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November 3, 2006

Mr. Eric Solomon
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Legislative Grants of Regulatory Authority

Dear Acting Deputy Assistant Secretary Solomon and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1121, addressing the subject of legislative grants of regulatory authority to write tax rules (the "Report").

The Report discusses grants of authority given by Congress to the Treasury Department and the Internal Revenue Service (the "IRS") to promulgate regulations under the Internal Revenue Code of 1986, as amended (the "Code"), describes some of the problems taxpayers and the courts have had in interpreting these grants, and contains a brief summary of the degree of deference given by courts to these grants of regulatory authority. The Report then proposes model language to be used in the Code in places where Congress wishes to delegate regulatory authority to the Treasury Department and the IRS.

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As explained in the Report, regulations are issued pursuant to the general grant of authority set forth in Section 7805(a) of the Code or pursuant a specific grant of regulatory authority contained in a particular provision of the Code (and sometimes pursuant to both simultaneously). As further explained in the Report, there are various types of specific grants of regulatory authority contained in the Code. Some of these specific grants are part of or relate to a provision of the Code that is operative before the issuance of any regulations, while some other specific grants are part of or relate to a provision of the Code that do not apply until regulations are issued. Some specific grants, however, do not fit neatly within either of these categories. For example, some grants provide that a Code provision can be “turned off” in certain circumstances, while some other grants are intended to permit regulations to vary the terms of the statute in order to carry out the purpose of the statute.

There are numerous variations in how these types of grants are expressed in the Code. These variations may result in uncertainty for taxpayers, the potential for whipsaw of the Treasury Department and the IRS, and general frustration for those who are faced with the difficult task of applying the relevant provisions. Members of the staff of the Joint Committee on Taxation and officials of the Treasury Department and the IRS Chief Counsel’s office have informally expressed these concerns to the Tax Section.

Our proposed model language is described below.

Self-Operative Code Provisions. The following is suggested when Congress wishes to defer to the Treasury Department and the IRS to provide additional details as to how a particular Code provision should operate, but where the particular Code provision with respect to which this grant relates is intended to be self-operative in the absence of such regulations:

“The Secretary shall prescribe such regulations as he determines are appropriate to carry out the purposes of this [insert the appropriate label of the relevant Code provision, e.g., Section, subsection, etc.]”

If Congress wishes to include details of the subject matter to be covered by the regulations or constraints on the substantive terms of the provisions to be included in the regulations, we suggested that the grant state:

“The Secretary shall prescribe such regulations as he determines are appropriate to carry out the purposes of this [insert the appropriate label of the relevant Code provision, e.g., Section, subsection, etc.], including regulations [insert appropriate description of the subject matter].”

Self-Operative Code Provisions Adapting Concepts. The following is suggested when Congress wishes to identify a situation in which a statute, written in terms of one situation, should apply to another situation. This language would be used where Congress intends that the statute be self-operative, but recognizes that the details of its

application to the second situation may differ from the details of the application to the first situation, or otherwise require amplification.

“[insert the appropriate label of the relevant Code provision, e.g., Section, subsection, etc.] shall apply to [insert description of identified situation] and the Secretary shall prescribe regulations determining the manner in which it shall so apply.”

Code Provisions That Are Not Self-Operative. The following is suggested when Congress desires that a particular Code provision not be operative until the Treasury Department and the IRS promulgate regulations:

“to the extent provided in regulations and only upon the issuance of such regulations . . .”

Code Provisions “Turned Off” By Issuance of Regulations. The following is suggested when Congress desires to grant authority for the issuance of regulations that “turn off” Code provisions:

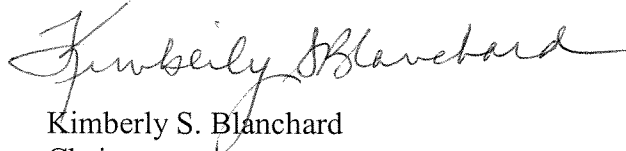
“except to the extent provided in regulations . . .”

Moreover, the Report suggests that Section 7805 be amended in two respects. First, Section 7805 should be amended to state the express intent of the different types of grants of regulatory authority. By codifying the legislative purpose of different types of grants of regulatory authority, confusion and ambiguity would be mitigated to a significant extent.

Second, the Report suggests that Section 7805 should be amended to clarify that the Treasury Department and the IRS have the authority to issue anti-abuse regulations under Section 7805(a). Although a number of anti-abuse regulations have been promulgated in recent years under the general grant of authority contained in Section 7805(a), there has been some doubt as to whether this authority currently exists. The fact that *some* provisions of the Code contain specific grants of authority to issue anti-abuse regulations may call into question whether Section 7805(a) authorizes the Treasury Department and the IRS to promulgate anti-abuse regulations thereunder. We consider specific grants of authority to issue anti-abuse regulations to be a useful notice by Congress of particular areas where anti-abuse regulations will be promulgated, but we recognize that there are situations in which anti-abuse rules may be appropriate in the absence of any such specific grant. We therefore feel that this question of authority should be addressed specifically in Section 7805.

We appreciate your consideration of our recommendations. If you have any questions or comments regarding this report, please feel free to contact us and we will be glad to discuss or assist in any way.

Respectfully submitted,



Kimberly S. Blanchard
Chair

Enclosure

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