move the transportation fleet to that next generation, whether it is electric vehicles or fleets powered by natural gas.

The final item in terms of what we can do to help address our Nation's energy policy is to shelve bad ideas. There is an awful lot of bad ideas holding us up. This is the stop-the-bleeding element of the proposal. With oil prices on the rise, the administration and many in Congress seem to have forgotten that the oil industry actually provides Americans with energy and jobs. Yet sometimes they are viewed as an untapped source of government revenues.

Proposals to take more from oil companies have included a range of tax increases, the use-it-or-lose-it proposal and similar fees, and substantially shorter lease terms. All of these antiproduction efforts deprive companies of stable operating environments and reduce their willingness to invest in America. We need to look at what we are doing. If they are bad ideas, let's set the bad ideas aside. Let's adopt a constructive approach instead of seeking to punish. Let's figure out a better way forward so we can tap into more of America's vast resources and then make good use of the resulting revenues.

We clearly do have options. I look forward to discussing them more in detail, how we can develop these goals of a national energy policy. For today, I emphasize that responsible domestic production will reduce our energy prices, create jobs, improve security, raise revenue to pay down debt, and allow America to invest in technologies for the future. We cannot afford to wait on any of these benefits.

I urge Members, as we talk about ways to reduce our budget, ways to create more jobs for the country, we need to look critically at what is happening with our energy policy.

I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

THE BUDGET

Mr. ISAKSON. Madam President, on June 27, 2010, President Obama made the following statement:

> I hope some of those folks who are hollering about deficits and debt will step up, because I'm calling their bluff.

I am stepping up. At the same time, I also want to call the President's bluff. I think we are at a serious point in time in our history, and we need to be realistic about what confronts us ahead of time.

The biggest bluff this year in the Congress was the 2012 budget presented by the President which did not take any of the recommendations from his own deficit commission—by the way, I was one of the Republicans who supported that—and instead locked in a 25.4-percent increase in spending over the last 2 years and made it permanent by calling it a freeze. It raises taxes in the outyears and dedicates a higher regulatory environment in the United States of America. None of that does anything to reduce the debt or the deficit. In fact, the President's budget actually makes it worse.

But it is fair to ask people to step up. The American people are asking us to step up. They want us to do what they have been doing in the last 3 years: sit around their kitchen table, reorganize their priorities, spend within their means, and reduce their debt and the deficit. The very least they should ask of their country is their country to do the same thing they have had to do. In large measure, we have been the contributor to the protracted nature of the current recession.

Now, everybody knows there are two ways to reduce the deficit in the short run and the debt in the long run. One way is to cut spending. But that is not the only way. Another way is to raise revenue and increase income. And that is not just by raising a tax, that is by improving business opportunity and the expansion of opportunity in America. There is a third way: by changing the processes by which we regulate and make decisions, by looking at reforms that in the outyears make a difference for all of us.

On the spending side, the spending cuts are going to be difficult. They are going to be modest compared to what our deficit really is. But they are going to send a signal to the world that we are finally going to get serious about our spending level, and the majority of the rest of the world already has—whether it is Great Britain or many of the other countries in the European Union.

So spending cuts are important. But spending cuts in and of themselves will not solve the entire problem. In fact, H.R. 1, in the House, which made reductions of $61 billion, was a modest start at a long-term process. But it sent us in the right direction, and it called the bluff the President was talking about by making real, significant proposals.

Secondly, in terms of raising revenue, we raise revenue by expanding opportunity, not by raising the rate of tax, but, as his deficit commission said, by lowering the rate of tax, doing away with deductions that are specialized and targeted in nature and giving business the encouragement to expand.

A funny thing happened to me on January 3 of this year in Atlanta, GA, right after the first of January. I went to the OK Cafe in downtown Buckhead, GA, for a breakfast. That is the gathering place for most Atlanta businesspeople on the north side of town. I was going to have a business meeting, and Steve Hennessy walked in, one of the largest automobile dealers in the United States. He happened to come up to me. He rushed toward me. He had his arms open. I thought I was going to get a good luck hug, a ''go to Washington and do a good job'' type speech. Instead, he put his finger right on my nose and said: JOHNNY, I just had to hire two compliance officers to comply with Dodd-Frank, and I lost a salesman. I am spending more money complying and less money producing.

That is one of the things this administration has done in tremendous quantity to put us in a very difficult situation. Every agency is promulgating rules and regulations at a rapid rate—regulations that to comply with cost new employees, more expense in operating a business, and less capital investment in what that business does.

It is very important that the President understand what happens; that is, regulation has consequences. Right now the regulatory volume of the United States being proposed by this administration is unsustainable. It is costly, and it increases the debt and the deficit of the United States of America. Quite frankly, it is a reach far beyond where government should go.

I am the first person to support occupational safety, the first person to support financial security, the first person to support transparency. I will always fight to see that our government is transparent and our rules are fair and our occupational safety is good. But to overreach, to go beyond our reach, is just wrong.

I will give you a couple of examples. Georgia is a large agricultural State. Yesterday I was with some cotton farmers who were bemoaning the fact of the most recent proposal to regulate agricultural dust. The EPA actually wants to regulate the dust created by a plow or a tractor or a truck on a dirt road on a farm, to say that the farmer must make sure that dust stays within the confines of his hedge row or his fence line—meaning we are going to try to control nature? Well, how is he going to do it? By hiring water trucks to follow behind his tractor to tamp down the dust? That is a reach too far.

