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**To:** Mr. Eric Solomon, Acting Assistant Secretary (Tax Policy),  
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**From:** The American Council on Gift Annuities

Frank Minton, Chair of Board of Directors

Conrad Teitell, Counsel

**Re:** Revenue Procedure 2005-24

**Date:** 5/5/2005

**About the American Council on Gift Annuities** (ACGA, formerly the Committee on Gift Annuities) ACGA, formed in 1927, is an IRC §501(c)(3) organization described in IRC §170(b)(1)(A)(vi) and is sponsored by approximately 1,250 colleges and universities, religious organizations, social welfare charities, health care organizations, and environmental organizations. A list of the sponsors is an attachment to this e-mail.

ACGA's board of directors and its counsel are all unpaid volunteers. The sponsors of ACGA have planned giving programs that include charitable remainder unitrusts and charitable remainder annuity trusts (CRUTs and CRATs—sometimes collectively called CRTs).

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**Far-reaching consequences of Rev. Proc. 2005-24.** Unless its requirements are met for CRTs created on or after June 28, 2005, inter vivos CRUTs and CRATs are disqualified—retroactively to the date of creation—if a spousal right of election now exists under state law, exists in the future, exists if the grantor of a CRUT or CRAT moves, marries or remarries.

**Tax benefits shouldn't be available if a charity's remainder interest in a CRT will be reduced or eliminated by a surviving spouse or anyone else.** But spousal rights of election are rarely exercised. Thus waivers shouldn't be required regardless of when a CRT is created. In the rare case that a right of election is exercised, the government should be protected and we give our suggestions for accomplishing that later in this letter.

**Problems created by Rev. Proc. 2005-24 for CRTs created on or after June 28, 2005 in cases where the right of election is not exercised (virtually all cases).** The revenue procedure doesn't take everyday realities into account:

**\*Not all lawyers who prepare CRTs are specialists.** Many are likely to be unaware of Rev. Proc. 2005-24. As evidence, consider all the court proceedings to reform defectively drafted CRTs. Should the non-specialist's unawareness be visited on generous donors and disqualify trusts even though it is highly unlikely that a right of election will ever be exercised?

\*If a state does not now have a spousal right of election, but enacts one in the future, as a practical matter the CRT grantor is not going to know that he or she has to get a waiver.

\*A single individual or a married individual who divorces and remarries is unlikely to know that he or she has to get a waiver.

\*A couple moves to a new state that has a right of election law that has different requirements for a waiver than the waiver that the spouse executed when the CRT was created. It is unlikely that a new waiver will be obtained.

\*A "protective" waiver signed before one is required may be invalid because it isn't possible to know the requirements for a valid waiver before a statute is enacted or before a grantor and spouse know the state that they might move to in the future.

\*Take the case of a husband who creates a CRT on June 28, 2005 (or thereafter). He gets a waiver of the right of election from his

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wife. It is timely, irrevocable and meets all the other requirements of Rev. Proc. 2005-24. It is an effective waiver under the law of the state in which the husband and wife are domiciled. The husband delivers it to the trustee who keeps the waiver with the CRT records.

Five years later, the husband and wife move to a new state. It also gives spouses the right of election against CRUTs and CRATs. But the new state has different requirements for a valid waiver than those of their old state. Although the husband is elderly, he remembers that his wife may have to sign a new waiver. He sees a lawyer. But unfortunately the years have taken their toll, and his wife is incompetent and can't sign an effective waiver. The husband dies. Neither the wife nor her court-appointed guardian elect against the trust. Nevertheless, the CRUT is disqualified retroactively to the date it was created—with loss of all the attendant tax benefits.

\*A waiver wasn't required when the grantor created his CRUT because his state had no right of election law. But when he moved to a new state that had such a law, he got a waiver from his spouse. But he didn't send it to the trustee. The waiver is found with his will in his safe deposit box. Is his CRUT disqualified? Rev. Proc. 2005-24 requires: "*Trustee To Retain Copy*. A copy of the signed waiver must be provided to the trustee of the CRAT or CRUT. The trustee must retain the copy in the official records of the trust so long as the contents thereof may become material in the administration of any internal revenue law. See §1.6001-1(e) of the Income Tax Regulations."

\*Should the grantor and spouse have different lawyers because their interests are potentially adverse? Additional legal fees for making a charitable gift?

