or has directed to whom the state agency should forward such documents;
- ✓ has provided information from applicable individuals.

For purposes of supporting documentation, the charity would need to gather some or all the following:

- ✓ IRS tax-exempt letter;
- ✓ articles of incorporation;
- ✓ certificate of good standing;
- ✓ by-laws;
- ✓ listing of board members and corporate officers;
- ✓ audited financial statements (up to 5 years);
- ✓ Form 990;
- ✓ prototypes of all proposed variations of annuity agreements (e.g., one life, two life, immediate, deferred);
- ✓ gift annuity disclosure statement;
- ✓ representative gift annuity marketing pieces;
- ✓ proof of registration (or exemption) with other applicable state agencies;
- ✓ reserve calculation;
- ✓ account statement for segregated reserve fund;
- ✓ investment policy statement for reserve fund.

Maintaining the Exemption

Once a charity has registered in a state, it must comply with any ongoing requirements. Beyond maintaining a list of due dates and documents to be filed annually, a charity should be aware of the broader issues that underlie the filings. It would also be appropriate to track in some fashion the status of registration in different states, particularly if not all are being done at once. A color-coded map can work well for this, with different colors highlighting the states in which the charity is

already compliant, the states in which a charity has held off but in which registration would need to be done if the charity had an interested donor, and, if applicable, the states from which the charity has opted to steer clear and not issue.

Most prominently, ongoing compliance with the state agencies that regulate issuance of gift annuities involves timely submission of the requisite annual filing, whether it be a report on the segregated reserve fund or other specific documentation for annual renewal. However, in addition to the annual filing submissions themselves, there are a number of ongoing issues that a charity needs to monitor. While some of these issues may come up in the context of regular annual reporting, others may require apprising applicable state(s) of changes during the year, and some may simply involve internal action.

Items to Monitor

Change in legal name or address

If there is a change in the charity's legal name, in any state in which the charity received a permit/certificate of exemption to issue gift annuities it will need to request a reissuance of the permit under the new name. This typically involves providing a copy of the amended articles of incorporation as filed with the applicable agency in the charity's state of domicile (often the Secretary of State), as well as the original gift annuity permit or certificate. California has a more formal process, requiring a charity to submit a specific form for an amended Certificate of Authority, a copy of the amended articles of incorporation, and a copy of the amended bylaws; each document submission has a corresponding fee (currently totaling just over \$600).

For those states where only a notification was required to be submitted, a letter advising of the name change should be sufficient, though the charity may want to also include a copy of the amended articles reflecting the change.

A change of address should similarly be conveyed to the state, but typically can be done as part of the annual filing. However, New York requires not only that specific notice of the change be given to the Department of Financial Services, Office of General Counsel, but also submission of an address change endorsement for approval; that endorsement must then be sent to each active New York annuity donor.

Both a name change or a change in address will require submitting revised forms of annuity agreements in states where such forms are filed (see discussion below).

Unrestricted assets

(AZ, AK, CT, GA, HI, ID, IL, IA, MS, MO, MT, NV, NH, NM, NC, OK, OR, PA, SD, TX, VA, VT, WA, WV)

In all states with a minimum asset requirement, a charity needs to have at least the specified level of assets at any time a charity is issuing gift annuities in the state. While most of the states with a minimum asset requirement do not call for an annual filing, a charity should monitor its own compliance and suspend its activity, on its own initiative, in any state in which it no longer meets the minimum asset requirement. Issuing an annuity while having insufficient assets could subject the charity to penalties and may also remove the exemption from insurance regulation that the statute provides. Sufficiency of assets is also not just a matter of regulatory compliance but ensures that the organization is not putting annuitants at risk.

For those states with an annual filing, a charity's financial condition will be monitored via submission of the most current audited financial statement and/or by responses to limited questions about overall assets as part of the detailed annual reporting on the gift annuity reserve fund. This is particularly true of Hawaii and Washington, the two more highly regulated states that have specific minimum asset requirements.

Change in financial institution

(CA)

While there are a few other states that ask, on the annual report form, for the name of the custodian of the assets, it is California where a change in financial institution requires additional steps. The trust or custodial agreement between the charity and the financial institution holding its California reserve fund must be submitted and reviewed by California as part of the initial registration. Should there be a change in financial institution, a copy of the trust/custodial agreement with the new institution must be submitted to the Department of Insurance for review and approval.

In-state agent

(AL, CA, TN, WA)

As part of the registration process in California, a charity designates an in-state agent for service of process. If a charity makes use of a commercial service for this purpose, the agent is likely to remain constant as long as the applicable fee is paid. However, if a charity names an individual connected with the organization, a periodic check should be made to ensure that the designated person is still living, still willing and able to serve, and still at the same address. Any change in agent or in the agent's address must be communicated to the state.