To categorize milk as oil and to say farmers who run dairies have to have storage tanks for milk that are equivalent to storage tanks for petroleum, that is just crazy. It is a reach too far, and it makes the ability to do business tougher, the ability to make a profit more impossible, the amount of revenue produced less because it is less profitable, and it protracts our debt and our deficit problem.

So when the President talks about calling bluffs, I am willing to do it. I am willing to sit down and talk about the hard issues. In fact, I am willing to tell the story about how in certain measure myself and everybody else born after 1943 in America is an example of some of the things we need to do.

In 1983, I was 39 years old. Social Security sent out their annual report on the stability of the Social Security fund and said it was going broke; that if we did not do something we were going to run out of Social Security benefits in the early 2000s.

Well, that worried everybody. But Tip O'Neill, a great Speaker and a

Democrat, and Ronald Reagan got together at the White House, and they said: We have a problem.

Ronald Reagan said: Well, I don't want to raise the payroll tax.

Tip O'Neill said: I don't want to lower the amount of the benefit.

They looked at the actuary and said: What do we do? And he said: Recast the eligibility. Push it into the outyears, and that will get the system calibrated and back to actuarial soundness.

So they sat down with the actuaries at the table and said: I tell you what we are going to do. We are going to preserve everybody's Social Security eligibility today. But for those people born after 1943 and before 1947, we are pushing them out from age 65 to age 66. I was born in 1944. With a stroke of a pen, Ronald Reagan and Tip O'Neill changed my eligibility by 1 year. But they changed mine and millions of other Americans at the lead of the baby boomers, recalibrated the system, and put Social Security in actuarial soundness until 2050. Then they added 2-month increments for eligibility beyond, where eventually the law now takes Social Security eligibility to 67.

The President's commission recommended doing a similar thing over the next 50 to 75 years to push eligibility out so that benefits are not cut. Eligibility is changed but taxes do not go up. Eligibility is only changed, and when you become eligible to collect.

We already know that when Social Security was formed originally, most people did not live to the eligibility age of 65, and today most everybody does. Our lifespans are a longer time, and that is what has gotten the system actuarially unsound.

So I do not think it is right to say that nobody has answered the call on debt and deficit reduction. I do not think it is right to say that our bluff—we have not been bluffing anybody, neither did the President's debt and deficit commission. They called our hand by giving us consequential recommendations that work and in the long term make the future of America bright.

This problem is not a partisan problem; it is a bipartisan problem. The parties have contributed each to the other to cause the problem. We need to sit down together and begin solving it but not making it a political issue for the 2012 election with no solutions. Instead of bluffs, we ought to make constructive proposals. Instead of speeches on the floor that run time, we ought to be offering amendments on the floor that make a difference in terms of the debt and the deficit of the United States of America.

This is the greatest country on the face of this Earth, and it is because people trust it. But if we continue to look the other way as our debt and our deficit increases, that trust will dissipate and our interest rates will go up, the cost of goods and services will be inflated, and America will be in trouble.

I close by telling a brief story about a speech I made in Albany, GA, last year in November, when I was talking about the debt and the deficit, talking about some of the solutions we have talked about. I kept talking about a trillion this and trillion that, and saying one day soon we are going to owe $14 trillion.

A farmer at the back of the room at the rotary club raised his hand and said: Senator, I only went to Dougherty County High School. I don't know how much $1 trillion is. How much is it?

Well, I stumbled and I stammered, and finally, I said: Well, it is a lot. I could not think of how to quantify it.

I got home that night, and my wife said: What is wrong? I said: Well, I got stumped today.

She said: What was the question?

I said: The question was, how much is a trillion?

She said: What did you say?

I said: Well, it is a lot.

She said: Well, that was stupid.

I said: Well, give me a suggestion.

And she is always right.

She said: Well, why don't you just figure out how many years have to go by for 1 trillion seconds to pass. Then people will understand how much $1 trillion is.

So I did the math. I multiplied 60 seconds times 60 minutes times 24 hours times 365 days. I got on the calculator, and the calculator only went to 12 digits. So I had to go to the computer to get something that would go to 13 digits, which is a trillion. I divided that product into 1 trillion.

Do you know how many years have to pass for 1 trillion seconds to go by? Madam President, 31,709. And we owe $14 trillion. At a dollar a second, for over 400,000 years, we could solve our problem. That is a huge problem. But we have the benefit of the time value of money and the hope and opportunity of the greatest country on the face of this Earth.

So I call the President's bluff. Let's sit down together and talk about the tough things. Let's talk about the shared sacrifice. Let's talk about the benefit that comes from responsibility, frugality, and a commitment to the principles of our Founding Fathers and always remember the principle that less debt is better, and we should never be a country controlled by those we owe. Instead, we ought to be a country loved by those we protect.

Madam President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Ms. KLOBUCHAR). The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. GRASSLEY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRASSLEY. Madam President, I understand there are questions about what the tax strategies portion of the bill does and who it impacts. So I want to take a few minutes to address those questions.

In simple terms, a tax strategy is any method for reducing, avoiding, or deferring tax liability based upon the tax law—including interpretations and applications of the Internal Revenue Code, regulations, and related guidance.

A tax strategy can be as simple as a plan to buy tax-exempt bonds or invest in an IRA to reduce your tax liability or as complex as some sort of sale-leaseback tax shelter involving multiple domestic and foreign corporations and partnerships.

A tax strategy patent, which is what we are talking about in this bill, is just that—a patent on a particular tax strategy.

