



# COMPLYING WITH GIFT ANNUITY REGULATIONS

## PG CALC WEBINAR

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This paper is meant as a practical reference to the process of registering with the states to issue gift annuities. It presumes that a charity has already determined the need to register, and where, but is wondering what actually needs to be done – both initially and annually. The focus is on noting “action items” relating to the particular levels of regulation, both relating to submission of documents to a state and to determining compliance with certain criteria.

Though no two states’ gift annuity laws are exactly the same, there are great similarities among some states allowing them to be grouped by level of regulation. Working from least to most regulated, the states can be broken down as follows (for additional information, see the Appendix):

**State law does not specifically address gift annuities (4 states + District of Columbia).**

While it is unclear whether the departments of insurance would view the lack of regulation as requiring charities to comply with the insurance laws, states have not been enforcing the law in that manner and most charities feel comfortable in issuing gift annuities in silent states. Interestingly, in 2002 an Ohio appellate court held that gift annuities were not subject to insurance regulation, even in the absence of a specific statutory provision governing issuance.

**Statutory criteria to meet, but no notification (19 states).** No gift annuity-specific registration is required in these states, although to fall under the exemption from insurance regulation provided by the state’s gift annuity law, a charity might need to be registered with another state agency. Some of these states require compliance with specific criteria, such as years of operation, minimum assets, or disclosure language in the annuity agreement.

**Notification to the state (15 states).** Registration with the state insurance department is required, but it is a notification requiring minimal paperwork, and can be completed concurrent with entering into the first annuity in the state. As with the preceding “no notification” category, there will be specific criteria to comply with and the notification is an attestation of a charity’s compliance. Because it is a notification rather than an application, the registration is in essence complete upon submission.

**Application for a certificate of authority/permit (12 states).** Registrations in these states are to be completed prior to entering into any gift annuity in the state, and in general they involve completion of various state application forms and submission of supporting documentation. Review by the states typically takes one to three months, although it can be significantly longer in the case of New York (4 – 6 months) and California (6 - 9 months, or longer if the charity has already issued gift annuities in the state).

### I. Becoming Compliant

All states, regardless of the level of regulation, 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. Most states then have additional requirements, ranging from minimal to quite extensive, in order for a charity to be able to issue gift annuities to their

residents. What follows is a grouping of states by degree of regulation, with a description of the requirements and an indication of which states have which requirements.

### **Silent states (4 states + District of Columbia)**

(Delaware, Ohio, Rhode Island, Wyoming)

Though none of these states have specific laws spelling out an exemption from insurance regulation for gift annuities, Delaware does have two provisions that could be construed as providing an exemption: one that defines an annuity as a contract “issued by a person which is not classified by the Internal Revenue Service as exempt from taxation under § 501(c)(3)” and another that excludes from a member insurer “an organization which has a certificate or license limited to the issuance of charitable gift annuities.” With respect to the latter provision, the Delaware insurance department has not indicated a need for charities to file any notice with the department. And, as was noted previously, 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 (19 states)**

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

Within this grouping, a charity needs to meet certain requirements, varying from state to state, in order to qualify for the exemption from insurance regulation provided by state law. Those requirements are:

#### ***Years-in-operation***

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

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. 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. 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. Some states do not allow a newly formed Foundation to “piggy back” 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, OR, PA, SD, VA, VT)

At the time a charity enters into any annuity 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.

### ***Disclosure language***

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

These six 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 in to 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 at least seven days 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, in order 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 in order to be qualified to issue gift annuities in the state.

***Segregated reserve fund***

(OR, PA)

Though a common requirement for the more highly regulated states, just two states in this category direct that a charity maintain gift annuity reserves. While Oregon requires that the reserves be held in a segregated fund, 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. A charity needs, depending on which of the above criteria are required in a particular state, 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 process for ensuring disclosure language will appear in agreement
- ✓ create 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

As was noted previously, not all of the “no notification” states have all the requirements mentioned above. The divisions below group the states by the criteria they do have.

Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Utah

No criteria

(i.e., no additional requirements beyond the standard criteria noted previously about being a not-for-profit tax-exempt organization issuing what within the tax code is defined as a charitable gift annuity).

