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RE: Patentability of Tax Planning Methods

Gentlemen:

I address you in my capacity as the President of The American College of Trust and Estate Counsel (the "College"), a professional association of more than 2,500 lawyers from throughout the United States. Members of the College are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates law and on the basis of having made substantial contributions to these areas of the law through lecturing, writing, teaching, and bar association activities. I am writing on behalf of the College in support of your efforts to find a legislative solution to the problem of patenting tax planning methods. We believe that the solution is to prohibit the issuance of such patents.

The College is concerned about the negative impact that the patentability of tax planning methods is having on taxpayers and our system of taxation in general.* From our experience as estate planning professionals, we have found that patents for tax planning methods in the area of federal estate and gift taxation are prohibiting clients from using congressionally authorized tax planning methods. We also believe that if patents for tax planning methods are not prohibited by legislation, these types of patents will in all likelihood expand and create problems for a much larger number of taxpayers.

The College applauds the House of Representatives for including in the passage of H. R. 1908, the Patent Modernization Act of 2007, the amendment offered by Representatives Boucher and Goodlatte making tax planning methods unpatentable. We encourage the Senate to pass similar legislation. Although the Internal Revenue Service recently issued proposed regulations making transactions that utilize patented strategies reportable transactions (similar to tax shelters) under Internal Revenue Code sections 6011 and 6111, we do not believe that these rules will be sufficient to address this problem. A legislative remedy is the only way to ensure that every taxpayer may use congressionally authorized techniques to reduce the taxpayer's tax burden.

Until 2003, few estate planning advisers considered patents when advising clients about estate planning. That view changed in 2003 when an individual was awarded a patent for an estate planning technique that the patent holder called a "SOGRAT" (Patent No. 6,567,790, Establishing and Managing Grantor Retained Annuity Trusts Funded by Nonqualified Stock Options). According to the patent, a SOGRAT involves a grantor retained annuity trust (commonly called a "GRAT") funded with nonqualified stock options. When word of this patent spread through the estate planning community, most estate planning professionals were shocked to learn that it was possible to patent a common estate planning technique used in connection with a specific asset, the purpose of which is to allow taxpayers to minimize their federal estate and gift tax liability, particularly a technique (such as a GRAT) authorized by regulations promulgated by the Treasury Department and approved in many Internal Revenue Service rulings.

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On January 6, 2006, the SOGRAT patent holder filed suit in the United States District Court in Connecticut for infringement of the SOGRAT patent. The lawsuit was settled earlier this year with a stipulated determination as to the validity of the SOGRAT patent. As a result, taxpayers cannot use a GRAT funded with non-qualified stock options without facing the possibility of a suit for patent infringement unless the taxpayer obtains the consent of the patent holder notwithstanding that Congress has authorized the use of a GRAT. Congress should not allow patents to be used to prevent a taxpayer from using congressionally authorized methods to reduce the taxpayer's tax burden.

The College supports legislation to prohibit the patenting of tax planning strategies so that taxpayers may use legitimate tax reduction methods to satisfy their obligations to pay taxes without concern that they may become liable for infringement of a tax strategy patent.

Very truly yours,



Daniel H. Markstein, III
President

cc: Honorable Rick Boucher
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Washington, DC 20515

Honorable Erie Solomon
Assistant Treasury Secretary for Tax Policy
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ACTEC Executive Committee
Gerry A. Vogt, Executive Director

* As a result of the College's concern, the College has taken the position that tax planning strategies should not be patented. See Statement of Dennis I. Belcher, Testimony Before the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means, July 13, 2006