Madam President, I ask unanimous consent to have printed in the RECORD an article from a publication called the Tax Adviser. This article provides some examples of tax strategies that should not be patented.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Tax Advisors, Aug. 1, 2007]

PATENTING TAX IDEAS

(By Justine P. Ransome, J.D., MBA, CPA; and Eileen Sherr, CPA, M.Tax)

EXECUTIVE SUMMARY

TSPs have been issued in many areas, and many applications are currently pending.

Such patents thwart Congressional intent and undermine the integrity of, and the public's confidence in, the tax system.

AICPA will continue to work with the IRS, USPTO, Treasury and Congress to handle—and hopefully resolve—this emerging issue.

One of the greatest challenges tax practitioners face in providing quality tax services to clients is to keep abreast of the ever-changing complexity of the tax law. Added to this challenge is the burden of determining whether the chosen advice is another party's exclusive property. While this may seem absurd, in the real world of tax consulting, tax advisers must now contend with certain practitioners and companies seeking patents to protect their exclusive right to use various tax planning ideas and techniques they claim to have developed.

Tax practitioners may be surprised to find that tax strategies they have used routinely in practice are now patented and unavailable for use without the patent holder's permission. The trend of patenting tax strategies is on the rise. This article explores tax-strategy patenting. It provides an overview of the issue and discusses the AICPA's concerns and activities to keep its members informed, as well as its attempts to seek a legislative remedy that will stem the tide of these types of patents.

BACKGROUND

The Patent Act of 1952 provided that patents may be granted for innovations that are useful, novel and nonobvious. Under 35 USC Section 271, a patent gives its holder the exclusive right to make, use and sell the patented idea. The consequences of infringing a patent can be substantial. The remedies for patent infringement under 35 USC Sections 283 and 284 include injunctive relief and money damages equal to lost profits or a reasonable royalty. Money damages can be tripled in cases of willful infringement, as authorized under 35 USC Section 284; under 35

USC Section 285, attorneys' fees can be awarded to the prevailing party in exceptional cases. Issued patents are presumed valid; under 35 USC Section 282, an accuser must overcome this presumption with clear and convincing evidence to invalidate a patent. Even if an accused is not found liable, defending a lawsuit can be costly.

In 1998, the Federal Circuit, in State Street Bank & Trust, held that business methods are patentable. Since this decision, patents for business methods have flourished. In some cases, these patents involve processes that would seem to be neither novel nor nonobvious (i.e., other reasonably intelligent people would come to the same or a similar conclusion when confronted with the same or similar issue).

Recently, the Supreme Court held that the long-standing test used by the lower courts to determine whether an idea was nonobvious was not being applied correctly (and, in fact, was being applied too strictly). The opinion stated that for an idea to be nonobvious, it must be (1) one that would not have occurred to persons of ordinary skill and intelligence in the field of endeavor involved; or (2) previously available knowledge that would have caused a person of ordinary intelligence to affirmatively believe that the idea would not work. Since this decision was just handed down, it remains to be seen what effect it will have on the proliferation of patents for business methods in the future.

The patenting of business methods has recently crept into the practice of tax planning. At press time, 60 tax-strategy patents (TSPs) have been granted; 86 are pending. There may be additional TSPs; about 10% are generally unpublished, because applicants can elect not to publish a patent if no protection is being sought in a foreign jurisdiction. Also, it can take up to 18 months for a patent application to be published and listed on the USPTO website. As discussed below, many of these patents deal with planning techniques routinely used by tax practitioners in delivering tax services to clients.

Reasons for Concern

SOGRAT patent: The primary catalyst for the concern of the AICPA and other tax practitioners was a 2006 infringement suit over the ''SOGRAT patent.'' Awarded by the USPTO on May 20, 2003, to Robert C. Slane of Wealth Transfer Group LLC, the SOGRAT patent describes an estate planning technique that uses grantor retained annuity trusts (GRATs) to transfer nonqualified stock options (NQSOs) to younger generations, with few or no gift tax consequences.

GRATs are permitted under Sec. 2702 and the regulations there under. Many estate planners are familiar with, and routinely use, GRATs to shift a variety of different types of assets to younger generations. Thus, it came as quite a surprise to many estate planners when an article touting the estate tax benefits of placing NQSOs into a GRAT noted that the technique had been patented by one of that article's authors. This surprise grew into concern when the patent holder instituted the above-mentioned patent infringement suit against a taxpayer who implemented the technique without its permission.

Warning letters: As previously stated, money damages can be tripled in cases of willful infringement (which requires knowledge of the patent). Some patent holders have resorted to mail campaigns and/or press releases touting their patents and warning other tax practitioners that they may be infringing on said patents. For example, one patent infringement warning letter addressed a method for financing future needs of an individual or future intentions on the death of such person, and a method for investing long-term assets of tax-exempt charities. The letter noted that the allowed claims in the patent involve investments used for charitable remainder trusts, pooled-income funds, charitable gift annuities, charitable lead trusts and permanent endowment funds.

Part of this patent resembles the facts and results of Letter Ruling 90090471 and TAM 9825001. In those rulings, the IRS permitted a net-income charitable remainder unitrust to invest in a tax-deferred annuity contract for the purposes of controlling the timing and amount of income distributions and to otherwise provide a guaranteed death benefit payable to the charitable remainder interest holder. The patent purports to achieve a similar result through the use of tax-deferred arrangements.