With respect to Alabama, Tennessee, and Washington, the charity is required at the time of registration to appoint a state agency as its agent for service of process and then indicate to whom the agency should forward the documents. Just as with the appointed agent, it is important to remain aware of who has been designated, so that if that person has left the organization or it is determined that the documents should be sent to someone in a different position, the state can be advised of the change. Though commencement of legal action, and thus serving of process, might be an unlikely occurrence, delay of such documents being received by the charity because of an incorrect agent or designated recipient could have dire consequences if it led to the charity being unable to file a timely response.

Gift annuity rates

(AL, AR, CA, MD, NJ, NY, WA)

If a charity changes its rate schedule it should advise the applicable states of that fact. This is particularly true when a charity is not following the current ACGA rates, whether this means it has developed its own schedule of rates, has modified the ACGA rates in some way (e.g., capped them at a lower rate, or lowered the rates across the board by a certain percentage), or is adhering to an older ACGA schedule. For a charity following the ACGA rates, most states presume that the charity changes its rates when the ACGA announces a change, and in general it is not necessary to file the new schedule. However, if a charity will delay implementation of the new schedule (i.e., start using it on a date different than the ACGA's stated effective date), it should advise the state of this fact. In many of the annual reports required to be filed there is a question regarding the rates and an opportunity to provide the new schedule. Nevertheless, a charity may wish to send in the new schedule separately, depending on the effective date of the change as compared to the annual filing due date. While some states requiring an annual filing pose a question as to whether the current rate schedule is on file, not all do; thus, a charity should separately have it tickled as an item to monitor, particularly if the charity follows its own schedule of rates or modifies the ACGA schedule in some way.

As noted previously, at the time this paper is being written the maximum rates allowed by New York are lower than ACGA's rates. Until that issue is resolved, a charity issuing gift annuities to New York donors should confirm the maximum rates allowed. New York posts its maximum rates quarterly, under "present value of immediate annuities and maximum incomes per \$1000 gift allowed by Section 1110 for issues of 2020+" at https://www.dfs.ny.gov/apps_and_licensing/life_insurers/reserve_requirements. Calculate the New York maximum payout rate by dividing the applicable "Maximum Income" value by 10. Note that the rates for the most recent quarter are added to the bottom of the document. The maximum rates for one quarter apply to gift annuities issued to New York residents in the following quarter.

Annuity agreement content

(AL, AR, CA, MD, NJ, NY, ND, TN, WA)

If a charity decides to revise its annuity agreements after it has submitted the forms to a state as part of its registration, it must submit new forms of agreement for review and approval prior to making use of those forms. In addition to substantive changes, a change in the charity's name or address will necessitate submitting new forms to the applicable state(s). A charity that chooses to switch from its own forms of agreement to those contained in its gift calculation software should note that the software forms are not, and cannot, be approved by the states on a global basis – they must be approved for use on a charity-by-charity basis. While Arkansas has accepted submission of revised forms as part of the annual reporting, in general this must be done as a separate filing and, in the case of Washington, is done through an on-line system.

To avoid confusion as to what forms have been approved for use, a copy of the agreement forms on file with each state, or at least a listing of the forms and an indication of when they were submitted, should be maintained. If a charity is using its own forms of agreement, it should have a system in place to draw attention to the states with particular content requirements, so that the appropriate agreement is created when a gift is received from a donor in that state. For states that have only disclosure language as a specified content requirement, and do not require that agreement forms be filed, it may be sufficient to maintain a standard agreement template with an indication of the disclosure language for each state. However, when there are more detailed content requirements, which tends to coincide with the need to file the forms with the state, the charity will be better off creating separate state-specific sets of agreements. This way, the charity ensures that it uses the appropriate agreement form when completing a gift-specific agreement. If a charity opts to use the agreements contained within its gift calculation software (and has filed these forms in the applicable state), the appropriate disclosure language and/or other required provisions will be drawn into the agreement upon selection of the donor's state of residence.

Segregated reserve fund

(AL, AR, CA, FL, HI, MD, MT, NH, NJ, NY, ND, OR, PA, TN, WA)

Perhaps the most significant ongoing requirement, one that is imposed by 15 states, is the need to maintain a segregated gift annuity reserve fund. The reserve fund must be held separate and distinct from other assets of the organization. California requires a California-only fund (meaning it must hold reserves for only California annuities), held in trust. A few other states (Arkansas, Florida, and Tennessee) allow, but do not require, a state-specific reserve fund.

The amount required to be held in the fund is generally calculated based on an actuarial methodology (standard valuation law), utilizing mortality tables and interest rates that can vary from state to state. In addition, certain states require a surplus, which can either be a

set percentage of the calculated reserve or be the greater of a minimum dollar amount or a set percentage. If a charity is registered in multiple states, the key is to determine which of them has the highest reserve and surplus requirement – in meeting that state’s requirement the charity will also be compliant in other states.

