

# Model Mortgage Subordination and Commentary

*Prepared by the*  
Pennsylvania Land Trust Association

*with support from the*

William Penn Foundation  W I L L I A M P E N N  
F O U N D A T I O N

*and the*

Pennsylvania Department of Conservation and  
Natural Resources Bureau of Recreation and  
Conservation “Growing Greener” Program



*as well as other generous contributors.*

*Find the most recent edition of this document as well as other models  
and guidance at [ConservationTools.org](http://ConservationTools.org) and [ConserveLand.org](http://ConserveLand.org).*



Model last updated – 11/23/2011  
Commentary last updated – 11/23/2011

## Comments Requested

Suggestions for improving the model and commentary may be directed to the Pennsylvania Land Trust Association at [aloza@conserveland.org](mailto:aloza@conserveland.org).

### Introduction

When a mortgage precedes a conservation easement on a property, there is no guaranty of perpetual enforceability unless the holder of the mortgage (the “Mortgage Holder”) signs a document (often called a “mortgage subordination”) that allows the conservation easement to survive a foreclosure of the mortgage. In Pennsylvania, a judgment lien obtained on a debt secured by a mortgage relates back to the date of recording of the mortgage. This means that, when a judicial sale (a sale by the county sheriff, for example) is held to pay off a judgment lien on a debt secured by a mortgage, the purchaser takes ownership of the property free and clear of all interests recorded after the recording date of the foreclosed mortgage -- including a conservation easement recorded after the recording of the mortgage.

The guide [Mortgage Subordination](#) provides landowners (the “Owners”) and the conservation organization receiving the conservation easement (the “CE Holder”) with advice on how to approach the Mortgage Holder to obtain a mortgage subordination. The [Model Mortgage Subordination](#) was prepared to provide the Owners and the CE Holders with a sample document to submit to the Mortgage Holder with the other information supporting the request for subordination as detailed in the [guide](#).

Some Mortgage Holders will want to use their own form for subordination. In that case, the guide [Mortgage Subordination](#) as well as this commentary may be useful to evaluate whether the Mortgage Holder’s form achieves the objectives summarized below or whether changes must be made.

### Objectives

The objectives of the [Model Mortgage Subordination](#) are: first, to assure that the conservation easement will not be impaired by the exercise of the Mortgage Holder’s rights and remedies under the mortgage; and second, to conform to the requirements of the [Internal Revenue Code](#) and accompanying [Regulations](#) applicable to enforcement of qualified conservation contributions in perpetuity.

### Scope

The [Model Mortgage Subordination](#) seeks to achieve the objectives stated above but tries to avoid putting the Mortgage Holder in a worse position than needed to achieve those objectives. Some land trusts may not be willing to accept anything other than a subordination document that completely and unconditionally subordinates every right and remedy of the Mortgage Holder to the rights and powers of the CE Holder to enforce the conservation easement strictly in accordance with its terms. Phrases like “subordinate in lien, priority and effect” often raise a red flag with lenders because they then must analyze every provision of the conservation easement to see if it could possibly jeopardize their right to receive payments of indebtedness from borrowers and other rights to realize upon the security for the loan. The [Model Mortgage Subordination](#) takes the position that, for the most part, the Mortgage Holder’s interest in maintaining a regular stream of payments operates separately from, and does not collide or compete with, the interest of the CE Holder in protecting natural and scenic resources. The scope of the model focuses on the circumstances in which these interests collide or compete and seeks to resolve these issues with as little intrusion into the purview of lender as possible.

### Customize for the State

This guidance addresses the nationwide challenges of obtaining mortgage subordinations from banks and other mortgage servicing companies; however, the ways in which a creditor can realize upon an obligation secured by real estate vary greatly from state to state. The [Model Mortgage Subordination and Commentary](#) are drafted specifically to conform to Pennsylvania laws and practices pertaining to mortgage foreclosure. Thus, the model and commentary, before being used outside of Pennsylvania, must be adapted to applicable state law, as well as the customs and practices of the state, by knowledgeable counsel licensed to practice in that locale.

## Acknowledgements

Financial support from the *Pennsylvania Department of Conservation and Natural Resources* Bureau of Recreation and Conservation “Growing Greener” Program and the *William Penn Foundation* makes this endeavor possible.