The patent holder also sent a press release to the Planned Giving Design Center (PGDC), a professional organization that provides advice on charitable planning and taxation. An article written by the PGDC's editor noted that the letter ruling and TAM are well known to members of the insurance community in particular, ''which have since facilitated thousands of annuity invested charitable remainder trusts since 1990.'' The article further noted that these rulings are also well known to the IRS, which issued them and subsequently discussed such arrangements in its 1999 Continuing Professional Education text. The IRS also added these rulings to its annual ''no-ruling'' list as it studied whether they conveyed an inappropriate tax benefit to taxpayers. The article noted that all of these events occurred well in advance of the date the holder applied for his patent (2004).

In light of that patent, the AICPA and American Bar Association (ABA) asked the USPTO whether IRS rulings were considered ''prior art'' (and, thus, not novel) if they were not listed in the ''Other References'' section of a patent application. The patent application did not contain a reference to either ruling. The USPTO replied that, although it had not required such information in the past, it would start requesting it for financial-type patents under its Rule 105 (which is used to ask applicants for more information).

Sec. 1031: A patent relying heavily on Sec. 1031 has also drawn tax advisers' attention. The ''Section 1031 deedshare patent'' involves a method and investment instruments (deedshares) for performing tax-deferred real estate exchanges. The patent follows the result in Rev. Proc. 2002–22. Its exclusive licensee, CB Richard Ellis Investors, L.L.C., has publicized and warned that it will aggressively pursue patent enforcement.

Deferred compensation: A patent on hedging liabilities associated with a deferred-compensation plan was granted and assigned to Goldman Sachs & Company. The patent purports to provide a mechanism to hedge the compensation expense liabilities of an employer providing deferred compensation to one or more employees.

IRAs: A patent has been granted to evaluate the financial consequences of converting a traditional IRA to a Roth IRA. It describes a computer-implemented process for computing the tax consequences of converting to a Roth IRA and various options for funding the taxes, such as term insurance to fund the Federal tax liability of early withdrawal for premature death, calculating the entire rollover amount and financing the tax and insurance premium.

FSAs: A patent has been granted on flexible spending accounts (FSAs). The patent sets forth a method to calculate costs using a ''health cost calculator'' and ''flexible spending account calculator.''

FOLIOfn: The trend to patent tax ideas is only in its infancy; however, several individuals and companies already have applied for multiple patents. For example, FOLIOfn, Inc., a brokerage and investment solutions company, holds three TSPs. It has developed methods for tracking and organizing investments and has patented mechanisms and processes that allow users to view and manipulate potential tax consequences of investment decisions. Several of FOLIOfn's other business-method patents are in practice via large licensing agreements. The company is similarly looking for licensing opportunities for its three TSPs but has not yet secured any deals.

As far as the AICPA is aware, only one of its members (a sole practitioner) has applied for a TSP. The AICPA Tax Division staff discussed the issue with that member. The AICPA has confirmed that, currently, none of the ''Big Four' accounting firms holds TSPs.

AICPA ISSUES

In a Feb. 28, 2007, letter to Congress, the AICPA outlined its concerns and position on patenting tax strategies. Its position is that TSPs:

Limit taxpayers' ability to use fully tax law interpretations intended by Congress;

May cause some taxpayers to pay more tax than Congress intended or more than others similarly situated;

Complicate the provision of tax advice by professionals;

Hinder compliance by taxpayers;

Mislead taxpayers into believing that a patented strategy is valid under the tax law; and

Preclude tax professionals from challenging the validity of a patented strategy.

The AICPA is concerned about patents for methods that taxpayers use in arranging their affairs to minimize tax obligations. TSPs may limit taxpayers' ability to use fully interpretations of law intended by Congress. As a result, they thwart Congressional intent and, thus, undermine the integrity of, and the public's confidence in, the tax system. TSPs also unfairly cause some taxpayers to pay more tax than (1) intended by Congress or (2) others similarly situated. The AICPA believes that the conflict with Congressional intent highlights a serious policy reason against allowing patent protection. Allowing a patent on a strategy for complying with a law or regulation is not sound public policy because it creates exclusivity in interpreting the law.

The AICPA is also concerned with tax law simplicity and administration. TSPs greatly complicate tax advice and compliance. Tax law is already quite complex. The AICPA believes that the addition of rapidly proliferating patents on tax-planning techniques and concepts will render tax compliance much more difficult.

Because TSPs are granted by the Federal government, the AICPA is concerned that they pose a significant risk to taxpayers. Taxpayers may be misled into believing that a patented tax strategy bears the approval of other government agencies (e.g., the IRS) and, thus, is a valid and viable technique under the tax law. However, this is not the case; the USPTO does not consider the viability of a strategy under the tax law. The USPTO is authorized only to apply the criteria for patent approval as enacted by Congress and as interpreted by the courts. The IRS is not involved in the USPTO's consideration of a TSP application.

The AICPA is concerned that tax professionals also may be unable, as a practical matter, to challenge the validity of TSPs as being obvious or lacking novelty, due to their professional obligations of client confidentiality. Tax advisers may also find it difficult to defend patent-infringement lawsuits due to client confidentiality. The

USPTO will also find it difficult, if not impossible, to determine whether proposed tax strategies meet the statutory requirements for patentability because tax advice is generally provided on a confidential basis.

The usefulness of TSPs is also questionable. The AICPA believes that some of these patents may be sought to prevent tax advisers and taxpayers from using otherwise legally permissible tax-planning techniques, unless they pay a royalty.

