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December 12, 2006

Mr. Thomas A. Barthold
Acting Chief of Staff
Joint Committee on Taxation
Room 1015 Longworth House Office Building
Washington, D.C. 20515

The Honorable Chuck Grassley
Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

The Honorable Max Baucus
Ranking Democrat
Senate Committee on Finance
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The Honorable Bill Thomas
Chairman
Committee on Ways & Means
U.S. House of Representatives
Room 1102 Longworth House Office Building
Washington, D.C. 20515

The Honorable Charles B. Rangel
Ranking Democrat
Committee on Ways & Means
U.S. House of Representatives
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Eric Solomon, Esq.
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20220

Re: Request For Technical Corrections And/Or Regulatory Clarifications To Certain Provisions Of The Pension Protection Act Of 2006 Relating To Charitable Gifts Of Fractional Interests In Tangible Personal Property

Gentlemen:

This letter sets forth the comments of the Association of the Bar of the City of New York to certain provisions of the Pension Protection Act of 2006 (the “Act”) that relate to the estate, gift and income tax charitable deductions for gifts of fractional interests in tangible personal property. Part I of this letter sets forth our proposed technical corrections, while Part II contains our proposals for regulatory action.

I. I.R.C. §§ 170(o)(2), 2055(g) and 2522(e)(2)¹ should be repealed to avoid creating a “valuation whipsaw” for estate and gift tax purposes that will effectively shut down an important avenue of charitable giving.

We strongly believe that the Act’s valuation provisions relating to the income, estate and gift tax charitable deductions for additional gifts of fractional interests in tangible personal property are materially inconsistent with Congress’s intent. The Act essentially engrafts rules that are applicable for income tax purposes into the estate and gift tax fields without considering the collateral consequences resulting from the application of other estate and gift tax valuation provisions of the Internal Revenue Code. Unless amended through technical corrections, the Act’s provisions will effectively shut down an important avenue of charitable giving, which many museums (and other public charities) use to obtain a “foot in the door” to acquire over time all of the interests in a work of art or other item of tangible personal property.

The Act provides that, for contributions of fractional interests made after the initial contribution, the donor’s charitable deduction must now be calculated with reference to the fair market value used at the time the *initial* contribution to charity was made. The only exception to this rule would be where the donated property has depreciated in value, in which case the deduction would be based on the reduced fair market value of the property. This rule applies for estate, gift and income tax purposes.²

The chief problem with this rule is that the Act imposes a limitation on the value of a charitable deduction (by excluding subsequent appreciation) that works from an income tax perspective, and then engrafts this limitation into the estate and gift tax fields without considering the substantial “whipsaw potential” that may result. As noted above, the Act provides that for estate and gift tax purposes, the amount of the charitable deduction shall not consider any appreciation in the underlying value of the donated item of tangible personal property following the initial fractional contribution. Unfortunately, the Act contains no corresponding mechanism to prevent such appreciation in the value of the underlying property from being considered for purposes of calculating the amount of the taxable transfer (whether by lifetime gift or as an item included in the decedent’s gross estate).³

¹ All references to Internal Revenue Code sections are to the Internal Revenue Code of 1986, as amended.

² See I.R.C. §§ 170(o)(2), 2055(g), 2522(e)(2).

³ See I.R.C. §§ 2031(a) (providing general valuation rules for estate tax purposes) and 2512(a) (providing general valuation rules for gift tax purposes) and the Treasury Regulations thereunder.

Consequently, a potential *mismatch* is created between (i) the value of the property transferred for gross estate (or gift tax) purposes and (ii) the amount of the estate tax (or gift tax) charitable deduction for that same item. This mismatch could cause the donor to pay estate tax (or gift tax) on property that is being given entirely to charity.

