



## IRS Notice 2017-10: Myths and Facts

Internal Revenue Service Notice 2017-10, which was published in December 2016, makes conservation easement tax shelters listed transactions. The Land Trust Alliance welcomes Notice 2017-10 and believes the reporting obligations that begin May 1, 2017 should be implemented without delay.

As reported March 28 in [The Wall Street Journal](#), tax shelter promoters who “focus on turning tax breaks into profits” by using “inflated property appraisals” have “hired well-connected Washington firms” to protect their interests. We encourage you to resist this lobbying effort, look past the myths, and focus on the facts.

**Myth:** Because the Notice was published during the Obama administration, the new administration and/or Congress should delay or rescind it.

**Fact:** This is not a partisan issue that came about due to a White House directive; it is a tax compliance issue that IRS staff felt a need to address, especially because it involves hundreds of millions of dollars of questionable tax deductions. In short, the “listing” of a tax transaction is a technical compliance matter, not a political one. And it is not a tool abused by the IRS during Democratic administrations; three-quarters of the tax transactions listed since 2000 were done during the George W. Bush administration.

**Myth:** Notice 2017-10 is an eleventh-hour Obama administration initiative that was issued in December 2016 with no warning.

**Fact:** An IRS senior official announced October 30, 2016 that the Service was considering issuing this Notice. *The Wall Street Journal*, *Tax Notes* and *Daily Tax Report* reported this development. The IRS received public comments before the Notice was published on December 23, 2016.

**Myth:** The Notice is a retroactive application of the law because it requires reporting on transactions as far back as 2010, which makes the Notice fundamentally unfair.

**Fact:** The Notice does not change the law, now or retroactively. It uses an existing mechanism within the law to require that particular types of transactions be reported to the IRS. The IRS has taken this step 36 times since 2000.

**Myth:** One of the criteria for reportable transactions – that investors are led to believe they will receive a tax deduction that is at least 2.5 times their investment – is totally arbitrary. Why the 2.5 multiplier? Why not 1.75 or 3.3 or some other number?

**Fact:** The number is not arbitrary. When top-rate taxpayers receive a charitable tax deduction greater than 2.5 times his or her investment, those taxpayers are at that point turning a profit (i.e., 2.5 is essentially the inverse of the federal marginal tax rate to which most investors in these transactions are subject). The purpose of the charitable incentive in the IRS Tax Code is to encourage charity, not to enable profit.

**Myth:** The Notice is so broad that it will chill – or even freeze – land conservation donations.

**Fact:** The Notice has not frozen conservation donations. The Land Trust Alliance, in consultation with leading tax experts and land trust practitioners from across the country, has concluded the Notice is so specific and narrowly tailored that it will have no measurable effect on traditional conservation easement donations. This is because a transaction must meet all four key criteria set forth clearly in the Notice:

- promotional materials, which can be oral or written; **and**
- investors; **and**
- a promised federal tax deduction that is at least 250% of the investor's investment; **and**
- the contribution and deduction.

For more information and to view our published advice to land trusts and land owners, visit <http://www.landtrustalliance.org/blog/definitive-answer>.

**Myth:** These tax-advantaged land conservation investment deals represent innovation, a creative new way of achieving desirable land conservation.

**Fact:** While it certainly is creative, we suggest that you ask to see the promotional materials associated with these transactions. Consider how, for example, this type of scenario (which is not unusual in these transactions) does not make sense: land is initially purchased for \$2 million, sold shortly afterwards to a partnership of investors for \$8 million, and then suddenly – prior to being donated – is projected by the partnership to be worth \$20 million or more. Like the IRS, you should want to question these drastic increases in value.