It is important to understand that although any annual reporting on the reserve is as of a fixed point in time (either fiscal year end or calendar year end), the need to hold adequate reserves is ongoing throughout the year. A charity should monitor its reserve level in relation to its reserve requirement periodically, to ensure that the reserve fund is sufficient to meet the requirements of the state(s) in which it is operating. How frequently this needs to be done may vary depending on market conditions as well as how close the fair market value of the reserve fund is to the required reserve amount. If a charity is significantly “over reserved” (meaning the fair market value is significantly higher than the required reserve) and investments are holding steady, a charity might check the reserves once at mid-year and again shortly before the end of the reporting period. If the fair market value of the reserve fund is close to the required reserve amount, and/or investment values are fluctuating significantly, the monitoring should take place more frequently – perhaps quarterly, monthly, or even weekly, as was the case for many charities in the last quarter of 2008 and the first quarter of 2009.

A charity is obligated to infuse its reserve fund with additional assets if the fund balance drops below the required reserve amount. While this is particularly critical at the end of the reporting period (and why it is advisable to do a check of the fund balance vs. the required reserve a few weeks before that date), it is a requirement throughout the year. If it is not discovered until after the end of the reporting period that the reserves are insufficient to meet a state’s requirements, the charity should take immediate action to bring the reserves up to the appropriate level and an explanation of the situation should be included in the charity’s annual reporting. Such proactive action is likely to be viewed more favorably by the insurance department than a charity waiting to be instructed; however, recurrent “after the fact” additions are likely to draw interest and concern from the department as to why it is happening.

Limitations on investments of reserve fund

(CA, FL)

Most states are either silent on investment of gift annuity reserve assets or require investment in accordance with a prudent investor standard. However, two states (California and Florida) place specific limitations on how the segregated reserve fund is invested. Because California requires a “California only” reserve fund, the restrictions imposed by that state apply only to reserves held for California annuities. Florida allows a charity the option of creating a state-specific fund, which can make it easier to monitor and maintain compliance with the particular restrictions it imposes. If Florida reserves are held within a larger “all states” fund, the charity must ensure that there are sufficient assets in

that fund invested in accordance with Florida's limitations to cover the required reserve for Florida annuities.

As with the amount required to be held in reserve, maintaining appropriate investment levels is also an ongoing requirement and should be monitored throughout the year. Again, the frequency of the monitoring may differ depending on certain conditions. If there has been significant change in the amount of the California or Florida reserves (additional annuities issued or annuities terminated), it would be advisable to check on investment allocation either when those assets are added or withdrawn from the fund or else periodically, perhaps quarterly. Likewise, if there has been significant fluctuation in value (either gains or losses), the investment allocation should be checked more frequently. In any case, it would be advisable to check the allocation at some point during the year, and then again just ahead of the end of the reporting period, so that any necessary reallocation can be done in advance.

Annual Submissions

Just as the level of regulation varies among the states, so too does the nature of annual reporting. In fact, the combination of states with no registration requirement at all (and thus no annual reporting) coupled with a number of states that require only an initial registration, leaves only 14 states requiring an annual filing specific to gift annuity registration. (A charity may also be subject to annual filings in connection with charitable solicitation or foreign corporation registrations.) These filings can range from a simple renotification (repeating the notice required initially), to submission of a copy of the charity's audited financial statement, to signing an attestation of compliance, to a detailed annual reporting requirement. The latter involves providing information on the activity in the segregated reserve fund relating to money moving into and out of the fund, the purchase and sale of assets, and gains and losses on the investments.

Annual filings are primarily connected with the calendar year or a charity's fiscal year, with due dates generally set as a certain number of days after the reporting period ends. There are a few fixed due dates, but these fall in March which puts them in the same time period as states with reporting deadlines following calendar year end. A charity that has December 31 as its fiscal year end will have a single time period for annual reporting, with the majority of the filings submitted throughout the first two quarters of the year. Depending on the states in which it is registered, a charity with a non-calendar year fiscal year end is likely to have two such reporting periods – after the calendar year end and after its fiscal year end. (See Appendix II for a state-by-state listing of due dates, with links to online documents as applicable.)

Whatever the nature of the annual filing, a charity should have a tickler system that alerts the applicable person to both what is needed and the due date. (See Appendix III for a sample chronological checklist based on a December 31 fiscal year end.) While a few annual submissions are prompted by state reminders (most typically involving renewal fees), in general a charity will not receive anything pre-deadline to indicate a filing is upcoming. If a filing is missed, however, there will likely be a request from the state for immediate submission, with an indication that

failure to do so could result in suspension or revocation of authority to issue in the state and/or imposition of a fine. In the case of Washington state, fines are automatically assessed for a late or incomplete filing.

While preparing the annual report is often by default viewed as the responsibility of the Development or Planned Giving Office, an argument can be made that it is a better fit to have them handled by the finance or business office given the nature of the information requested in certain of the filings. Some charities will utilize in-house legal counsel or their compliance officer if they are lucky enough to have such a designated position. A charity might also choose to outsource some, or all, of the work involved with the annual filings.

It is important to have a designated point person who monitors deadlines and helps shepherd the entire process. However, regardless of the department in which that person operates, it is most likely that they will need to obtain some information from individuals in other departments. Everyone from whom information will be requested should set up their own tickler system, rather than being solely reliant on the point person to remind them. This helps broaden the institutional awareness of the filings and serves as a backup in the event the primary person is unexpectedly out or has left the organization.