We do not believe that Congress intended to create this highly punitive “whipsaw” for estate and gift tax purposes which, unless repealed, will almost certainly shut down an important avenue of charitable giving that benefits our society. Accordingly, we strongly recommend that technical corrections be made to the Act to prevent this dire result from occurring. One solution would be to repeal each of I.R.C. §§ 170(o)(2), 2055(g) and 2522(e)(2) retroactive to their date of enactment. Alternatively, the income tax provision (I.R.C. § 170(o)(2)) could be maintained while the estate and gift tax provisions (I.R.C. §§ 2055(g) and 2522(e)(2)) would be repealed retroactive to their date of enactment.

II. Proposed Regulatory Actions

In addition to the valuation issue warranting technical corrections described above, we have identified two areas where Treasury Regulations are warranted, which are discussed below.

- A. Dispositions to charity of the donor’s entire remaining interest in tangible personal property pursuant to a will (a “Will”) or *inter vivos* instrument, that are effective as of the date of the donor’s death, should be deemed to occur on such date for purposes of the charitable deduction recapture provisions of I.R.C. §§ 170(o)(3)(A) and 2522(e)(3).**

The Act provides that the charitable deduction for income and gift tax purposes is subject to full “recapture” (with interest and penalties) if, *inter alia*, the donor fails to contribute all of his or her entire remaining interest in the property to the charity by the time of the donor’s death or the 10th anniversary of the initial fractional gift, whichever occurs first. Congress expressly delegated to Treasury responsibility for implementing this legislation, stating that “[t]he Secretary shall provide for the recapture of the amount of any deduction allowed under this section (plus interest)”⁴

The Act’s recapture provisions call into question the proper treatment where the disposition to charity of the donor’s entire remaining interest in tangible personal property is effective *as of* the date of the donor’s death, but distribution to charity does not in fact occur until some later date. For example, distribution to charity of the donor’s entire remaining interest pursuant to a Will would almost certainly be delayed, at minimum, until after the Will has been admitted to probate and the decedent’s executor has obtained the necessary authorization from the local surrogate’s court to act on the estate’s behalf. A similar delay could also occur in the context of an *inter vivos* deed of gift that is effective as of the date of the donor’s death.

In light of the foregoing concern, we respectfully request that Treasury adopt regulations providing that a disposition to charity of the donor’s entire remaining interest in tangible

⁴ I.R.C. § 170(o)(3)(A); see I.R.C. § 2522(e)(3)(A).

personal property that is effective as of the date of the donor's death pursuant to the governing instrument shall be deemed to occur on such date (*i.e.*, the date of the donor's death) for purposes of the Act's recapture provisions.

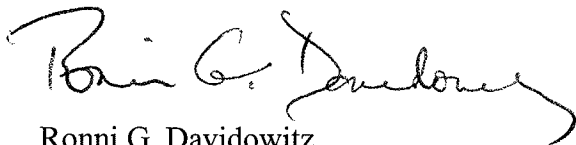
B. Confirmation should be provided, in accordance with the Report of the Joint Committee on Taxation, that a gift of a fractional interest in tangible personal property made before August 17, 2006 (the Act's date of enactment) shall *not* be considered an "initial fractional contribution" for purposes of these rules.

Finally, the legislative history specifically provides that a contribution of an undivided interest in tangible personal property that is made *before* August 17, 2006 (the Act's date of enactment) is *not* intended to be treated as an "initial fractional contribution" for purposes of these rules. Rather, the first fractional interest contribution made *after* August 17, 2006 is considered the initial fractional contribution, regardless of whether the donor made earlier contributions in the same item of tangible personal property.⁵

This "grandfather rule" for pre-Act gifts, however, was not codified in the statute. Accordingly, we respectfully request that Treasury Regulations be issued to confirm that these new rules do not apply to charitable gifts of fractional interests in tangible personal property made before August 17, 2006.

We appreciate your consideration of the above-proposed actions. Should you wish to discuss this matter further, please do not hesitate to contact me at (212) 940-7197.

Sincerely,



Ronni G. Davidowitz

Contributing Members:

Kevin Matz
Ronni G. Davidowitz
Michael I. Frankel
Lanny A. Oppenheim

⁵ See Joint Committee on Taxation, Technical Explanation of the Pension Protection Act of 2006, § 1218 (JCX-38-06).