

**STATE OF ARKANSAS  
SECURITIES DEPARTMENT**

---

**IN THE MATTER OF**

**AN EXEMPTION FOR OFFERS AND SALES  
OF SECURITIES OF CERTAIN  
CHARITABLE FUNDS MAINTAINED  
BY CHARITABLE ORGANIZATIONS  
AND OTHER MATTERS**

---

**ORDER PROVIDING AN  
EXEMPTION FROM  
REGISTRATION**

**ORDER NO. 02-025-S**

**BACKGROUND**

On September 12, 2002, the Arkansas Securities Commissioner (the "Commissioner") received a petition (the "Petition") requesting him to issue an order exempting offers and sales of securities of a fund of a charitable organization that is exempt from the definition of an investment company under Section 3(c)(10) of the Investment Company Act of 1940 (the "Investment Company Act") from the registration provisions of the Arkansas Securities Act, Ark. Code Ann. § 23-42-101, *et seq* (the "Act"). The Petition also requested that the order provide that (a) the term "investment adviser," as set forth in Section 23-42-102(8) of the Act not include certain persons who are either charitable organizations or persons acting on behalf of such organizations and who are excluded from the definition of investment adviser under Section 203(b)(4) of the Investment Advisers Act of 1940 (the "Investment Advisers Act") and (b) certain persons who represent an issuer in effecting transactions in securities exempted from registration pursuant to the order not be considered an "agent" as that term is defined in Section 23-42-102(1) of the Act.

## **FINDINGS OF FACT**

1. The Philanthropy Protection Act of 1995 (the “PPA”) amended Section 3(a)(4) of the Securities Act of 1933 (the “Securities Act”) to provide an exemption from registration for any security of a fund of a charitable organization that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act. The PPA also amends Section 203(b) of the Investment Advisers Act of 1940 to exclude certain persons from the definition of an investment advisor who are involved in specific ways with those funds and Section 3(c) of the Securities Exchange Act of 1934 (the “Securities Exchange Act”) to exclude charitable organizations, as defined Section 3(c)(10)(D) of the Investment Company Act from being deemed to be a “broker” or “dealer” under the Securities Exchange Act.
2. Pursuant to Section 3(c)(10)(B) of the Investment Company Act (added by the PPA), a company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable or reformatory purpose is excluded from the definition of an “investment company” if the charitable organization maintains a charitable fund.
3. Section 6(b) of the PPA preempts: (a) any state securities statute or regulation that requires the registration or qualification of a security issued by, or any interest or participation in, any charitable fund that is excluded from the definition of investment company under Section 3(c)(10)(B) of the Investment Company Act, or other offer or sale thereof, and (b) any state securities law that regulates or requires the registration of a broker, dealer, agent or investment adviser for such offer or sale.

The PPA allows a state to opt out of this preemption, and Arkansas did so in 1997, in order, *inter alia*, to give the Commissioner time to determine whether situations covered by the PPA should be subject to extensive regulation in Arkansas or whether the public interest and investor protection is better served by the preemption provided by the PPA. Arkansas was one of only a handful of states that enacted a statute to opt-out of the preemption.

4. The Commissioner has now determined that it is not necessary or appropriate in the public interest or for the protection of investors at this time that charitable organizations and persons acting on behalf of such organizations who are covered by the PPA be subjected to the securities, investment adviser and agent registration requirements of the Act.
5. In order to ensure the compatibility with the federal requirements and consistency in the application of securities laws to the same offering at both the federal and state levels, it is appropriate to exempt the situations covered by the PPA from these registration, but not the anti-fraud, provisions of the Act.

### **CONCLUSIONS OF LAW**

Section 23-42-503(a)(9) of the Act provides that the Commissioner may by order exempt certain securities from Sections 23-42-501 and 23-42-502 of the Act as not being necessary or appropriate in the public interest or for the protection of investors. Section 23-42-102(2)(B)(i)(a) provides that the term "Agent" does not include an individual who represents an issuer in effecting transactions in a security exempted by those clauses of Section 23-42-503 that the Commissioner by rule or order exempts. Further, Section 23-

42-102(8) allows the Commissioner by order to exclude persons from the definition of investment adviser.

### **OPINION**

It is not necessary or appropriate in the public interest or for the protection of investors at this time that the offer and sale of securities issued by, or any interest or participation in a charitable fund maintained by, a charitable organization be required to be registered under the Act. However, each charitable fund covered by this order should provide, to each donor to such charitable fund, at or before the time of the donation, written information containing the information required by Section 7(e) of the Investment Company Act and, within not more than ten (10) days following a written request to do so, provide a copy of such written information to the Commissioner.

It is not necessary or appropriate in the public interest or for the protection of investors that any individual who represents an issuer in effecting transactions in securities exempted under this order be defined, or required to register, as an agent under the Act if the person soliciting donations on behalf of the charitable organization to a charitable fund is either a volunteer or is engaged in the overall fund raising activities of the charitable organization, and receives no commission or other special compensation based on the number or the value of donations collected for the charitable fund.