Practical Information

Understanding the ongoing requirements and the applicable deadlines are, of course, important; but from a practical perspective it all leads to the actual completion of the annual filings. To aid in streamlining the process, let's take a look at steps along the way.

Ongoing procedures

Separate from any specific reporting cycle, on an ongoing basis there are some administrative best practices that will make completion of the more detailed forms easier:

- ✓ Have all activity flow clearly into and out of the segregated reserve account, including timely deposit of new gifts, gift annuity payments, deposit of reclaimed funds made after death, and withdrawal of severances for terminated contracts. If a disbursement account is used to make payments, be sure to withdraw the exact amount of those payments from the reserve account; don't round off. Aside from disbursements, use of multiple accounts – for example, deposits being made into the reserve account but payments out of a general operating account – can make activity tracking difficult. It may also prompt concerns from regulators, either by giving the impression that payments aren't being made or that the reporting does not include all of the accounts in which reserve dollars are held.
- ✓ Stay on top of disbursements and follow up quickly on uncashed checks. Keep the account reconciled, as any funds in the account will be included in the assets on the annual filing.

- ✓ If they don't already, ask your asset manager to include within the activity reports some level of detail in the descriptions/notes for withdrawals and deposits (e.g., "CGA Gift from Joe Jones" or "Return of Larson payment")

Prior to reporting period end

As the end of a reporting period approaches, it is advisable to run a reserve calculation a few weeks prior to determine if there are sufficient assets to meet applicable state requirements. If Florida and California are among the states in which reporting will be done, this is a good time to check that investments also conform to their requirements. Reviewing in advance allows time for any needed adjustments to be made prior to the end of the period. As noted previously, maintaining adequate and appropriately invested reserves is an ongoing (not just a point in time) requirement, so if funds need to be added it is not an "in and out" transaction; they need to be left in until such time as they are no longer needed to keep the reserves at the required level.

Other things to do at this time:

- ✓ Make sure data entry is up to date for both new gifts and annuitant deaths. There may well be activity that occurs just as the period is ending, but entering what you can in advance minimizes what has to be done in what will otherwise be a busy time period.
- ✓ Review your tickle sheet/filing checklist to refresh your memory on deadlines and needed information; this can be particularly helpful if there have been staffing changes that will result in needing to check-in with different people than in prior years.

Information gathering

There are two prime questions when it comes to gathering the information needed to complete the annual filings: 1) what is needed, and 2) who has it? With respect to the second question, who holds what information will vary from charity to charity; however, gathering it is likely to involve requests to the finance office, outside administrator, legal counsel and/or the Development or Planned Giving office.

The information needed may include some or all the following, depending on the states in which a charity is registered:

- a. account statements (for the gift annuity reserve account(s), as of the reporting period end date);
- b. financial reports (e.g., holdings and transactions);
- c. new gift and finished gift reports;
- d. reserve calculations (done in accordance with applicable state methodologies, also as of the reporting period end date);
- e. FASB liability figure;

- f. overall asset figures (unaudited);
- g. list of board members (as of reporting period);
- h. legal questions (e.g., changes in organizational status, legal name change, amended articles of incorporation);
- i. information on reinsurance (if applicable);
- j. actuarial verification of reserve calculation (if applicable);

Be sure that all activity within the reporting period has been accounted for before running reports. If possible, create standing requests for certain reports to be provided at specific times of the year. This can be particularly helpful if the person gathering the information doesn't interact directly with those from whom the information is being requested. Needing an intermediary to make the request can slow down the process.

When requesting information, it may be useful to provide a copy of the applicable page(s) of the form so that the person being asked can see the specific phrasing of the question and/or the context in which it is being requested. Providing a copy of the prior year's information can likewise be helpful in obtaining the same information for the current year. For requests that have previously raised questions or concerns, save email threads or notes from in-person conversations for use the following year when asking for that information. In particular, it may be necessary to recurrently stress that figures relating to overall assets of the organization can be unaudited, as they will typically be needed prior to the audit being complete.

Completing forms

There are certain forms, particularly for California, New Jersey, and New York (and to a lesser extent Washington) that include a lot of detail with respect to the reserve fund holdings and activity throughout the year. The forms contain various schedules relating to assets and liabilities, income and disbursements, investment income, unrealized capital gain and losses, and listings of investments held as of the end of the reporting period as well as investments held or disposed of during the year. If handled internally, it is recommended that completion of these schedules be done by someone within the finance office.

In addition to financial details, the forms will include questions relating generally to the organization and/or to the operation of the gift annuity program. These will encompass such things as whether the charity's legal name has changed, the articles of incorporation have been amended, the annuity rates have changed, and/or new forms of annuity agreements have been adopted. Some of this information will come from within the Development/Planned Giving office, while some may necessitate an inquiry to in-house or outsourced legal counsel. Work on the two different aspects of the form (financial schedules v. general and organization information) should be done concurrently; this will allow for quicker finalization of the form once the financial schedules have been completed, which may not come until close to the filing deadline. This is particularly true of New York and Washington, which provide for just 60 days between the end of the reporting period and the due date.