\*Are post-June 28, 2005 additions to a CRUT created before June 28, 2005 protected by the safe-harbor rule? The spouse at the grantor's death doesn't exercise the right of election. But no waiver was obtained for post-June 28, 2005 additions to the trust. Had a new unitrust been created after June 28, 2005, a timely and properly executed waiver would have had to be obtained, and kept with the trust documents. Are the additions protected by the pre-June 28, 2005 safe-harbor?

**The potential net of Rev. Proc. 2005-24 is wide.** The revenue procedure (Sec. 1 Purpose and Scope) states: "In general, only inter vivos CRATs or CRUTs are within the scope of this revenue

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procedure." We don't want to stir up any more hornets, but if the potential right of election by a spouse is a problem for CRATs and CRUTs, isn't it also a problem for pre-Tax Reform Act of 1969 charitable remainder trusts, for pooled income fund gifts and for remainder interests in personal residences and farms? And isn't it also a potential problem for charitable lead unitrusts and lead annuity trusts? We, of course, are talking about cases where a right of election is not exercised.

**ACGA requests this action by Treasury and the Service:** We respectfully ask you to withdraw Rev. Proc. 2005-24 for further study and announce that any future guidance will be prospective only. If Treasury and the Service decide to pursue this, make this issue a proposed regulation with opportunity to comment at a hearing and in writing.

### **ACGA's suggested guidelines for any future Treasury and Service pronouncements:**

\*Treat CRATs and CRUTs whenever they were or will be created, the way Rev. Proc. 2005-24 treats pre-June 28, 2005 trusts. Thus no waiver of the right of election should ever be required.

\*In the rare case that a right of election is exercised, the estate should, on the grantor's final income tax return, be required to include as income any income tax charitable deduction taken by the grantor when the grantor created the trust (the tax benefit rule).

\*In the rare case that the right of election is exercised, the estate tax charitable deduction should be reduced. It should only be allowed to the grantor's estate for the value of the assets that actually go to the charitable remainder organization at the grantor's death. Thus the deduction would be reduced by the value of the assets going to the spouse. If at the grantor's death, trust payments are to continue for the life of a successor recipient(s) before the charity gets its remainder interest, the estate tax charitable deduction should be reduced to take into account the amount that went to the spouse from the CRT at the grantor's death.

### **Relevant court cases and a Treasury regulation dealing with the estate tax charitable deduction:**

\*The Tax Court has held that where a charitable bequest is not void—but only voidable—by reason of a decedent's children's right to a share of his estate under Louisiana law, an estate tax charitable deduction is allowable if the children do not enforce their

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right. *Longue Vue Foundation v. Commissioner*, 90 TC 150 (1988), *acq. in result* 1989-1 CB 1. See also: *Estate of Harvey*, 678 F.Supp. 1268; *Estate of Varick*, 10 TC 318; *Dimock*, 99 F.2d 799.

\*An estate tax charitable deduction is allowable if the charitable bequest is voidable—as opposed to void—and the charity gets the property. See Example 6 of Estate Tax Reg. §20.2055-2(e)(1)(i), dealing with a testator who devised real property to charity. The charitable devise could have been defeated by the exercise of the surviving spouse's statutory dower rights. The example concludes that the surviving spouse's unexercised dower rights are to be ignored, and the charitable deduction is to be allowed.

**Conclusion.** This has not been an area of abuse, and rights of election are rarely exercised. Rev. Proc. 2005-24, we strongly believe, will inhibit donors from creating CRTs if they are told that for the rest of their lives they must monitor right of election laws to assure that their CRTs aren't disqualified. The reality is that individuals put their wills, living trusts, charitable remainder trust agreements, and insurance and pension designations in a safe place and out of their minds for many years after doing their estate planning. And as they get older, the rules for waivers of spousal rights of election will not be uppermost in their minds.

We believe that our suggested solution protects the government, should the right of election be exercised, and doesn't make generous donors jump through hoops—some impossible to get through—in order to make a charitable gift. Rev. Proc. 2005-24 has already created much concern among attorneys who practice in this area, but we believe it isn't on the radar screen of non-specialists who draft CRTs for their clients.

We would welcome the opportunity to discuss Rev. Proc. 2005-24 with you to find a solution that meets the needs of the government, the donors and the charities who rely on CRTs for much of their support. Please contact Conrad Teitell, Counsel to ACGA at: (203) 351-4164 or [cteitell@cl-law.com](mailto:cteitell@cl-law.com).