It is not necessary or appropriate in the public interest or for the protection of investors that the term "investment adviser" include: (a) any person that is a charitable organization, no part of the net earnings of which inures to the benefit of any private shareholder or individual or (b) any person that is a charitable organization offering a charitable fund whose securities are exempt under this order or (c) any person that is a

trustee, director, officer, employee or volunteer of a charitable organization described in subsections (a) or (b) of this paragraph acting within the scope of such person's employment or duties with such a charitable organization, whose advice, analysis or reports are provided to one or more of the following: (i) any such charitable organization; (ii) a charitable fund whose securities are exempt under this order; or (iii) a trust or other donative instrument whose securities are exempt under this order or the trustees, administrators, settlors (or potential settlors) or the beneficiaries of any such trust or instrument.

### **ORDER**

IT IS THEREFORE ORDERED that the offer and sale of securities issued by or any interest or participation in a charitable fund maintained by a charitable organization shall be exempt from the registration provisions of the Act.

IT IS FURTHER ORDERED that each charitable fund whose securities are exempt under this order shall provide, to each donor of such charitable fund, at or before the time of the donation, written information containing the information received by Section 7(e) of the Investment Company Act and shall, within not more than ten (10) days following a written request to do so, provide a copy of such written information to the Commissioner.

IT IS FURTHER ORDERED that any individual who represents an issuer in effecting transactions in securities exempted under this order shall not be deemed to be an agent if the person soliciting donations on behalf of the charitable organization to a charitable fund is either a volunteer or is engaged in the overall fund raising activities of the charitable organization, and receives no commission or other special compensation based on the number or the value of donations collected for the charitable fund.

IT IS FURTHER ORDERED that the term “investment adviser” does not include: (a) any person that is a charitable organization no part of the net earnings of which inures to the benefit of any private shareholder or individual or (b) any person that is a charitable organization offering a charitable fund whose securities are exempt under this order or (c) any person that is a trustee, director, officer, employee or volunteer of a charitable organization described in subsections (a) or (b) of this paragraph acting within the scope of such person’s employment or duties with such a charitable organization, whose advice, analysis or reports are provided to one or more of the following: (i) any such charitable organization; (ii) a charitable fund whose securities are exempt under this order; (iii) a trust or other donative instrument whose securities are exempt under this order or the trustees, administrators, settlors (or potential settlors) or the beneficiaries of any such trust or instrument.

As used in this order:

- (A) A trust or fund is “maintained” by a charitable organization if the organization serves as trustee or administrator of the trust or fund or has the power to remove the trustees or administrators of the trust or fund and to designate new trustees or administrators.
- (B) The term “pooled income fund” has the same meaning as in Section 642(c)(5) of the Internal Revenue Code of 1986.
- (C) The term “charitable organization” means an organization described in paragraphs 1 through 5 of Section 170(c) or Section 501(c)(3) of the Internal Revenue Code of 1986.

- (D) The term “charitable fund” means a pooled income fund, collective trust fund, collective investment fund, or similar fund exclusively for the collective investment and reinvestment of (a) assets of the general endowment fund or other funds of one or more charitable organizations; (b) assets of a pooled income fund; (c) assets contributed to a charitable organization in exchange for the issuance of charitable gift annuities; (d) assets of a charitable remainder trust or of any other trust, the remainder interest of which are irrevocably dedicated to any charitable organization; (e) assets of a charitable lead trust; (f) assets of a trust, the remainder interests which are revocably dedicated to or for the benefit of one or more charitable organizations, if the ability to revoke the dedication is limited to circumstances involving (i) an adverse change in the financial condition of a settlor or an income beneficiary of the trust; (ii) a change in the identity of the charitable organization or organizations having the remainder interest, provided the new beneficiary is also a charitable organization; or (iii) both the changes described in clauses (i) and (ii); and (g) such assets as the Securities and Exchange Commission may prescribe by rule or order.
- (E) The term “charitable lead trust” means a trust described in Section 170(f)(2)(B), 2055(E)(2)(B) or 2522(c)(2)(B) of the Internal Revenue Code of 1986.
- (F) The term “charitable remainder trust” means a charitable remainder annuity trust or a charitable remainder unitrust, as those terms are defined in Section 664(d) of the Internal Revenue Code of 1986.

(G) The term “charitable gift annuity” means an annuity issued by a charitable organization that is described in Section 501(m)(5) of the Internal Revenue Code of 1986.

This order does not exempt any securities from the antifraud provisions of the Act.

This order shall remain in effect until such time as Section 23-42-503(a)(7) has been amended, the Commissioner has adopted a rule exempting these securities and persons from the registration provisions of the Act, or this order is otherwise modified or vacated, whichever comes first.

WITNESS MY HAND AND SEAL this 10th day of October 2002.

A handwritten signature in black ink, appearing to read "M. Johnson". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

MICHAEL JOHNSON  
SECURITIES COMMISSIONER