A final step in completing the forms will be to obtain the necessary signatures, which in most instances involves officers of the organization (not simply someone with signing authority). It is important to know your signatories! Include on your checklist/tickler system the names of the applicable people so that as you begin the filing process you remember to check their schedule (are they travelling? do they work from a different location?) and take into account the typical turnaround time for obtaining their signature. An advance reminder to them that you will be needing their signature and by what date can make it easier when you are operating on a tight deadline. Also, understand their “personality” as a signatory; some people need just minimal information, while others may want to see all supporting materials before they’ll sign.

Note: If the form requires two signatories, it is acceptable for them to sign separate signatory pages, with both pages then included in the submission. This practice is helpful when the individuals are at different locations but can also save time by allowing the signatures to be obtained concurrently rather than consecutively.

Filing submissions

Actual submission of the various annual filing documents will be done via mail (or courier), email, or use of an on-line system; for some states it will be a combination of methods, with some documents electronically submitted while original signature pages must be mailed. How the filing will be accomplished should be understood in advance so that it can be taken into account in meeting the due date. In most instances the filing must be received, not mailed, by the due date in order to be considered timely.

For those states with an annual renewal fee, it is important to consider the internal timeframe for requesting/obtaining a check – i.e., does it take a matter of days, a few weeks, or are checks processed only once a month.

Continuity of knowledge

Perhaps the biggest challenge in maintaining compliance with state regulation is staff turnover. A new person may not be familiar with requirements if s/he previously worked for an organization that was not issuing gift annuities or issuing only in less-regulated states, or s/he may not have been the person responsible for ongoing compliance. One way to assure continuity of knowledge with respect to state regulation is to maintain a single file covering all states, or separate files for each state, in which a charity has registered. In these files would be placed the original certificate of authority or confirmation of the initial notification, plus any other correspondence with the state relating to the registration – including annuity agreement forms, rate schedule, and annual filings. As noted previously, it is also desirable to have more than one person maintaining a tickler system regarding filing due dates so that a deadline is not missed because of staff departures. Creating a system to help streamline the annual reporting process not only aids current staff but also should

help minimize the disruption in filings when staff turnover occurs (and avoid inquiries and possible fines from insurance departments that can accompany missed deadlines).

State-specific issues

In soliciting comments from state regulators as to what they see with annual reports, several positively noted that filings without problems vastly outweigh filings with problems, and that the quality/completeness of filings has improved over the years. It was also noted that a common factor in problematic filings was staff turnover at the charity; more than one regulator highlighted that they would prefer someone at the charity to pick up the phone and call if they have questions, rather than submitting an incomplete or incorrect filing because they did not understand the process.

Although not an exhaustive list, what follows are some state-specific items of note, some flagged by the regulators and others by the author:

✓ **All: pay attention to the attachments**

What is the biggest contributor to incorrect filings? Failure to include the required attachments. While primarily this was cited with regards to reserve calculations, certain states require other supporting materials (current board list, account statement as of the period ending date) that are frequently left out. Before you send your filing off via email or mail, or hit “submit” on an online filing, be sure you’ve included all the required documents.

✓ **CA: fees and other withdrawals**

In recent years, the Department of Insurance has been paying closer attention to the annual reports, in particular with respect to withdrawals from the segregated reserve account. A charity can withdraw money from the account to make gift annuity payments, and it can also remove the residuum associated with an obligation that has terminated, so long as the amount that remains in the account is sufficient to meet the reserve requirements of obligations that have not terminated. However, for a withdrawal of money for any other purpose, including a delayed withdrawal for annuities terminated in prior years, the charity must include with its annual reporting a Board resolution authorizing the withdrawal and financial information as of the withdrawal date. This would relate to withdrawals for investment and administrative fees as well; automatic withdrawals for such fees are not allowed.

✓ **Florida: form has underlying requirements**

The actual process of completing the annual filing is minimal, requiring a simple one-page sworn statement. However, a charity should understand that the form is attesting to ongoing compliance with Florida’s requirements: use of rates designed to leave a 50 percent residuum, inclusion of disclosure language in the annuity agreements, and maintenance of a segregated reserve account that is adequately funded and appropriately invested. Review of

these issues should be done prior to asking the two officers to sign, so that they can feel comfortable with their attestation of compliance.

✓ **Maryland: statement as to adequacy of reserves**

A charity is to submit a copy of its audited financials each year, but it also must provide a statement from a certified public accountant as to the adequacy of its reserves. If the audited financials address gift annuity reserves specifically (as opposed to only a combined reference to split-interest gifts including trusts or pooled income funds), that will be sufficient. Otherwise, a separate CPA statement is needed. Failure to provide this statement is a common “deficiency” noted by the Maryland Insurance Administration.