## Complying with Gift Annuity Regulations

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Nebraska, South Carolina

- years in operation

Illinois

- years in operation
- minimum assets

Colorado

- years in operation
- disclosure in agreement

Virginia, Vermont

- years in operation
- minimum assets
- disclosure in agreement

Arizona

- years in operation
- minimum assets
- disclosure statement

South Dakota

- years in operation
- minimum assets
- disclosure in agreement and in marketing materials
- non-gift annuity registration

Kentucky

- non-gift annuity registration

Maine

- years in operation
- non-gift annuity registration

Oregon

- years in operation
- minimum assets
- disclosure in agreement
- reserve fund

Pennsylvania

- Years in operation
- minimum assets
- disclosure in agreement
- reserve fund
- non-gift annuity registration

**Statutory criteria to meet, and notification to state (gift annuity-specific filing) required (15 states)**

(Alaska, Connecticut, Georgia, Idaho, Iowa, Mississippi, Missouri, Montana, 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, MT, 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, MT, 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. 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, MT, NV, NH, NM, NC, OK, TX, WV)

All of 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 insure 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* (MT, NH)

Just two states in this category specifically 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. New Hampshire requires a charity to 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](http://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
- ✓ not exceed the ACGA suggested rates (applicable only in New Hampshire)



## Complying with Gift Annuity Regulations

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In addition to the notification some states require supporting documentation, and so the organization would need to gather some or all of the following:

- ✓ IRS tax-exempt letter
- ✓ audited financial statements (up to 3 years)
- ✓ sample gift annuity agreement
- ✓ 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

As with the prior grouping, not all of the “notification” states have all the same requirements. The divisions below group the states by the criteria they do have.

Alaska, Connecticut, Georgia, Idaho, Iowa, Missouri, Nevada, New Mexico, North Carolina, Texas, West Virginia

- years in operation
- minimum assets
- disclosure in agreement

Oklahoma

- years in operation
- minimum assets
- disclosure in agreement *and* in marketing materials

Mississippi

- years in operation
- minimum assets
- disclosure in agreement
- non-gift annuity registration

Montana

- years in operation
- minimum assets
- disclosure in agreement
- reserve fund

New Hampshire

- years in operation
- minimum assets
- disclosure in agreement
- non-gift annuity registration
- reserve fund
- cannot exceed ACGA rates

### **Application for a certificate of authority/permit (12 states)**

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

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, WI)

Of the states in this group requiring a specific number of years, the number ranges from 3 to 10. Six of these states (CA, FL, HI, NY, WA, and WI) 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.

### ***Disclosure language/annuity agreement content***

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

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 seven (AL, CA, FL, HI, MD, TN, WI) that do require disclosure language (although in the case of Wisconsin, some charities that registered years ago may not have a disclosure provision in their approved agreements). 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).

Ten of the twelve 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, WI)

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. (This calculated reserve is in most instances less, and often significantly less, than the amount contributed for the gift annuity, with the exception being deferred annuities with a long deferral period.) 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.) However, in a few states (Hawaii, New Jersey, and Wisconsin) 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 become compliant in states that have the requirement, 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 in order 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, WI) 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 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, WI)

As part of the application in these eight states, a charity must put on file its maximum schedule of 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.

### *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, WI)

As part of the registration process in California and Wisconsin, 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.

On a related note, 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 of these states have at least one specific form that must be completed as part of the application (again, see [www.acga-web.org](http://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 of 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

## Complying with Gift Annuity Regulations

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More than is the case with either of the prior groupings, the requirements among the application states can differ significantly. Thus, rather than trying to group states by similarities, each of the 12 states is listed below with its applicable criteria.

### Alabama

- disclosure in agreement/annuity agreement content
- disclosure statement
- segregated reserve fund
- gift annuity rate schedule
- appoint state agency as agent for service of process
- information from individuals

### Arkansas

- years in operation
- annuity agreement content
- segregated reserve fund
- investment per prudent investor standard or specific limitations
- gift annuity rate schedule
- adoption of board resolution

### California

- years in operation
- disclosure in agreement/annuity agreement content
- disclosure in marketing materials
- segregated reserve fund (state-specific fund)
- limitations on investment of reserve fund
- gift annuity rate schedule
- adoption of board resolution
- appoint in-state agent for service of process
- information from individuals

### Florida

- years in operation
- disclosure in agreement
- segregated reserve fund
- limitations on investment of reserve fund