The AICPA is concerned that both tax practitioners and taxpayers may be sued for patent infringement, whether or not the infringer knew about the patent. A taxpayer can infringe a patent without intent or knowledge of it; ignorance of an applicable patent is not a defense. Practitioners must be aware that once they know that a particular tax strategy is patented, using that strategy without the patent holders permission may expose them to claims of willful infringement and triple damages. Unfortunately, the current environment may leave some practitioners with no recourse, other than engaging patent counsel to review and monitor techniques they routinely use.

Advocacy Efforts and Communications

Background: In November 2005 and February 2006, the AICPA Trust, Estate & Gift Tax TRP discussed this emerging issue with IRS representatives. In addition, AICPA President Barry Melancon discussed this issue with then-IRS Commissioner Mark Everson on Oct. 17, 2006, advising him of the AICPA's concern and desire to take legislative action.

In January 2006, the AICPA Tax Division's Tax Executive Committee (TEC) decided to form the PTF. This article's authors chair and staff that task force, respectively. The PTF was formed with both large- and small-firm members, from various technical areas of the AICPA Tax Division, including individual, international, partnership, S corporation, tax policy and legislation, and trust, estate and gift taxes. The task force held several conference calls and meetings, including one call with a patent expert who explained the basis for patents and the application process.

In June 2006, the TEC authorized some PTF members to participate in a joint multi-professional organization task force (including the AICPA, the ABA's Real Property, Probate and Trust Law Section and Tax Section, the American College of Trust and Estate Counsel and the American Bankers Association) on the issue. The joint task force had several conference calls; its chair attended a PTF meeting in November 2006.

In July 2006, prior to the Congressional hearings on the issue, the PTF discussed its concerns with Capitol Hill staff. This article's authors attended the hearing, then updated AICPA Tax Division members about the issue and hearing via an electronic alert (e-alert) in August 2006.

In October 2006, the AICPA up-dated members via an update to state CPA societies. In February 2007, the AICPA sent to the leadership of the House and Senate tax-writing and judiciary committees its position on tax-strategy patenting, including legislative proposals. E-alerts went out to the AICPA membership and were included in the April 2007 issue of the AICPA's The CPA Letter. In addition, PTF members authored Journal of Accountancy articles on the subject.

In March 2007, the PTF drafted and submitted comments to Treasury on the regulations for ''reportable transactions.'' These comments recommended that Treasury not require taxpayers to report patented transactions as reportable transactions, but require the patent holder or USPTO to disclose when the patent is issued.

The AICPA Congressional and Political Affairs group has made TSPs a top priority and is in discussions with Congress and its staffs, as well as the USPTO's General Counsel and Director of Business Method Patents, to develop and enact legislation designed to bar grants of, or provide immunity for taxpayers and practitioners from liability related to, such patents. Currently, the AICPA's legislative efforts are focused on the judiciary committees, which consider and vote on any patent legislation.

Action: The AICPA has taken a pro-active role against the patenting of tax ideas. Most of its efforts are reflected in a website it has created on the subject, which contains:

AICPA comments to Congress, Treasury and the IRS, updates to members, and its PTF roster;

Comments of other groups and the Joint Committee on Taxation;

USPTO links;

Information on specific TSPs;

Related articles and other information; and

Links to additional resources.

RECOMMENDED STEPS

To minimize potential liability until a legislative solution is enacted, tax practitioners should take the following steps, as appropriate, in response to TSPs:

Stay current on matters regarding TSPs by continually visiting the AICPA website on the subject.

Read articles and attend conferences about TSPs.

Continually visit the USPTO website to determine if a tax idea, technique or strategy that a tax practitioner intends to recommend to a client has been issued a patent or if one is pending.

If a strategy is either already patented or is similar to a patented strategy:

Advise the client about the patent's existence, the options available and the associated risks;

Determine whether patent counsel is needed to further investigate the patent; and

If there is a relevant patent, determine whether to negotiate with the patent holder to be able to use the strategy.

PROPOSED LEGISLATIVE SOLUTION

The AICPA has considered various administrative solutions to this issue and concluded that they are insufficient. In its Feb. 28, 2007, letter, it encouraged Congress to develop legislation to eliminate the harmful consequences of TSPs by either (1) restricting the issuance of such patents or (2) providing immunity from patent infringement liability for taxpayers and tax practitioners.

HR 2365, legislation sought by the AICPA to limit damages and other remedies with respect to patents for tax-planning methods, was introduced by Rep. Rick Boucher (D–VA) on May 17, 2007, with initial co-sponsors Reps. Bob Goodlatte (R–VA) and Steve Chabot (R–OH). Reps. Boucher, Goodlatte and Chabot are senior members of the House Judiciary Committee, which has jurisdiction over patent legislation. The bill was referred to that committee. As of May 30, 2007, 14 co-sponsors had signed onto the bill. AICPA efforts and discussions continue with other members of Congress, including members of the Senate Judiciary Committee. On May 16, 2007, Reps. Lamar Smith (R–TX), Boucher and Goodlatte sent a letter requesting a hearing on the issue to Howard Berman (D–CA), chairman of the House Judiciary Committee Subcommittee on Courts, the Internet, and Intellectual Property.

The Future

The AICPA continues to work with Congress to make legislative changes regarding the patenting of tax strategies. It is also currently working with the USPTO to determine how both organizations might work together to better scrutinize such patent applications. The AICPA will continue to focus its legislative efforts on the judiciary committees and to work with the USPTO, IRS and Treasury, as well as other professional groups, to educate tax advisers on TSPs and to enhance the flow of information among the groups. The PTF and the AICPA will continue to update its website with additional resources for members, develop other educational and practice-oriented tools and study and address related professional ethical issues.