✓ **New York: investment issues**

In the last several years New York has focused more intently on investments held within the segregated reserve account, and specifically on investment concentrations. The Department of Financial Services’ particular concern is the increased use of exchange traded funds or mutual funds that attempt to track indices. The Department has indicated that when an investment vehicle gains widespread popularity, it raises a red flag that investor exuberance may be in play. From the Department’s perspective, while such funds give the appearance of apparent diversification, organizations may not fully understand the risks that can make an index fund depart from the performance of the index being tracked. This has led to the Department recommending that investment concentration be limited to no more than 10 percent in any one fund. The Department is also asking charities to adopt a board-approved investment strategy statement, and to include a reference to the Prudent Investor Standard within the statement.

✓ **New York: reporting the surplus**

Although New York is commonly thought of as requiring a surplus (on top of calculated reserves) of 26.5 percent, there is not actually a singular surplus of that amount. Rather a charity is subject to two levels of surplus: an initial level of 15 percent per Regulation 126 (a charity has the option to avoid this level of surplus by obtaining an Actuarial Opinion and Memorandum, though this could be a costly alternative) and an additional level of 10 percent. Since the two surpluses are layered, the total resulting surplus is 26.5 percent. On the annual report form, the calculated reserve is noted, followed by a separate reporting of each level of surplus. Misstatement of these figures is a common error on the form.

✓ **New York and Washington: audits**

Charities domiciled in these states will be subject to audits (by state insurance examiners) of their gift annuity programs every five years. (While the states have the authority to conduct audits of all registered charities, the focus to date has been on in-state charities.) These audits go more in-depth on program procedures, individual annuities (both new gifts and terminations), forms of agreements approved by the states, as well as past annual filings. The charity is expected to provide copies of documents for the audit even if these same documents were previously filed with the state.

✓ **Washington: asset information**

While most of the annual report covers gift annuity activity, certain financial information (summary of net assets and statement of income and expenses) is requested about the charity as a whole. The fact that it must be provided so soon after fiscal year end (60 days) can be a source of irritation to the finance office. To help ease their concern, be sure to highlight that the information can be unaudited, and that an amended filing can be submitted later with updated figures. However, also highlight that without such information the annual report will be viewed as incomplete and treated as a late filing, and thus subject to a fine.

Conclusion

When first approaching the topic of state regulation of gift annuities, a charity should determine in what states it makes sense to issue gift annuities, weighing the “cost” of compliance with the regulation against the “benefit” accorded to the perceived potential for gifts in the state. Going in, the charity should understand what it is undertaking and the ongoing requirements to which it will be subject. Once in, perhaps the biggest challenge in maintaining compliance with state regulation is staff turnover. A new person may not be familiar with requirements if he or she previously worked for an organization that was not issuing gift annuities or issuing only in less-regulated states, or he or she may not have been the person responsible for ongoing compliance. Creating a central file for all state regulatory documents and a tickler system for due dates, and being sure that more than one person knows where such information is located, is key to assuring a continuity of knowledge.

To be sure there are complexities to gift annuity regulations, but only in some of the states. The key is to make informed decisions on where to issue and, once registered, to create a structure for staying on top of those states with ongoing requirements. Remember, “it does not do to leave a live dragon out of your calculations if you live near one.” (JRR Tolkien)

Appendix I

1. State law requires segregated reserve, annual reporting, and/or detailed application (11):

State	Years in operation	Board Resolution	Disclosure in agreement	Reserve required	Investment limitations	Other registrations
AL ¹	—	—	yes	yes	—	—
AR	5	yes	—	yes ²	yes ³	—
CA	10	yes	yes	yes ⁴	yes ⁴	—
FL	5	—	yes	yes ⁵	yes	—
HI ⁶	10 in HI	—	yes	yes	— ⁷	—
MD	10 in MD	—	yes ⁸	yes	— ⁷	—
NJ	10	yes	—	yes	— ⁷	yes ⁹
NY	10	yes	—	yes	— ⁷	—
ND	—	—	—	yes	—	—
TN	—	—	yes ⁸	yes ¹⁰	— ⁷	—
WA ¹¹	3	—	—	yes	— ⁷	yes ¹²

NOTES:

¹ Regulated by Securities Dept. rather than Insurance
² May elect to segregate AR annuitants
³ Prudent investor standard allowed
⁴ CA annuitants only
⁵ May elect to segregate FL annuitants

* Law requires \$200,000 of assets in Hawaii
⁷ Prudent investor standard
⁸ If signed, or in separate signed document
⁹ Registration w/ NJ Div. of Revenue and NJ Dept. of Law and Public Safety

¹⁰ TN-only fund allowed but no longer mandated
¹¹ Organization must have \$500,000 in unrestricted net assets
¹² Registration w/ WA Secretary of State