### Hawaii

- years of activity in-state
- unrestricted assets held in-state
- disclosure language
- segregated reserve fund
- investment per prudent investor standard



## Complying with Gift Annuity Regulations

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### Maryland

- years of activity in-state
- disclosure language/annuity agreement content
- segregated reserve fund
- investment per prudent investor standard
- gift annuity rate schedule

### New Jersey

- years in operation
- annuity agreement content
- non-gift annuity registration
- segregated reserve fund
- investment per prudent investor standard
- gift annuity rate schedule
- adoption of board resolution

### New York

- years in operation
- annuity agreement content
- segregated reserve fund
- investment per prudent investor standard
- gift annuity rate schedule
- adoption of board resolution

### North Dakota

- annuity agreement content
- segregated reserve fund

### Tennessee

- disclosure language/annuity agreement content
- segregated reserve fund
- investment per prudent investor standard
- appoint state agency as agent for service of process

### Washington

- years in operation
- unrestricted assets
- annuity agreement content
- non-gift annuity registration
- segregated reserve fund
- investment per prudent investor standard
- gift annuity rate schedule
- appoint state agency as agent for service of process

### Wisconsin

- years in operation
- disclosure language/annuity agreement content
- segregated reserve fund
- investment per prudent investor standard
- gift annuity rate schedule
- appoint in-state agent for service of process

## II. Staying Compliant

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 16 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.

While most notably the ongoing compliance involves submitting annual filings where applicable, action may also be required by the charity relating to specific criteria set out earlier in this paper, involving areas such as annuity rates, annuity agreements, in-state agents, minimum asset requirements, and activity in the state.

### *Years-in-operation*

(HI, MD)

For both Hawaii and Maryland the years of operation requirement is linked with activity in the state. This need for in-state activity is continuous, and so the charity needs to be sure that it continues to maintain such activity. As noted previously, the years in operation requirement can also resurface when a change is made in the entity that will issue gift annuities, e.g., if a long-operating charity creates a Foundation with the intent to have it handle all fundraising for the organization.

### *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 such a requirement, a charity needs to have that specified level of assets at any time a charity is issuing gift annuities in the state. In the case of Hawaii, this means that the in-state bank or brokerage account would need to be maintained as long as the charity is registered in that state to issue gift annuities, and proof of the account's

existence is required as part of the annual reporting to the state. Washington State also monitors compliance with the minimum asset requirement on an annual basis. Among other aspects of the reporting, a charity must file a copy of its audited financial statement, and this is reviewed to ensure compliance with Washington's requirement of \$500,000 in unrestricted net assets. Should such assets fall below the requisite figure, the Office of Insurance Commissioner will suspend a charity's permit and it will be unable to issue gift annuities in the state until it can show sufficient assets. Even though the state conducts an annual review, a charity is also expected to monitor compliance throughout the year, and to take the initiative to suspend its issuance in the state should it fail to meet the net asset requirement. 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. As noted previously, this is not just a matter of regulatory compliance but also ensures that the organization is not putting annuitants at risk.

### ***Annuity agreements***

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

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 may choose 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.

### ***Segregated reserve fund***

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

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 in comparison 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 quite close to the required reserve amount, and/or investment values are fluctuating quite significantly, the monitoring should take place more frequently – perhaps quarterly, monthly, or even weekly, as in the last quarter of 2008 or the first quarter of 2009. A charity has the obligation 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.

***Limitations on investments of reserve fund***

(CA, FL)

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.

***Gift annuity rates***

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

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, many states presume that the charity changes its rates when the ACGA announces a change (California and Washington, in particular, have indicated this presumption.) If a charity will delay implementation of the new schedule, 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.

***Appointing an in-state agent***

(AL, CA, TN, WA, WI)

As part of the registration process in California and Wisconsin, 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 insure 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.

### *Information from individuals*

(AL)

The agent registration in Alabama 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.

The Individual Affidavit form completed by certain individuals in California as part of the application process is not part of the annual filing, nor are new ones required if there is a change in personnel.

### *Annual submissions*

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 states with 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 which has December 31 as its fiscal year end will have a single time period for annual reporting, with due dates ranging through the first four months 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.