CONCLUSION

Practitioners and taxpayers need to (1) be aware that TSPs are being granted and (2) review planning approaches and consider consulting with patent counsel, if appropriate. Tax advisers should ask clients about their use of tax strategies, as they may be unknowingly using patented ones. The AICPA will continue to work with the IRS, USPTO, Treasury and Congress to handle—and hopefully resolve—this emerging issue.

Mr. GRASSLEY. Tax strategies are bad because they allow the tax law to be patented. A patent gives the holder the exclusive right to exclude others from using the patented invention. A tax strategy patent makes taxpayers choose between paying more than legally required in taxes or providing a windfall to a tax strategy patentholder by paying a royalty to comply with the tax law.

Tax strategy patents add another layer of complexity to the tax laws by requiring taxpayers or their advisers to conduct patent searches and exposing them to potential patent infringement lawsuits.

If a tax strategy patent is granted for a tax shelter designed to illegally evade taxes, the fact that a patent was granted may mislead unknowing taxpayers into believing the obvious: That the strategy is valid under the tax law when, in fact, it might not be.

Tax strategies are not like other inventions because everyone wants to pay less tax. Tax strategy patents are on the rise, which then means more and more legal tax strategies are unavailable or, obviously, more expensive for more and more taxpayers.

Madam President, I ask unanimous consent to have printed in the RECORD a letter. This letter, which is from a coalition of 15 consumer groups, including the umbrella group for public accountants, the Tax Justice Center, and the U.S. Public Interest Research Group, provides more information on why tax strategy patents are bad for taxpayers.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

FEBRUARY 2, 2011.

Re Tax Strategy Patents.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. CHARLES GRASSLEY,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR GENTLEMEN: On behalf of our 15 national organizations representing consumer, taxpayer, charitable, financial planning, and

tax advisor groups, we commend you for including a provision in S. 23, The Patent Reform Act of 2011, to address the serious problem of tax strategy patents. Similar to legislation recently introduced by Senators Baucus and Grassley, S. 139, we believe that this pro-taxpayer measure is a critical component of any comprehensive patent reform effort. The ongoing, serious concerns associated with tax strategy patents pose a significant threat to American taxpayers and businesses, and we believe that Congress must prioritize fixing this problem as soon as possible.

As the Senate Judiciary Committee moves to mark up S. 23, we ask you specifically to champion this provision, and aggressively oppose any efforts to weaken or remove it. There is too much at stake to allow special interests to try to monopolize methods of Federal tax compliance, leaving American taxpayers potentially subject to lawsuits. royalties, and a much more complicated, expensive tax code.

As you know, the problems associated with tax strategy patents are multiple and quite complex. First, such patents may limit the ability of taxpayers to utilize fully interpretations of tax law intended by Congress—effectively creating a monopoly for the patent holders to determine who can and cannot utilize parts of the tax code. Furthermore, tax advisors, who generally are not patent experts, have the burden to be aware of such patents, and either provide tax advice that complies with the patent holder's requirements, risk a lawsuit for themselves and their clients, or potentially not provide the most advantageous advice to clients. Not surprisingly, these patents create a highly burdensome level of cost ultimately borne by taxpayers.

These patents already affect a myriad of tax planning vehicles, including retirement plans, real estate transactions, deferred compensation, financial investments, charitable giving, and estate planning transfers. We are concerned that the U.S. Patent Office may permit the expansion of these types of patents into additional areas broadly affecting average taxpayers. For example, there are pending patents that would affect taxpayers' ability to create a financial plan for funding college education, utilize incentive programs for health care savings account cards, insure against tax liabilities, and use life insurance to generate income.

As of now, the numbers of tax strategy patents have grown to over 130 issued and more than 150 pending. We fear this trend is likely to continue to grow exponentially without your leadership. Legislation must be passed quickly if we are to provide taxpayers with equal access to all available avenues of federal tax compliance.

As you know, there is broad, bipartisan, and growing support for this legislation. In the 111th Congress, Congressmen Rick Boucher and Bob Goodlatte introduced H.R. 2584, a similar initiative which ended the Congress with 45 cosponsors. That legislation built off of the passage of comprehensive patent reform legislation, passed by the House in the 110th Congress, which included its own tax strategy patents provision. In addition, Senators Baucus and Grassley previously introduced legislation on this topic in the 110th Congress, garnering 30 cosponsors, including then-Senator Barack Obama. The National Taxpayer Advocate, Nina Olsen, has also publicly stated her support for a legislative solution to this problem. Clearly, with such overwhelming support and momentum over the last several years, the time has come to finally enact this proposal and send it to the President.

Thank you again for your leadership on behalf of American taxpayers. Please contact any of us if we can assist you as you move forward on this important matter.

Sincerely,

Barry C. Melancon, CPA, President and Chief Executive Officer, American Institute of Certified Public Accountants; Nicole Tichon, Executive Director, Tax Justice Network USA; Jo Marie Griesgraber, Executive Director, New Rules for Global Finance; Richard M. Lipton, Chair, American College of Tax Counsel; Linda Sherry, National Priorities Director, Consumer Action; Karen M. Moore, President, The American College of Trust and Estate Counsel; Tanya Howe Johnson, President and CEO, Partnership for Philanthropic Planning; Raymond W. Baker, Director, Global Financial Integrity; Edwin P. Morrow, CLU, ChFC, CFP®, RFC®, Chairman and Chief Executive Officer, International Association for Registered Financial Consultants; H. Stephen Bailey, President, International Association for Registered Financial Consultants; Michael Nelson, Executive Vice President & Chief Executive Officer, National Association of Enrolled Agents; Gary Kalman, Director, Federal Legislative Office, USPIRG; Kevin R. Keller, Chief Executive Officer, Certified Financial Planner Board of Standards; Marvin W. Tutle, CAE, Executive Director/CEO, Financial Planning Association; John Akard Jr., JD, CPA, President, American Association of Attorney-Certified Public Accountants; Robert S. McIntyre, Director, Citizens for Tax Justice.