*Patricia L. Pregmon, Esq.*, is the principal author.

*Andrew M. Loza* is the contributing author, editor and project manager.

# Table of Contents

## - The Model -

## - The Commentary -

- General Instructions ..... 1**
- Preliminary Matters ..... 1**
  - Formatting and Information for Recording Office ..... 1
  - Title ..... 2
  - Opening Section ..... 2
- ¶1. Consent ..... 2**
- ¶2. Sale Subject to Conservation Easement ..... 2**
  - (a) A prohibition on naming the CE Holder as an interest to be divested in a sale ..... 3
  - (b) A requirement that any sale of the Mortgaged Property must be advertised explicitly as being under and subject to the conservation easement ..... 3
  - (c) Establishing the CE Holder’s right to inform the public ..... 3
  - (d) Establishing the CE Holder’s right to stay a sale and injunctive relief ..... 3
- ¶3. Proportionate Value ..... 3**
  - Purpose ..... 3
  - Scenario A: Proportionate Value Established in Advance ..... 4
  - Scenario B: Proportionate Value Not Yet Determined ..... 4
  - Scenario C: Proportionate Value Inapplicable ..... 5
  - Pro Rata Distribution of Proceeds – Consult with Counsel ..... 5
  - Proceeds Attributable to Improvements ..... 5
  - Proceeds of Insurance ..... 5
- ¶4. Subordination ..... 6**
- ¶5. Notices ..... 6**
- ¶6. Binding Effect ..... 6**
- ¶7. Consideration ..... 6**
- Optional Additional Paragraph: Non-Disturbance Agreement ..... 6**
- Closing Recital ..... 7**

# Commentary to the Model Mortgage Subordination

## General Instructions

- **Read the Commentary.** Users of the model are encouraged to read through the commentary at least once. The purpose of each Section is explained and, oftentimes, variations are provided to address alternatives that may be useful in particular situations.
- **Structure.** The commentary follows the same numbered paragraphs as the model to make cross-referencing easy. Titles or captions in bold lettering preceded by numbers refer to paragraphs of the same title in the model.
- **Get Legal Counsel.** The model and this commentary should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. The Agreement must be revised to reflect the specific circumstances of the particular project under the guidance of legal counsel.
- **Best Practices.** Any organization considering acquiring land or easements for conservation or recreational purposes should be aware of the guidelines contained in [Land Trust Standards and Practices](#) (referred to in this commentary as “S&P”). Last updated by the Land Trust Alliance in 2004, these voluntary standards and practices draw on the decades of experiences and lessons learned by organizations across the country. Standard 9, Practice A calls for land trusts to obtain legal review of every land and easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.
- **Disclaimer Box.** Once a document based on the model has been prepared or reviewed on behalf of the Holder by an attorney licensed to practice law in the applicable state, the box following the signature area that begins “The model on which this document is based should not be construed or relied upon as legal advice ...” may be deleted.
- **Other States.** Users outside of Pennsylvania need to take care to modify the model to account for differences in state laws.
- **Updates.** Check [ConservationTools.org](#) or [ConserveLand.org](#) periodically for updates to the model.

## Preliminary Matters

### Formatting and Information for Recording Office

- **Margins.** Minimum margin requirements vary among counties; however, a typical requirement is a 3-inch margin at the top of the first page of any document presented for recording and 1-inch margins on the left, right and bottom margins. (However, page numbers may be less than an inch from page bottom.) Many counties require that documents presented for recording must be printed on 8.5-inch by 11-inch paper. Many counties require type size not less than 10-point. The model is formatted to conform to these requirements.
- **Identifying Information.** There is a trend for County recording offices to require information identifying the preparer (including both address and telephone number), the name and address of the person to whom the document is to be returned, and the tax parcels of the real estate to which the document pertains. The model is formatted to conform to these requirements. If unneeded or undesirable in a particular county, delete the text but keep the lines in order to preserve a 3-inch margin at the top of the first page.
- **Preparer.** Pennsylvania law does not require that a lawyer or law firm be identified as the preparer of the document; however, legal review is nevertheless important. See note “Get Legal Counsel” above. Users

should not identify a lawyer as the “preparer” if the lawyer did not, in fact, prepare the particular document or was not given the opportunity to review all of the changes made to the document. Lawyers and other professionals, such as architects and engineers, are legally and professionally responsible for the work they produce for clients. It is legally and ethically improper to represent to the public that a legal document, survey plan or architectural drawing is the work product of a professional if it has been changed without the knowledge or consent of that professional.