2. State law provides for exemption - Notification required (14):

State	Years in operation	Board Resolution	Disclosure in agreement	Reserve required	Available Assets	Other registrations
AK	3	—	yes	—	\$300k	—
CT	3	—	yes	—	\$300k	—
GA ¹³	3	—	yes	—	\$300k	—
ID	3	—	yes	—	\$100k	—
IA	3	—	yes	—	\$300k	—
MS	3	—	yes	—	\$300k	yes ¹⁴
MO	3	—	yes	—	\$100k	—
NV	3	—	yes	—	\$300k	—
NH ^{15,16}	3	—	yes	yes	\$300k	yes ¹⁷
NM	3	—	yes	—	\$300k ¹⁸	—
NC	3	—	yes	—	\$100k	—
OK ¹³	3	—	yes	—	\$100k	—
TX	3	—	yes	—	\$100k	—
WV	3	—	yes	—	\$300k	—

NOTES:

¹³ Annual reporting: submission of audited financial statement
¹⁴ Registration w/ MS Secretary of State (as charitable organization)
¹⁵ Annual reporting: re-notification

¹⁶ Annuity rates must not exceed ACGA suggested rates
¹⁷ General registration with NH Dept. of Justice in some instances
¹⁸ Either in unrestricted assets or reserve fund

3. State law provides for exemption - No notification required (22):

State	Years in operation	Board Resolution	Disclosure in agreement	Reserve required	Available Assets	Other registrations
AZ	3	—	— ¹⁹	—	\$300k	—
CO	3	—	yes	—	—	—
DE	—	—	—	—	—	—
IL	20 ²⁰	—	—	—	\$2 mil. ²⁰	—
IN	—	—	—	—	—	—
KS	—	—	—	—	—	—
KY	—	—	—	—	—	yes ²¹
LA	—	—	—	—	—	—
ME	5	—	—	—	—	yes ²²
MA	—	—	—	—	—	—
MI	—	—	—	—	—	—
MN	—	—	—	—	—	—
MT	3 ²⁰	—	—	yes ²⁰	\$100k ^{20,23}	—
NE	3	—	—	—	—	—
OR	5	—	— ²⁴	yes	\$300k	—
PA	3	—	yes	yes	\$100k	yes ²⁵
SC	5	—	—	—	—	—
SD	10	—	yes	—	\$500k	yes ²⁶
UT	—	—	—	—	—	—
VA	3	—	yes	—	\$100k	—
VT	3	—	yes	—	\$300k	—
WI	3	—	yes ²⁷	—	—	—

NOTES:

¹⁹ Detailed disclosure statement to donor prior to gift

²⁰ Waived if annuities reinsured

²¹ Certain charities must file copy of Form 990 with KY Attorney General

²² Registration w/ ME Secretary of State (qualified as foreign corporation)

²³ \$100,000 in unrestricted assets or \$300,000 net worth

²⁴ Content-specific written disclosure, in agreement or other document

²⁵ Certain charities must register w/ PA Dept. of State (general solicitation law)

²⁶ Registration w/ SD Secretary of State (qualified as foreign corporation)

²⁷ Language modified when law changed 4/18/14

4. State law does not specifically address gift annuities (4):

DC, OH²⁸, RI, WY

NOTES:

²⁸ OH previously provided for an exemption from securities law under now rescinded administrative rule. OH Court of Appeals case decided in 2002 held gift annuities not subject to insurance regulation (OH Supreme Court declined to hear appeal).

Appendix II

Annual Filing Deadlines – State by State

Alabama

- ✓ Renew “restricted agents” by December 31 (fee of \$70 per agent)
- ✓ Copy of audited financial statement within 60 days of FYE

Arkansas

- ✓ Annual report form within 180 days of FYE
- ✓ <https://insurance.arkansas.gov/pages/industry-regulation/compliance/charitable-gift-annuities/>

California

- ✓ Renewal fee due March 1
- ✓ Information on new CA annuities, 30 days after end of any quarter in which annuities issued (plus \$60 per annuity fee)
- ✓ Fourth quarter confirmation regarding content of annuity agreements
- ✓ Detailed annual report within 120 days of either FYE or CYE (depending on how charity has elected to report)
- ✓ <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0100-applications/financial-filing-notice-forms/GrantsAnnuities/>

Florida

- ✓ Attestation of compliance due 60 days after FYE
- ✓ Form: <https://www.floir.com/siteDocuments/oir-a3-1209.pdf>
- ✓ Online filing: <https://irfs.fldfs.com/>

Georgia

- ✓ Copy of audited financial statement when available

Hawaii

- ✓ Annual report due March 15
- ✓ <http://ag.hawaii.gov/tax/files/2013/01/107734v3.pdf>

Maryland

- ✓ Audited financials verifying adequate reserves, due 180 days after FYE

New Hampshire

- ✓ Renotification due 4 months, 15 days after FYE (submitted as part of annual renewal for charitable solicitation registration)
- ✓ On-line filing: <https://onlineforms.nh.gov/>

New Jersey

- ✓ Detailed annual report due 120 days after CYE or FYE, depending on how charity has elected to report (Note: If a charity has elected CYE filing to NJ, if it is also registered in NY it may use a copy of its NY annual filing to satisfy NJ.)
- ✓ Copy of audited financial statement – can be filed later if not available within 120 days
- ✓ http://www.state.nj.us/dobi/division_insurance/charitableann.htm

