

IRS Notice 2017-10: What Landowners Need to Know

The Internal Revenue Service recently took action against certain conservation donations. But landowners contemplating donating land or a conservation easement should not fear [IRS Notice 2017-10](#) (the “Notice”), published Dec. 23, 2016. The IRS action is narrowly targeted to a handful of unusual transactions and will not affect traditional donations. The Notice imposes no new requirements for traditional easement donors and it will not result in more scrutiny of traditional donations.

What does the Notice mean for landowners?

The Notice has no effect on landowners making a traditional donation of land or a traditional donation of a conservation easement. It imposes no new requirements for – and brings no more scrutiny to – such donations. Audits of traditional conservation donations remain a possibility, but audits are no more or less likely now.

So the Notice wouldn't affect my donation?

Easement or land donations where the land is owned by an individual, a family or a family partnership that hasn't recently sold partnerships are not affected by the IRS action. Donations from most other partnership entities, too, are unlikely to be subject to the Notice, because it so narrowly defines the transactions it covers.

What are the unusual transactions covered by the Notice?

IRS Notice 2017-10 targets transactions in which very high tax deductions are deliberately and explicitly “promoted” to potential investors. These transactions generally involve investors who otherwise have little or no interest in the specific property.

Section 2 of the Notice explicitly lists the elements of a “listed transaction.” To qualify as being subject to the Notice, potential investors in an LLC or other “pass-through” entity must receive promotional materials that offer the possibility of a federal tax deduction for a conservation donation that is at least 2.5 times the investor's investment. If the donation is then made, and the entity passes-through the promised deduction to the investor who uses it on their federal tax return, the transaction qualifies as a “listed transaction.”

A transaction that meets these requirements is what the IRS wants to review more closely. And rightly so. An investor can only realize this sort of deduction if the value of the property has dramatically increased in value between the time of their investment and the donation – which in many of these transactions is only a year or so.

The Notice requires participants in these transactions to file a report to the IRS or face severe fines.

What does the Notice mean when it talks about “substantially similar” transactions?

When the IRS identifies a “listed transaction,” the listing applies not just to the exact transaction described, but also to transactions that are “substantially similar.” A syndication of deductions from the donation of land in fee, where investors are promised the potential of a deduction more than 2.5 times

their investment, is very likely to be seen by the IRS as “substantially similar” to the conservation easement donation described in the Notice.

What’s the conclusion to all this?

An easement donor should always take great care to comply with all of the complex regulatory requirements the IRS has set up for conservation donations. Using an experienced legal advisor and working with an experienced land trust are always a good idea in any conservation donation. The new Notice changes none of these best practices. The Notice is an IRS initiative carefully aimed at some very unusual transactions and does not affect the vast majority of easement donors.

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