Mr. GRASSLEY. Section 14 of the bill, which has been before the Senate for the last week or more, prevents patenting of tax law. It provides that a strategy that relies on the tax law to reduce, to avoid, or to defer tax liability cannot be novel or nonobvious.

So a strategy for reducing, avoiding, or deferring tax liability will be deemed insufficient to differentiate a claimed invention from the prior art for purposes of evaluating an invention under section 102 or section 103 of the bill that is before us. This ensures that taxpayers and their advisers will then be guaranteed equal access to the tax laws, and that is obviously the fair way to do it. It is the commonsense way to do it.

So I wish to be clear that tax preparation software is not a tax strategy. Senior policy and examination staff from the Patent and Trademark Office agree that such software is not a tax strategy.

I also have letters from H&R Block, KPMG LLP, and Grant Thornton that state that the underlying language does not impact their software patents. Again, I ask unanimous consent to have these letters printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

H&R BLOCK,
Washington, DC, February 10, 2011.

Hon. CHARLES E. GRASSLEY,
Ranking Member, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR RANKING MEMBER GRASSLEY, Our company has reviewed the language in Section 14 of the Patent Reform Act of 2011, now pending in Congress. Although H&R Block holds and is seeking numerous patents pertaining to methods of delivering tax advice and tax return preparation, H&R Block's inventions do not, by their nature, reduce, avoid, or defer tax liability. Therefore, at this time, we do not have any major concerns regarding the language in the Act that statutorily deems that all strategies for reducing, avoiding, or deferring tax liability are 'in the prior art' and not patentable. Nonetheless, we should mention that H&R Block is concerned about the precedent that this bill will set. Our fear is that Congress is going down the path where, in the future, it will simply declare ''not patentable'' any subject matter it deems to be unpopular or politically unfavorable.

Sincerely,

BRIAN DONOHUE,
AVP, Government Relations.

KPMG LLP,
Washington, DC, February 25, 2011.

Hon. PATRICK LEAHY, *Chairman,*
Hon. CHARLES GRASSLEY, *Ranking Member,*
U.S. Senate Committee on the Judiciary 224 Dirksen Senate Office Building Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: We would like to commend you on the inclusion of section 14—a ban on the patenting of tax strategies—in S. 23, the Patent Reform Act of 2011, recently approved and reported by the Committee.

We agree with the sentiments expressed by Sen. Grassley on February 3rd that ''[i]f firms or individuals were able to hold patents for these strategies, some taxpayers could face fees simply for complying with the tax code.'' Taxpayers should not be forced to choose between paying more tax than they are legally obligated to pay or paying royalties to a third party with a patent on a legal method of complying with tax law. Tax strategy patents create higher costs and produce confusion for taxpayers and their advisors.

As noted by the AICPA in its letter to you, tax strategy patents undermine Congressional authority, intent, and control of tax policy, and would create inequalities among taxpayers. No person should hold exclusive rights over how to comply with the Tax Code.

We are a firm with extensive experience in the provision of tax advice to clients, and we are a firm that develops its own proprietary tax tools, including computer software. We therefore appreciate the proper balance between the protection of intellectual property rights and the public policy concerns implicated by extending that protection to patents on tax planning. This bill gives proper deference to the rights of the taxpayer and the already complex requirements of a tax advisor. We therefore urge inclusion of section 14 by the Senate in the final version of S. 23.

Respectfully yours,

KPMG LLP.

GRANT THORNTON,
Washington, DC, February 24, 2011.

Re: Tax strategy patent legislation.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. CHARLES GRASSLEY,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR GENTLEMEN: I am writing to offer Grant Thornton's strong support for the tax strategy patent provision included in the patent reform legislation (S. 23) recently approved by the Senate Judiciary Committee and now poised for full Senate consideration. I would like to commend you for your commitment to addressing the problems created

by tax strategy patents and for including the tax strategy patent provision in S. 23.

Patents on tax strategy methods threaten the integrity, fairness, and administration of the tax system, and Grant Thornton believes resolving this problem must be an essential component of any patent reform legislation. Grant Thornton wants to encourage you to aggressively oppose efforts to remove or weaken the tax strategy patent provision in S. 23.

Tax strategy patents grant private legal parties virtual 20-year monopolies over particular methods of compliance with U.S. tax laws. Taxpayers cannot satisfy their legal obligations using a patented interpretation of the tax code, allowing patent holders to privatize tax provisions that Congress intended for everyone. This makes a uniform application of the U.S. Tax Code impossible, potentially forcing taxpayers to pay more tax than Congress intended and more tax than similarly situated taxpayers. Tax strategy patents threaten to undermine public confidence in the nation's tax laws, hinder compliance, and mislead taxpayers into believing that a patented strategy has been approved by the IRS solely because a patent was granted. In addition, tax strategy patents increase the costs and burdens of compliance. Preparers and taxpayers must not only determine the proper tax treatment of an item, but also whether that treatment is covered by a patent, whether the patent might be infringed by properly reporting the item, and whether the patent is valid.