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. While the states with a more detailed annual reporting requirement will typically send a reminder notice (often providing the link for downloading the form from the insurance department's website), it is ultimately the charity's responsibility to submit any annual filing on a timely basis. Failure to do so, absent an extension from the state, may result in suspension or revocation of the certificate of authority and/or imposition of a fine. Note that while preparing the annual report is often viewed as being the responsibility of the Development or Planned Giving Office, particularly with the more detailed filings it is more appropriately handled by the finance or business office. It is also possible to outsource preparation of the forms.

Alabama

- ✓ Renew "restricted agents" by December 31 (fee of \$60 per agent)
- ✓ Copy of audited financial statements within 60 days of FYE

## **Complying with Gift Annuity Regulations**

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### Arkansas

- ✓ Annual report form within 180 days of FYE

### California

- ✓ 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)
- ✓ Renewal fee due March 1

### Florida

- ✓ Attestation of compliance due 60 days after FYE

### Georgia

- ✓ Copy of audited financial statement when available

### Hawaii

- ✓ Annual report due March 15

### Maryland

- ✓ Annual report due 90 days after FYE

### Montana

- ✓ Renotification due March 1

### New Hampshire

- ✓ Renotification due 4 months, 15 days after FYE (submitted as part of annual renewal for charitable solicitation registration)

### 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.)

### New York

- ✓ Detailed annual report due March 1

### 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

- ✓ Annual report due 90 days after FYE
- ✓ Financial statement due 150 days after FYE if audited, 90 days after FYE if verified
- ✓ Renewal fee due March 1

### Washington

- ✓ Detailed annual report due 60 days after FYE
- ✓ Renewal fee due March 1
- ✓ Copy of audited financial due 120 days after FYE
- ✓ Copy of form 990 due 15 days after submission to IRS

### Wisconsin

- ✓ Detailed annual report due March 1 (renewal fee due with filing)

## III. 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 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. The new person may also presume existing compliance in all states in which his or her new employer has issued annuities or has prospective donors, when in fact the charity may have made selective decisions about registration. 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. It may also be desirable to have more than one person maintaining a tickler system regarding filing due dates, so that a deadline is not missed when someone departs.

In addition to a tickler system for annual reporting, a charity may find it useful to maintain a listing of states in which it has registered with an indication of any areas in which future action might be needed. This listing may also be an appropriate place to note any states in which the charity has elected not to register and thus not to issue. Alternatively, a color coded map could highlight the status of registration – indicating with one color the states in which the charity is already compliant, using another color to indicate 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, using a third color to indicate states from which the charity has opted to steer clear and not issue.

Appendix

**I. STATE LAW REQUIRES SEGREGATED RESERVE, ANNUAL REPORTING, AND/OR DETAILED APPLICATION (12):**

STATE	Years in operation	Board resolution	Disclosure in agreement	Reserve required	Investment limitations	Other registrations	Notes:
AL	---	---	yes	yes	---	---	Regulated by Securities Dept. rather than Insurance
AR	5	yes	---	yes <sup>1</sup>	yes <sup>2</sup>	---	<sup>1</sup> May elect to segregate AR annuitants; <sup>2</sup> Prudent investor standard allowed
CA	10	yes	yes	yes <sup>3</sup>	yes <sup>3</sup>	---	<sup>3</sup> CA annuitants only
FL	5	---	yes	yes <sup>4</sup>	yes <sup>4</sup>	---	<sup>4</sup> May elect to segregate FL annuitants;
HI	10 in HI	---	yes	yes	---	---	<sup>5</sup> Prudent investor standard; law requires \$200,000 of assets in Hawaii
MD	10 in MD	---	yes	yes	---	---	<sup>6</sup> Prudent investor standard
NJ	10	yes	---	yes	---	yes <sup>8</sup>	<sup>7</sup> Prudent investor standard; <sup>8</sup> registration w/ Div. of Revenue and Dept. of Law and Public Safety
NY	10	yes	---	yes	---	---	<sup>9</sup> Prudent investor standard
ND	---	---	---	yes	---	---	
TN	---	---	yes	yes <sup>10</sup>	---	---	<sup>10</sup> TN-only fund allowed but no longer mandated (per HB 3781 approved 4/16/12); <sup>11</sup> Prudent investor standard
WA	3	---	---	yes	---	yes <sup>13</sup>	<sup>12</sup> Prudent investor standard; <sup>13</sup> registration w/ Secretary of State; organization must have \$500,000 in unrestricted net assets
WI	10	---	---	yes <sup>15</sup>	---	---	<sup>14</sup> Newly registering charities may be asked to include disclosure; <sup>15</sup> may elect to segregate WI annuitants; <sup>16</sup> prudent investor standard