### **Title**

- The document is called “Mortgage Subordination” but some may want to avoid using that term out of a concern that the word “subordination” is most commonly understood to mean a complete reversal of priority, which may chill the Mortgage Holder’s willingness to consider the request. In that case, consider calling it “Mortgage Holder’s Agreement”.

### **Opening Section**

- **Purpose.** The purpose of the opening section is to provide a space for entering information that varies with each subordination. The objective is to keep the remainder of the document unchanged.
- **Subordination Date.** The date should not be later than the date of the acknowledgment of the Mortgage Holder's signature.
- **Mortgage Holder.** This may be the mortgage servicing company who owns the rights to service the mortgage rather than the person or entity who owns the rights to receive repayment of the debt. For further information on identifying the Mortgage Holder, *see* the guide [Mortgage Subordination](#).
- **Mortgage Information.** The loan number is not critical but very helpful for the Mortgage Holder to identify the loan in question. Some recorders are now identifying documents by Instrument Numbers in addition to, or in lieu of, the traditional book and page identifications. It is very important to accurately note the mortgage recording information for purposes of giving public notice of the terms of the Subordination.
- **Mortgaged Property.** It is not necessary to attach a legal description of the Property. Use the same information as is set forth in the recorded mortgage unless a change in that information has occurred.
- **Owners.** Identify the owners who will be the grantors of the conservation easement. If there has been a change from the owners who were the borrowers/mortgagors on the mortgage document, explain the chain of events that resulted in these owners being vested with title to the Mortgaged Property.

## **¶1. Consent**

The model starts off with the consent of the Mortgage Holder to the recording of the conservation easement. Mortgage documents sometimes prohibit the Owners from further encumbering the Mortgaged Property. The Owners and the CE Holder will want to guard against an inadvertent default under the mortgage due to the recording of the conservation easement. The Owners and the CE Holder should review the mortgage to see if there are any provisions that might conflict with the terms of the conservation easement other than those addressed in the model. If a standard form FNMA/FHLMC Security Instrument was used, that will be unlikely but it’s always a good idea to check. The requirements of funding provided under a loan program aimed at farmers, for example, might conflict with the protections applicable to the Highest Protection Area under the conservation easement.

## **¶2. Sale Subject to Conservation Easement**

The purpose of this paragraph is to protect the conservation easement from automatic release (the legal term is divestiture) upon a judicial sale of the Mortgaged Property held on account of a default on the mortgage. The CE Holder wants assurance that the Mortgage Holder and anyone purchasing from the Mortgage Holder, directly or via a sheriff’s sale or other judicial sale (including a bankruptcy sale in which

the Mortgage Holder participates as a secured creditor), will take title under and subject to the terms of the conservation easement so as to preserve its enforceability in perpetuity.

To further the protection of the conservation easement from divestiture, the covenant includes:

**(a) A prohibition on naming the CE Holder as an interest to be divested in a sale**

Pennsylvania rules governing judicial sales require notice to be given to junior liens and other interests to be divested by the sale. This provides an opportunity to petition the court to stay the sale if, perhaps inadvertently, the county sheriff has listed it for sale free and clear of the conservation easement. The CE Holder needs to be especially cautious if the Owners have filed for relief under federal bankruptcy laws. Under the rules applicable to bankruptcy, the trustee for the debtor has the power to avoid executory contracts (contracts not fully performed) and this power has been asserted to avoid servitudes that have ongoing benefits and burdens -- for example, a covenant running with the land obligating the debtor to pay for road maintenance. Servitudes, including conservation easements, are not contracts and should not be interpreted as such. For a discussion of the nature of a conservation easement as a servitude and not a contract or declaration of trust, *see*, "[What is a Conservation Easement?](#)" The land trust community needs to be prepared to defeat a trustee's claim of executory contract the first time the issue arises.