Grant Thornton believes that no one should have a patent on the application of the law to the facts and that the granting of tax strategy patents should be prohibited by legislation. Grant Thornton supports the provision in Section 14 of S. 23, which is based on the freestanding legislation S. 139. The new provision builds on previous legislative efforts that enjoyed wide bipartisan support in both chambers. In the 110th Congress, the House passed a patent reform bill that would have barred tax strategy patents.

The new language in S. 23 would designate any claim on a patent application for a ''strategy for reducing, avoiding, or deferring tax liability'' as indistinguishable from prior art, and thus preclude applicants from using a tax strategy as the point of novelty. Grant Thornton believes this provision needs to be enacted quickly. Over 130 tax strategy patents have already ben approved and more than 150 are currently pending.

Grant Thornton agrees that patents should continue to be available for tax preparation software, so long as the patent does not extend to tax strategies embedded in the software. Grant Thornton believes the bill sufficiently addresses the serious concerns raised by tax strategy patents without infringing on the rights of others to copyright, trademark or patent software that assists in the implementation of tax planning.

Grant Thornton is the U.S. member firm of Grant Thornton International, one of the six global accounting, tax and business advisory organizations. Through member and correspondent firms in over 100 countries, including 49 offices in the United States, the partners and employees of Grant Thornton member firms provide personalized attention and the highest quality service to public and private clients around the globe.

Sincerely yours,

DAVID B. AUCLAIR,
Managing Principal, Washington National Tax Office.

Mr. GRASSLEY. However, now, in order to allay the concerns of Intuit, makers of Turbo Tax, I have worked with Senator BAUCUS to make clear that tax preparation software such as Turbo Tax is not a tax strategy.

Financial management software, however, is a little murkier. While products such as Quicken and QuickBooks are not tax strategies, tax strategies can be embedded in financial management products and software. The investment banks and the law firms that have patented tax strategies often use software that could be deemed financial management software. The Tax Adviser article I mentioned earlier and got unanimous consent to have printed in the RECORD describes some of these. With financial management software, patent claims that include inventions that are severable from tax strategies may be entitled to patent protection, but the tax strategy itself will remain available to all taxpayers.

So it is important to protect intellectual property rights for true tax preparation and financial management software. However, we must be sure to protect the rights of taxpayers to have equal access to legal tax strategies.

I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. LEAHY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

SURFACE TRANSPORTATION EXTENSION ACT OF 2011

Mr. LEAHY. Madam President, I ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 662, the surface transportation extension bill; that the bill be read three times and the Senate proceed to a vote on passage of the bill; and that the motion to reconsider be considered made and laid upon the table, with no intervening action or debate.

The PRESIDING OFFICER. The clerk will report the bill by title.

The bill clerk read as follows:

A bill (H.R. 662) to provide an extension of Federal-aid highway, highway safety, motor carrier safety, transit, and other programs funded out of the Highway Trust Fund pending enactment of a multiyear law reauthorizing such programs.

Mrs. BOXER. Madam President, I am so pleased the Senate has passed H.R. 662, the Surface Transportation Extension Act of 2011. This legislation provides a clean extension of Federal surface transportation programs through the end of the fiscal year.

H.R. 662 was passed by the House of Representatives yesterday by an overwhelming bipartisan vote of 421–4. This legislation had previously been approved by voice vote in the House Transportation and Infrastructure Committee.

Under this extension, States will receive $23.1 billion for the remainder of fiscal year 2011. This equates to over 800,000 jobs nationwide that would be created or saved.

As chairman of the Senate Environment and Public Works Committee, I am working with my colleagues on both sides of the aisle and both sides of the Capitol to move forward on a transportation authorization that will put people to work, bring our Nation's highways, bridges, and transit systems up to a state of good repair, and reduce congestion and its impacts on commerce and communities.

The committee is planning to mark-up a new authorization by spring. However, this extension is necessary in order to give Congress time to enact this authorization.

I have letters from several organizations who urged Congress to pass H.R. 662. These letters were signed by AAA; American Association of State Highway and Transportation Officials, AASHTO; American Bus Association; American Highway Users Alliance; American Motorcyclist Association; Americans for Transportation Mobility, which includes 12 organizations; American Trucking Associations; Owner-Operator Independent Drivers Association; and U.S. Chamber of Commerce.

This broad and diverse coalition composed of businesses, workers, and users of the highways, recognized the need to enact this legislation today.

Investments in transportation infrastructure are an important part of the solution to the serious economic challenges we are facing. This is especially true in the construction industry, which has been hit hard by the economic downturn. According to January data released by the U.S. Bureau of Labor Statistics, the construction industry has an unemployment rate of over 22 percent.

Not only will this extension of SAFETEA–LU save jobs in the short term, an extension through the end of the fiscal year will provide the opportunity for Congress to enact a new surface transportation bill.

I am so pleased that my colleagues did the right thing and approved this legislation that will save hundreds of thousands of jobs, improve our nation's infrastructure, and provide a solid foundation for economic recovery.

I ask unanimous consent that several letters be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

FEBRUARY 28, 2011.

Hon. GARY L. ACKERMAN,
House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR REPRESENTATIVE ACKERMAN: Our organizations represent drivers, riders, and businesses that pay the federal highway user fees that fund the Highway Trust Fund (HTF). One of our top goals is to ensure that user fees are properly dedicated to federal programs that improve our nation's highway safety and mobility.

This year, Congress is expected to consider a major long-term transportation bill that will reform and streamline federal highway