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**Washington Update: Counting Votes, Recounting
Fables, and Discounting Values**

Ronald D. Aucutt

Ronald D. Aucutt
McGuireWoods LLP
Tysons, Virginia

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<http://www.mcguirewoods.com/estate-tax-changes>

I. INTRODUCTION

This outline includes excerpts from a longer outline that itself is a selective and evolving review of the history of the modern federal estate tax. The main outline originated during the attempts to repeal the estate tax in President Clinton's second term and accelerated with the one-year (2010) "repeal" enacted in 2001.

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II. PAST REMINISCENCES

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E. The Clinton Administration

1. The Clinton Administration's budget proposals for fiscal 1999 included a proposal to "eliminate non-business valuation discounts," described as follows:

The proposal would eliminate valuation discounts except as they apply to active businesses. Interests in entities would be required to be valued for transfer tax purposes at a proportional share of the net asset value of the entity to the extent that the entity holds readily marketable assets (including cash, cash equivalents, foreign currency, publicly traded securities, real property, annuities, royalty-producing assets, non-income producing property such as art or collectibles, commodities, options and swaps) at the time of the gift or death. To the extent the entity conducts an active business, the reasonable working capital needs of the business would be treated as part of the active business (i.e., not subject to the limits on valuation discounts). No inference is intended as to the propriety of these discounts under present law.

General Explanations of the Administration's Revenue Proposals (Feb. 1998) at 129, <http://www.treasury.gov/resource-center/tax-policy/Documents/grnbk98.pdf>.

- a. The Clinton Administration's budget proposals for fiscal 2000 and fiscal 2001 repeated this proposal, except that "readily marketable assets" was changed to "non-business assets" and "the propriety of these discounts under present law" was changed to "whether these discounts are allowable under current law."
- b. This proposal was reduced to legislative language in section 276 of H.R. 3874, 106th Cong., 2d Sess., introduced on March 9, 2000, by the Ranking Democrat on the House Ways and Means Committee, Rep. Charles Rangel of New York. This bill would have added a new section 2031(d) to the Code, the general rule of which read as follows:

(d) VALUATION RULES FOR CERTAIN TRANSFERS OF NONBUSINESS ASSETS—For purposes of this chapter and chapter 12—

(1) IN GENERAL—In the case of the transfer of any interest in an entity other than an interest which is actively traded (within the meaning of section 1092), the value of such interest shall be determined by taking into account

(A) the value of such interest's proportionate share of the nonbusiness assets of such entity (and no valuation discount shall be allowed with respect to such nonbusiness assets), plus

(B) the value of such entity determined without regard to the value taken into account under subparagraph (A).

- c. A slightly different articulation of this rule appeared in section 303 of H.R. 1264, 107th Cong., 1st Sess., which Rep. Rangel introduced on March 26, 2001, partly as an alternative to the Republican proposals that became the 2001 Tax Act:

(d) VALUATION RULES FOR CERTAIN TRANSFERS OF NONBUSINESS ASSETS—For purposes of this chapter and chapter 12—

(1) IN GENERAL—In the case of the transfer of any interest in an entity other than an interest which is actively traded (within the meaning of section 1092)—

(A) the value of any nonbusiness assets held by the entity shall be determined as if the transferor had transferred such assets directly to the transferee (and no valuation discount shall be allowed with respect to such nonbusiness assets), and

(B) the nonbusiness assets shall not be taken into account in determining the value of the interest in the entity.

Rep. Rangel's 2001 bill would also have added a new section 2031(e) to the Code, to read as follows:

(e) LIMITATION ON MINORITY DISCOUNTS—For purposes of this chapter and chapter 12, in the case of the transfer of any interest in an entity other than an interest which is actively traded (within the meaning of section 1092), no discount shall be allowed by reason of the fact that the transferee does not have control of such entity if the transferee and members of the family (as defined in section 2032A(e)(2)) of the transferee have control of such entity.

Identical statutory language for new sections 2031(d) and (e) appeared in H.R. 5008, 107th Cong., 2d Sess. §3 (introduced June 24, 2002, by Rep. Earl Pomeroy (D-ND)), H.R. 1577, 109th Cong., 1st Sess. §4 (introduced April 12, 2005, by Rep. Pomeroy), and H.R. 4242, 110th Cong., 1st Sess. §4 (introduced November 15, 2007, by Rep. Pomeroy).

- d. Clinton Administration proposals inevitably experienced a bit of a revival after Democrats took control of the Congress and White House. Democratic staff members publicly referred to them as a possible model for legislative drafting. This is perhaps reflected in H.R. 436, the 2009 version of Rep.

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