**(b) A requirement that any sale of the Mortgaged Property must be advertised explicitly as being under and subject to the conservation easement**

Judicial sales are governed by the rule "buyer beware". There is no obligation to disclose anything other than the most basic information: address, legal description, lien amount, and attorney for the plaintiff. The purpose of clause ¶2(b) in the model is to avoid a dispute with purchasers who assert that, because the conservation easement was recorded later in time, they understood it to be divested by the sale. Notice that the advertisement requirement is not limited to public sales but applies to private sales as well.

**(c) Establishing the CE Holder's right to inform the public**

Signage provides the CE Holder with the opportunity of furnishing additional information not included in the notice of sale posted by the county sheriff's office; for example, the name and telephone number of the CE Holder for additional information and to obtain a copy of the conservation easement and outstanding notices of violation.

**(d) Establishing the CE Holder's right to stay a sale and injunctive relief**

The purpose is to avoid a claim by the Mortgage Holder that the CE Holder is not entitled to a stay or injunctive relief due to the availability of an action for damages. The CE Holder's claim for monetary damages may be minimal and the loss of protection of natural resource values may be incalculable.

### ¶3. Proportionate Value

**Purpose**

The purpose of this paragraph is to assure that the CE Holder receives the Proportionate Value of proceeds of a condemnation or other taking.

- **Importance to Landowners.** The donation of the conservation easement will not qualify as a charitable contribution for federal tax purposes unless the CE Holder is entitled to the Proportionate Value of a taking. *See* commentary to the [Model Grant of Conservation Easement](#) §§1.06(e) and 6.04. *See also* discussion of the [Tax Court decision](#) (*Kaufman v. Commissioner*) in ¶4 below.
- **Importance to the Mortgage Holder.** The Mortgage Holder typically has the right to receive all proceeds of a taking until the indebtedness is paid in full. The Mortgaged Property is, after all, collateral for repayment of the debt and the Mortgage Holder does not want to lose its collateral in a taking without repayment of the debt. The model does not seek to reverse the priority; i.e., the model does not require that all proceeds must be paid first to the CE Holder up to the Proportionate Value before any proceeds are paid to the Mortgage Holder. The model creates an arrangement in which the two interested parties agree to divide proceeds, each receiving a percentage of the total proceeds. The CE Holder's percentage

is the Proportionate Value and the Mortgage Holder's percentage is the difference between 100% and the Proportionate Value percentage.

### **Scenario A: Proportionate Value Established in Advance**

If the Proportionate Value has been established by appraisal prior to the Subordination Date, add the following to the end of ¶3:

The Proportionate Value has been established at \_\_\_\_%.

### **Scenario B: Proportionate Value Not Yet Determined.**

To comply with federal tax law, the appraisal on which the Proportionate Value is established must not be dated more than 60 days prior to the Easement Date. Prospective easement donors are well advised to start the process of obtaining a Mortgage Subordination long before that. Thus, the Proportionate Value may be unknown, or only estimated by a preliminary evaluation by the appraiser, at the time Mortgage Subordination is requested. The following suggestions may help overcome the timing problem:

- (a) **Agreed upon Maximum.** If the Mortgage Holder is willing to share proceeds of a taking up to a specific maximum, for example, 20%, the following may be added to the end of ¶3:

The Proportionate Value has been established at 20% or such lesser amount as is established by the appraisal supporting the charitable contribution of the conservation easement to the CE Holder.

