

# IRS Notice 2017-10: What Land Trusts Need to Know

The Internal Revenue Service is working to halt conservation donations that give investors back more money than they donate. [IRS Notice 2017-10](#) (the “Notice”), published Dec. 23, 2016, identifies and classifies certain highly overvalued conservation easement transactions as “listed transactions.” As a result, investors and “material advisors” must file a report identifying these transactions to the IRS by May 1, 2017. If obligated individuals or entities fail to file this report, they could face severe fines.

So that land trusts can better understand the Notice and its repercussions, the Land Trust Alliance has prepared this document in conjunction with leading legal experts. This general overview will likely answer most questions you have about the Notice. If you have additional questions, contact Land Trust Alliance Conservation Defense Director Leslie Ratley-Beach at [lrbeach@lta.org](mailto:lrbeach@lta.org).

## ***What does the Notice mean for land trusts?***

For almost all conservation donations, the Notice will not affect donors or land trusts. The Notice specifically exempts land trusts from having to report simply because the land trust accepted an easement or land donation. Moreover, the problematic transactions described in the Notice are rare, and very few Alliance member land trusts have ever seen one of these transactions, let alone participated in one.

## ***So the notice doesn't affect traditional donations?***

The Notice narrowly targets investment scheme transactions and is not intended to be a deterrent to traditional conservation donations. Donations made by an individual, family or family partnership that has not sold partnership interests are not subject to the Notice. Donations from other entities, too, are unlikely to be subject to the Notice because the Notice narrowly defines covered transactions to those that feature four specific characteristics (see below).

## ***What transactions does this Notice cover?***

With this Notice, the IRS is targeting transactions involving conservation easements and land donations in which very high tax deductions are deliberately and explicitly “promoted” to potential investors. These transactions, which serve to shelter income from tax, generally involve investors who otherwise have little or no interest in the specific property.

Section 2 of the Notice explicitly lists the four elements of a “listed transaction.” To qualify as being subject to the Notice, all four requirements must be present:

- 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.

A transaction that meets all four 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 less than one year.

It should be noted these are the same types of transactions the Alliance warned land trusts to avoid in our advisories published in June 2015 and August 2016. In those advisories, we cautioned that overvalued conservation easement transactions should cause serious concern to land trusts following Standard 10 of *Land Trust Standards and Practices*. Please continue to use the [latest advisory](#) and [other Alliance-issued materials](#) to assist your outside counsel in assessing any questionable transactions.

***Does this Notice only apply to 2016 transactions?***

No. The Notice requires reporting on transactions entered into on or after January 1, 2010, that meet all the qualifications outlined above.

***What's this I see about an exemption for land trusts?***

Generally speaking, land trusts (i.e. donees) are not required to report a transaction to the IRS. The Notice expressly states:

For purposes of this notice, a donee described in § 170(c) [of the Internal Revenue Code] shall not be treated as a party to the transaction under § 4965 [of the Internal Revenue Code] or a participant under § 1.6011-4 [of the Treasury Regulations].

As a practical matter, this means no land trust should fear it is required to report under the Notice simply because it worked with a donor to complete and accept a conservation donation. Even if the donation fits the description above of a “listed transaction,” land trusts are still not obligated to report the transaction. The only exception would be where the land trust acted as a “material advisor” in the transaction.

***What would make a land trust a “material advisor” to a transaction?***

As defined by [26 CFR 301.6111-3](#), a land trust becomes a “material advisor” only when it:

- provides “material aid, assistance, or advice” including a “tax statement” about a listed transaction (see below, but note this does not include any statement by a land trust in its role as donee); **and**
- receives at least \$10,000 for doing so.

Generally speaking, land trusts are not a “material advisor” to a transaction for the purposes of this Notice.

***But what about negotiating an easement? Or signing Form 8283? Or any of the many other tasks land trusts complete to facilitate a donation? Does any of that work make a land trust a “material advisor”?***

No. Under normal circumstances, the usual and customary tasks associated with conservation easement transactions will not make a land trust a “material advisor” for the purposes of this Notice. These usual and customary tasks include – but are not limited to – discussing land conservation with potential donors, negotiating, signing and accepting a conservation easement, preparing a baseline

documentation report, sending a “contemporaneous written acknowledgement” or “gift letter,” or signing Form 8283.

The IRS isn’t trying to trick land trusts. The Service knows what being a donee involves, and the Service wouldn’t have specifically provided an exclusion for accepting a donation if the donee’s usual and customary tasks would require the donee reporting itself as a “material advisor.” This fact is affirmed by contrasting this Notice with other, similar notices. In these other instances, charities and nonprofits that received donations were specifically included by being made parties to the transaction.

In short, if the IRS wanted information from land trusts, it had the power to demand it. Instead, the Service has excluded land trusts. If, however, you have any questions about a particular transaction or were paid more than \$10,000 for work on a transaction that appears to meet the requirements of the Notice, please consult your land trust tax attorney.

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

Donations of land in fee that meet the criteria described in the Notice also are likely to be subject to reporting requirements. 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.

### ***Just so I know, what are the penalties for not reporting?***

For a “material advisor,” the penalty for not reporting is the greater of \$200,000 or 50% of the gross income the advisor received for aiding the transaction. Reporting is required on Form 8918. It is important to remember that the Notice imposes a reporting requirement regardless of whether the transaction is sound and the claimed deduction is fully supportable.

### ***What’s the conclusion to all this?***

Everyone involved in land conservation should take the Notice seriously. But outside the realm of easement donation syndications and substantially similar transactions, such as syndicated land donations, this Notice has no effect. Land trusts that comply fully and operate in good faith with *Land Trust Standards and Practices* and the Alliance’s advisory on these matters are safe.

*The Land Trust Alliance furnishes materials as tools to help land trusts with the understanding that the Land Trust Alliance is not rendering legal, accounting or other professional counsel. This article is not tax or legal advice. If a land trust requires legal advice or other expert assistance, seek the services of competent professionals. The Land Trust Alliance is solely responsible for this content. (Sources and additional resources available upon request.)*