Updated Easement Proposal Lands in Omnibus Bill

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A modified version of a long-standing proposal to deny deductions from syndicated easement deals was included in Congress's year-end omnibus appropriations bill, with a new exception for historic preservation easements and a curing provision.

The provision, which appears in the December 20 omnibus spending bill as part of the retirement package known as SECURE 2.0, would deny a section 170 charitable contribution deduction if it exceeds 2½ times the taxpayer's relevant basis in the passthrough entity that donated the easement.

The easement provision was added to SECURE 2.0 in June to offset the costs of a tax break for first responders. It is based on the Charitable Conservation Easement Program Integrity Act (H.R. 4164 and S. 2256), a bill that a bipartisan group of lawmakers, led by House Ways and Means Committee member Mike Thompson, D-Calif., and Senate Finance Committee member Steve Daines, R-Mont., has sought to advance since 2017.

According to the bill's sponsors, the provision is intended to track Notice 2017-10, 2017-4 IRB 544, which designated some syndicated easement deals as listed transactions. The IRS's authority to identify listed transactions by notice has been the subject of litigation in various courts, with the Tax Court holding last month in *Green Valley Investors LLC v. Commissioner*, 159 T.C. No. 5, that Notice 2017-10 is invalid because of the IRS's failure to comply with notice and comment procedures required by the Administrative Procedure Act. The IRS on December 9 filed a motion to reconsider in *Green Valley*.

Supporters have argued that the legislation is needed to curb abuse of the section 170 charitable contribution rules by those who promote or participate in syndicated conservation easement transactions. The bill's proponents say it would eliminate the ability of partnership investors to profit from the donation of a conservation easement on land held for a short period of time.

The provision was initially included in proposed pay-fors advanced in September 2021 by House Ways and Means Committee Democrats as part of a massive reconciliation bill, but House Democrats later dropped the provision because of objections to its retroactivity by Sen. Kyrsten Sinema, I-Ariz.

Updates

The version included in the omnibus bill is based on the proposal introduced in 2021, with some key modifications. Unlike the earlier iterations, which would have applied the deduction disallowance rules retroactively to December 23, 2016 — the date the IRS issued Notice 2017-10 — the new version would apply prospectively.

The new version also adds an exception to the deduction disallowance rule for easements donated to certified historic structures, but only if reporting requirements in proposed new section 170(f)(19) are met.

Another addition calls for Treasury to publish safe harbor deed language for extinguishment clauses and boundary line adjustments within 120 days of the date of the bill's enactment. Donors would be permitted to correct defective deed language regarding those provisions during the 90-day period following the publication of Treasury's safe harbor guidance.

The provision permitting the deed corrections wouldn't apply if: the easement donation is part of a reportable transaction as defined under section 6707A(c) or is a transaction described in Notice 2017-10 and is therefore disqualified under proposed new section 170(h)(7); the donor is contesting the IRS's disallowance of an easement deduction in a court case docketed on a date before the amended deed is recorded; or a claimed easement deduction resulted in an underpayment penalty that has been determined as final in an administrative or court proceeding.

Jeers and Cheers

Robert Ramsay of the Partnership for Conservation, a trade organization that has criticized the IRS's enforcement efforts against syndicated easement transactions, said his group is concerned about the chilling effect that the easement provision could have on private land conservation.

"The negative commentary from the IRS, and some special interest stakeholders, has been focused on syndicated conservation easements, but the proposed bill language is very broad and would limit virtually ALL non-family-owned partnerships from choosing to conserve their land," Ramsay said in a December 20 statement.

Ramsay added that the larger debate involving conservation easements will continue into the next Congress and that his organization will work with policymakers and stakeholders to develop solutions "that equitably uphold the integrity of all conservation easements while protecting the ability of *all* Americans to participate in choosing conservation for their land" (emphasis in original).

By contrast, Lori Faeth of the Land Trust Alliance welcomed inclusion of the easement provision in the omnibus.

"In spite of federal efforts to stop abusive syndicated conservation easement transactions during the past decade, they have continued and cost taxpayers billions of dollars," Faeth said in a December 20 statement.

"It has been clear for years that Congress alone has the power to stop bad actors by enacting sensible, narrowly targeted legislation that would end the abuse and protect an invaluable conservation tool," Faeth continued. "We're hopeful that Congress will exercise that power and get this bill across the finish line and, in the process, preserve the integrity of our tax laws and protect those who work tirelessly and ethically to conserve our country's irreplaceable working and natural lands."