- (b) **Less than Maximum.** If the Proportionate Value established upon delivery of the appraisal is less than the maximum, the landowners and the CE Holder can proceed to closing without further negotiation with the Mortgage Holder.
- (c) **Exceeds Maximum -- Reduce Claimed Deduction?** If the Proportionate Value established by appraisal exceeds the maximum (say 25% rather than the maximum of 20% in the above example), the landowners may, of course, seek approval for an increase from the Mortgage Holder. If that is not feasible, they may consult with their tax advisor as to whether their claim to a qualified conservation contribution based upon a reduction in value of 20% would be disallowed if the Proportionate Value based upon the appraisal is 25% (in other words, they could have claimed more but chose to claim less). Giving up 5% of the amount they would otherwise be entitled to claim may be a small price to pay to finalize the conservation easement donation. On the one hand, the federal tax code does not limit the amount a taxpayer may give to charity; it limits the amount that can be claimed as a deduction. See, "Limits on Deductions" in [IRS Publication 526](#). Reducing the claimed qualified conservation contribution so as to conform to the Mortgage Subordination is consistent with the *intent* of [Treasury Regulation 1.170A-14\(g\)\(2\)](#) (excerpted in the commentary to ¶4 below): assuring that the CE Holder is vested with a property interest at least equal to the proportionate reduction in value *claimed as a charitable deduction for federal tax purposes*. On the other hand, the precise language of §1.170A-14(g)(6) requires the donating taxpayers to acknowledge that the CE Holder has a vested property interest at least equal to the value of the *perpetual conservation restriction* as compared to the value of the property. That section, applicable to the donating taxpayers, has been interpreted by judicial decisions (for example, *Kaufman* discussed below) to apply as a requirement of mortgage subordinations as well. If "qualified conservation contribution" were substituted for the italicized phrase, there would be no question: reducing the claimed contribution to the maximum agreed to by the Mortgage Holder would not be subject to question. But that phrase was, unfortunately, not used and, until further guidance is available, other alternatives need to be considered.
- (d) **Exceeds Maximum -- Reduce Value of Conservation Easement?** A less desirable alternative (from the perspective of the CE Holder) is to reduce the value of the conservation easement (for example, by allowing some additional development) so that the Proportionate Value established by appraisal is consistent with the maximum agreed to by the Mortgage Holder. The absurdity of the IRS forcing this alternative (rather than interpreting §1.170A-14(g)(2) to allow taxpayer to reduce its claim for deduction) is obvious. Technical compliance with §1.170A-14(g)(2) under these circumstances conflicts with the overall purpose of §170(h) of the Code to incentivize land

conservation. Nevertheless, until further guidance is available, it is the safer alternative for landowners and, if the difference in value is not that great, may be acceptable to the CE Holder so as to proceed with closing.

- (e) **Approval but for Proportionate Value.** If there is no mutual understanding of an acceptable range for the Proportionate Value, landowners are advised to seek confirmation from the Mortgage Holder that the form of the Mortgage Subordination is acceptable but for filling in the blank as to the Proportionate Value. When the appraisal is in hand, the only issue will be whether the Proportionate Value is acceptable to the Mortgage Holder. If it is, the Mortgage Holder will fill in the percentage and deliver to closing.

### **Scenario C: Proportionate Value Inapplicable**

Conservation easements are sometimes granted without an appraisal, arms-length purchase price or other reasonable basis on which to establish the Proportionate Value. In that case, substitute the following for ¶3:

#### **3. Proceeds of Taking**

Mortgage Holder agrees that, if a condemnation or other event terminating or extinguishing the Conservation Easement upon all or any part of the Mortgaged Property (a “taking”) occurs, the CE Holder is entitled to assert a claim for the taking of its interest in an amount equal to the difference (the “CE Claim”) between the value of the condemned property free and clear of the Conservation Easement *less* the value of the condemned property subject to the Conservation Easement.

Notwithstanding anything to the contrary contained in the Mortgage, condemnation proceeds, to the extent attributable to land only and not improvements, (net of costs of collection) shall be divided on a pro rata basis, neither having priority over the other, so that the CE Holder receives its proportionate share up to the CE Claim and the Mortgage Holder (or the Owners, as the case may be) receives the balance.

### **Pro Rata Distribution of Proceeds – Consult with Counsel**

Users of the model are requested to consult with counsel to determine whether the sharing arrangement adopted in the model satisfies the requirements for compliance with [Treasury Regulation 1.170A-14\(g\)\(2\)](#) (excerpted in the commentary to ¶4 below) and the 2010 [Tax Court decision](#) (“*Kaufman*”), which held that the failure to protect the CE Holder’s interest in the proceeds of condemnation and insurance was fatal to the claim of a charitable contribution. In *Kaufman*, the Mortgage Holder retained its “prior claim” to proceeds of condemnation and insurance and, because of that, the charitable contribution was disallowed. The model avoids making that error without reversing priority in an effort to accommodate mortgage lender’s reasonable concerns as well as the CE Holder’s. Until further guidance is available, however, *some users of the model may decide to take a more conservative approach and require the CE Holder to be fully prior in seniority as to condemnation proceeds.* This may be feasible when the Owners are highly creditworthy and known to the local bank who holds the mortgage but less likely to be acceptable if the request for Subordination is being handled by a mortgage servicing company.

