Material Adviser Definition Scrutinized at Easement Reg Hearing

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A Treasury official questioned why donees should be excluded from the definition of material adviser during a public hearing on proposed regulations identifying syndicated easements as listed transactions.

The scope of that definition was the only government question posed to five witnesses who testified March 1 during an IRS telephonic hearing on the proposed regs (REG-106134-22). A transcript is available here.

The proposed regs, issued in December 2022, convert Notice 2017-10, 2017-4 IRB 544, into a formal rule subject to Administrative Procedure Act rulemaking requirements. The notice designated some syndicated easement deals as listed transactions requiring disclosure by participants and material advisers.

The proposed regs came in response to a series of adverse court decisions holding that IRS notices identifying listed transactions are invalid because the agency issued them without using the notice and comment procedures required by the APA for legislative rules.

Similar to Notice 2017-10, the proposed regs provide that transactions that are the same as or substantially similar to a syndicated conservation easement transaction are listed transactions for purposes of the disclosure and list maintenance requirements and related penalties.

The proposed regs differ from the notice by providing a broader definition of promotional materials and by creating a rebuttable presumption that the so-called 2½ times rule is met if the passthrough entity donates a conservation easement within three years of the taxpayer's investment in the passthrough entity. They also eliminate the notice's exclusion of qualified donees from the definition of material advisers — a proposal unanimously panned by stakeholders in comment letters to Treasury and the IRS.

At the hearing, Andrew Bowman of the Land Trust Alliance reiterated his group's view that final regs should retain the exclusion because donee organizations are mere recipients of a property interest under Treasury regs and aren't active transaction advisers. Those organizations "do not fit the definition of material adviser because they do not provide aid, assistance, or advice, nor do they receive fees for such services," he said.

Removing the exclusion "would contradict a long-standing core principle of U.S tax law that donee organizations are not responsible for the value of donated property," Bowman added. "The Internal Revenue Code, Treasury regulations, IRS guidelines, and IRS forms do not impose any such burden

on donee organizations for the good reason that such organizations do not have the knowledge and control, legal right, or responsibility to demand information sufficient to approve an appraisal or any part of a donor's structured transaction."

Amber MacKenzie of the Treasury Office of Tax Policy asked why a carveout is needed if most land trusts would never meet the definition of material adviser.

Bowman said the alliance is concerned that land trusts "will somehow be deemed accountable for opining on the value of an appraisal or other aspects of transactions like this."

"We're eager to keep the law and the system as is so that land trusts do not get unintentionally brought into this," Bowman continued. "We see it as a slippery slope, and we prefer that these broad exclusions and carveouts remain."

Appraisal Reform

Other witnesses argued that Treasury and the IRS should focus their resources on improving appraisals of conservation easement donations.

Testifying on behalf of the Center for Biological Diversity, William J. Snape III said that the proposed regs "don't appreciate the importance of appraisal reform in solving many of the problems identified in the proposed rule" and that the IRS should put appraisal improvement at the top of its regulatory reform agenda.

"Most, if not all, of the major issues with the conservation easement program at the federal level, real or perceived, are related to inaccurate, inflated, or otherwise flawed appraisals," Snape said.

The proposed regs also fail to provide any data on the scope of perceived problems with syndicated easement transactions, the number of acres involved, or the number of transactions that raise concerns, Snape added.

"We don't deny that there have been some bad actors, and we agree that the IRS needs to weed out these bad actors," Snape said. "But as the behavior of former President Trump shows with his conservation easement — and he's not the only one — abuse of the conservation easement system is not just with syndicated easements."

Bill Garber of the Appraisal Institute urged the government to develop a mechanism for addressing overvaluation concerns. "We have long felt that there is likely a better way to resolve differences of value opinions, and we have studied how other countries may have addressed similar concerns," he said.

According to Garber, a potential model for the IRS is Canada's ecological gifts program, a form of alternative dispute resolution that relies on a panel of qualified appraisers who review taxpayers' appraisals to collectively provide a determination of value.

"Think of this as being similar to a private letter ruling," Garber said. "The agreed-upon value is determined upfront, eliminating audit and litigation risks for taxpayers and also significantly reducing administrative burdens and costs that are incurred by the administering agency."

Garber added that his organization would be willing to work with the IRS and policymakers in pursuing the idea.

Pete Sepp of the National Taxpayers Union similarly urged the government to adopt more targeted approaches to addressing perceived abuse of the section 170(h) charitable contribution rules. The Appraisal Institute's recommendation of an alternative dispute resolution procedure "is an excellent one," Sepp said, adding that the union has testified in favor of that for several years.

"We need to be thinking about job aids between the appraisal community and IRS engineers, as well as the easement community itself, to help develop good guidelines for proper easement agreements and improvements in existing tax documents," Sepp said, adding that forms 8283 and 990 "could provide better transparency in this area."

"Strategic ambiguity is not a good strategy when it comes to rulemaking," Sepp continued. "It may be to the advantage of the government in some ways and some situations. But not with rulemakings — that's not the purpose. We need to take a different path here."

Sepp and other witnesses also argued that the proposed regs should be revised to mirror the provisions of the easement legislation enacted in the Consolidated Appropriations Act, 2023 (P.L. 117-328).