**II. STATE LAW PROVIDES FOR EXEMPTION - NOTIFICATION REQUIRED (15):**

State	Years in operation	Board resolution	Disclosure in agreement	Reserve required	Available assets	Other registrations	Notes:
AK	3	---	yes	---	\$300k	---	
CT	3	---	yes	---	\$300k	---	
GA	3	---	yes	---	\$300k	---	Annual submission of audited financial statement
ID	3	---	yes	---	\$100k	---	
IA	3	---	yes	---	\$300k	---	
MS	3	---	yes	---	\$300k	yes <sup>17</sup>	<sup>17</sup> Registration w/ Secretary of State (as charitable organization)
MO	3	---	yes	---	\$100k	---	
MT	3 <sup>18</sup>	---	yes	yes <sup>18</sup>	\$100k <sup>18, 19</sup>	---	<sup>18</sup> Waived if reinsured; <sup>19</sup> \$100,000 in unrestricted assets or \$300,000 net worth; annual renotification
NV	3	---	yes	---	\$300k	---	
NH	3	---	yes	yes	\$300k	yes <sup>20</sup>	<sup>20</sup> General registration with the Dept. of Justice; annual renotification; annuity rates must not exceed ACGA suggested rates
NM	3	---	yes	---	\$300k <sup>21</sup>	---	<sup>21</sup> Either in unrestricted assets or reserve fund
NC	3	---	yes	---	\$100k	---	
OK	3	---	yes	---	\$100k	---	Annual submission of audited financial statement
TX	3	---	yes	---	\$100k	---	
WV	3	---	yes	---	\$300k	---	



Appendix

No State Filing Required (Department of Insurance)

**III. STATE LAW PROVIDES FOR EXEMPTION - NO NOTIFICATION REQUIRED (19):**

State	Years in operation	Board resolution	Disclosure in agreement	Reserve required	Available assets	Other registrations	Notes:
AZ	3	---	--- <sup>22</sup>	---	\$300k	---	<sup>22</sup> Detailed disclosure statement to donor prior to gift
CO	3	---	yes	---	---	---	
IL	20 <sup>23</sup>	---	---	---	\$2 mil. <sup>23</sup>	---	<sup>23</sup> Waived if annuities reinsured
IN	---	---	---	---	---	---	
KS	---	---	---	---	---	---	
KY	---	---	---	---	---	yes <sup>24</sup>	<sup>24</sup> Certain charities must file copy of Form 990 with Attorney General
LA	---	---	---	---	---	---	
ME	5	---	---	---	---	yes <sup>25</sup>	<sup>25</sup> Registration w/ Secretary of State (qualified as foreign corporation)
MA	---	---	---	---	---	---	
MI	---	---	---	---	---	---	
MN	---	---	---	---	---	---	
NE	3	---	---	---	---	---	
OR	5	---	yes	yes	\$300k	---	
PA	3	---	yes	yes	\$100k	yes <sup>26</sup>	<sup>26</sup> Certain charities must register w/ Dept. of State (general solicitation law)
SC	5	---	---	---	---	---	
SD	10	---	yes	---	\$500k	yes <sup>27</sup>	<sup>27</sup> Registration w/ Secretary of State (qualified as foreign corporation)
UT	---	---	---	---	---	---	
VA	3	---	yes	---	\$100k	---	
VT	3	---	yes	---	\$300k	---	

**IV. STATE LAW DOES NOT SPECIFICALLY ADDRESS GIFT ANNUITIES (5):**

DE<sup>28</sup> DC OH<sup>29</sup> RI WY

<sup>28</sup> Insurance Code definition of annuity excludes those issued by tax-exempt organizations.

<sup>29</sup> Ohio previously provided for an exemption from securities law under now rescinded administrative rule. Court of Appeals case decided in 2002 held gift annuities not subject to insurance regulation (Ohio Supreme Court declined to hear appeal).