### **Proceeds Attributable to Improvements**

The model provision has been drafted on the assumption that the CE Holder has no interest in the value of improvements -- only the land. *Users of the model should check to be sure the facts underlying this assumption are accurate.* Ordinarily, the value of existing improvements is unchanged in the “before” and “after” valuations when a conservation easement is appraised. The differential in value calculated as the Proportionate Value comes from restrictions on future permitted land use and development -- not from restrictions on existing improvements. Users of the model who include covenants preserving certain existing improvements will want to change the model provision so as to delete the reference to “land only and not improvements” if the appraisal on which their Proportionate Value is based includes diminution in value of improvements.

### **Proceeds of Insurance**

Users of the model who have an interest in preserving improvements also must consult with counsel and add to the model provisions applicable to insurance proceeds as well as condemnation proceeds.

## ¶4. Subordination

To meet the requirements to claim a charitable deduction for the donation of a Qualified Conservation Contribution, §170(h)(5)(A) of the Code requires that the conservation purpose of the conservation easement must be protected in perpetuity. Applicable regulations (excerpted below) use the term “subordinate” to describe what the holder of a prior mortgage must do so as to protect the conservation purpose of the conservation easement in perpetuity.

### **Treas. Reg. Section 1.170A-14**

*(g) Enforceable in perpetuity...*

*(2) Protection of a conservation purpose in case of donation of property subject to a mortgage.... [N]o deduction will be permitted under this section for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity [emphasis added].*

As stated in the preface to this commentary, the model does not take an “all-or-nothing” approach. For the most part, the Mortgage Holder and the CE Holder can operate in their separate spheres -- neither superior to the other. Reasonably foreseeable circumstances in which they may have competing interests have been addressed in the model. If, however, a future court decision or guidance from the Internal Revenue Service suggests that “enforceability in perpetuity” has not been fully achieved under the terms of the model, then ¶4 provides a path to save the document from attack by interpreting the document so as to comply with the requirements for a Qualified Conservation Contribution.

## ¶5. Notices

Timely receipt of notice to the CE Holder will be critical to its ability to act quickly to preserve its interest in the conservation easement in the event of a judicial or other sale of the Mortgaged Property. Be sure the address for the CE Holder in the information section includes a street address for overnight delivery by commercial courier. Even if it is not named as an interest to be divested, the CE Holder will want to make reasonable efforts to inform prospective purchasers of the applicable limitations on future use and development of the Mortgaged Property under the conservation easement.

## ¶6. Binding Effect

The Mortgage Subordination must be recorded in the public records so as to be enforceable against the Mortgage Holder and anyone else who may come to own, or hold an interest in, the property by, through or under the Mortgage Holder, including purchasers at a judicial sale.

## ¶7. Consideration

The purpose is to avoid a claim by the Mortgage Holder that its promises are void for lack of consideration. Knowledge of the reliance of the Owners and the CE Holder on the promise will make it binding upon the Mortgage Holder.

### **Optional Additional Paragraph: Non-Disturbance Agreement**

In the case of easements and leases that grant rights of use and occupancy, the easement holder or tenant wants the Mortgage Holder’s agreement to not disturb those rights of use and occupancy should the Mortgage Holder exercise its rights to take possession of the Mortgaged Property, either before or after a sheriff’s sale. Should the conservation easement or a separate trail easement grant affirmative rights to use the property for certain purposes, then the CE Holder may want to include a non-disturbance agreement such as the following:

## **8. Non-Disturbance**

Mortgage Holder agrees not to disturb the CE Holder in the exercise of its rights to enter the Mortgaged Property under the terms of the Conservation Easement. This includes the rights of the CE Holder to make access to the Mortgaged Property available to the public under the terms of the Conservation Easement or any separate trail easement granted in connection with the Conservation Easement.

## **Closing Recital**

The phrase “Intending to be legally bound” is a valid substitute for consideration in Pennsylvania.

### Disclaimers

Nothing contained in this or any other document available at ConserveLand.org or ConservationTools.org is intended to be relied upon as legal advice. The authors disclaim any attorney-client relationship with anyone to whom this document is furnished. Nothing contained in this document is intended to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to any person any transaction or matter addressed in this document.