New York

- ✓ Detailed annual report due March 1
- ✓ https://www.dfs.ny.gov/apps_and_licensing/insurance_companies/annual_statements_ny_supplements

North Dakota

- ✓ Copy of audited financial statement due 15 days after it is available

Oklahoma

- ✓ Copy of audited financial statement due 90 days after it is available

Tennessee

- ✓ Renewal fee and letter, annual report form and copy of audited financials due March 1
- ✓ Form:
<https://www.tn.gov/content/dam/tn/commerce/documents/insurance/forms/CGAannualreportingform.pdf>
- ✓ On-line filing: <http://core.tn.gov>

Washington

- ✓ Renewal fee due March 1
- ✓ Detailed annual report due 60 days after FYE
- ✓ Copy of audited financial due within 9 months of FYE
- ✓ Copy of form 990 due 15 days after submission to IRS (also file copy of IRS extension, if one is obtained)
- ✓ Online filing: <https://www.insurance.wa.gov/annual-financial-filing-statements>

Appendix III

Sample Chronological Checklist (based on December 31 FYE)

Due Date	State	Document(s)	Signatory	Fees	Agent
30-Jan	California	Summary Spreadsheet and Transmittal Form (only if any CA CGAs issued in 4th quarter)	Officer name/title	\$60 per new CA CGA	
30-Jan	California	Agreement attestation (affirming content of agreements meets CA's requirements) (filed on-line)	Officer name/title	N/A	
1-Mar	Alabama	Audited Financials (<i>FYE + 60 days; accept later</i>)	Cover letter		
1-Mar	California	Renewal fee	N/A	\$150 (as of 3/3/19)	
1-Mar	Florida	Sworn statement in lieu of annual reporting (filed on-line)	N/A	N/A	
1-Mar	New York	Annual Statement of Segregated Reserve Fund (filed via email and in hard copy)	Officer (2) names/titles	N/A	
1-Mar	Tennessee	Renewal letter, annual report, and audited financials	Officer (2) names/titles	\$100	Internal person to whom TN directs legal process
1-Mar	Washington	Annual Report (filed on-line)	Officer name/title	\$25, plus \$5 for each new WA CGA for past year	Internal person to whom WA directs legal process
15-Mar	Hawaii	Annual Statement	Officer (2) names/titles	N/A	
31-Mar	Maryland	Audited financial statement and reserve information (filed via email)	N/A	N/A	
1-Apr	Georgia	Audited Financials (<i>when available</i>)	Cover letter	N/A	
1-Apr	North Dakota	Audited Financials (filed via email) (<i>15 days after available</i>)	N/A	N/A	
1-Apr	Oklahoma	Audited Financials (filed via email) (<i>90 days after available</i>)	N/A	N/A	

State Regulation of CGAs: From Simple to Downright Complex

Due Date	State	Document(s)	Signatory	Fees	Agent
30-Apr	California	Summary Spreadsheet and Transmittal Form (only if any CA CGAs issued in 1st quarter) (filed on-line)	Officer name/title	\$60 per new CA CGA	
30-Apr	California	Annual Report (filed on-line and in hard copy)	Officer name/title	N/A	Name of in-state agent for service of process
30-Apr	New Jersey	Annual Report (copy of NY's); audited financials	N/A	N/A	
15-May	New Hampshire	Notification form	Officer name/title	N/A	
29-Jun	Arkansas	Annual Report	Officer name/title	N/A	
15-Jul	Washington	Form 990 (filed on-line) (<i>due 15 days after filing with IRS</i>)	N/A	N/A	
30-Jul	California	Summary Spreadsheet and Transmittal Form (only if any CA CGAs issued in 2nd quarter) (filed on-line)	Officer name/title	\$60 per new CA CGA	
30-Sep	Washington	Audited Financials (filed on-line) (NOTE: due 9 months after FYE; preferably file once available)	N/A	N/A	
30-Oct	California	Summary Spreadsheet and Transmittal Form (only if any CA CGAs issued in 3rd quarter) (filed on-line)	Officer name/title	\$60 per new CA CGA	
15-Dec	Alabama	"Restricted Agent" renewals (Form U-4)	Cover letter	\$70 per agent	Agent names; Internal person to whom OIC directs legal process

Other issues:

In-state activity (HI, MD)

MINIMUM ASSETS: \$2M (IL); \$500k (SD, WA); \$300k (AZ, AK, CT, GA, IA, MS, NV, NH, NM, OR, VT, WV); \$200k (HI-INSTATE); \$100k (ID, MO, MT, NC, OK, PA, TX, VA)

Gift annuity agreements: date(s) filed; location of approved forms (hard copy? Electronic version?) (AL, AR, CA, MD, NJ, NY, ND, TN, WA);

Gift annuity rates: ACGA (other?); States in which rates filed (AL, AR, CA, MD, NJ, NY, WA)