Land Trust Alliance
Together, conserving the places you love

Re: Clarification request for T.D. 10007

Dear Commissioner Werfel,

On behalf of our member land trusts, I am writing to share the Land Trust Alliance's thoughts with respect to the recently issued final regulations related to abusive syndicated conservation easement transactions (T.D.-10007, 89 Fed. Reg. 81341 (Oct. 8, 2024)).

We appreciate the Internal Revenue Service (IRS) publishing these final regulations and look forward to working with the IRS to ensure their implementation does not unduly burden legitimate donors and donees. The Alliance submitted comments to the draft regulations but the comments would have been drastically different if the Alliance had foreseen the IRS's application of the regulatory provisions to legitimate donations, especially those that were exempted by the Charitable Conservation Easement Program Integrity Act, and the extension of the material advisors category to donee organizations. We now hope the IRS will work with us on issuing additional sub-regulatory guidance to address certain clarifications that would prevent unnecessary confusion by donors and donees and thus reduce the number of false-positive filings.

Founded in 1982, the Land Trust Alliance is a nonprofit corporation and national land conservation organization based in Washington, D.C. that works to save the places people need and love by strengthening land conservation across America. The Alliance represents approximately 950 member land trusts and is supported by 6.3 million members nationwide.

The land trust community plays an important role in advancing voluntary private land conservation and relies on a variety of tools to help willing landowners conserve their land, including the donation of conservation easements. The federal charitable contribution deduction for donations of conservation easements is one such tool that has been incredibly successful in fostering private land conservation. The Alliance fought hard to stop the abuse of the charitable contribution deduction relating to conservation easements. It supported the implementation of Notice 2017-10 and adopted those criteria in the Alliance's own guidelines for its members. The Alliance advocated strongly in support of the Charitable Conservation Easement Program Integrity Act (Section 605 of the SECURE 2.0 Act), which was signed into law in December 2022 and similarly aims to prevent abusive tax avoidance schemes related to conservation easements.

The final regulations are an important follow-up to that law, and we commend the IRS for combatting abusive tax shelters, including those relating to abusive syndicated conservation

easements. At the same time, however, we are concerned that certain provisions of the final regulations unduly burden well-intentioned, legitimate donors and donees, including our member land trusts. In carefully reviewing the regulations, we believe that a few clarifications could prevent responsible land trusts from spending a significant amount of their limited resources on past transactions entered into in good faith. In the absence of such clarifications, we believe the compliance burden would detract from our members' ability to promote conservation while also diverting critical IRS enforcement resources from stopping true abuses. Clarity is, in this instance, very important to our members and our donors, as the penalties for failing to report a listed transaction or register as a material advisor to such a transaction are severe.

With that in mind, the Land Trust Alliance respectfully requests the following operational clarifications:

Clarification on donees as material advisors:

The regulation does not provide a blanket exemption for donees being "material advisors." The preamble does state:

> *The Treasury Department and the IRS conclude that a qualified organization **acting solely in its capacity as a qualified organization** by, for example, accepting a conservation easement and separate payments or contributions to monitor and enforce that easement, provided such payments or contributions are in fact used for such purpose, would not be considered a material advisor.*

It goes on to say that actions such as signing a Form 8283, representing itself as a "qualified organization" under Section 170(h), accepting a contribution for monitoring and enforcement, and/or sending the donor a contemporaneous written acknowledgment of their gift, all are actions that do not in and of themselves make a qualified organization a material advisor.

Unfortunately, the preamble and regulations do not specifically mention the two actions by easement holders that are most likely to exceed the $10,000 threshold amount for a listed transaction. These costs are for the preparation of baseline documentation for the donor, and administrative fees that reimburse a land trust for staff time spent drafting, negotiating, and recording the easement. These are both actions that land trusts undertake for virtually all legitimate donations.

While preparing baseline documentation is legally the responsibility of the donor, it is almost universally done by land trust donees, with the donor reimbursing the land trust for

the service. The advantages of the baseline documentation being prepared by the land trust should be obvious, as it will be the land trust's burden to enforce the easement, so the land trust (as opposed to the donor or an outside consultant) is in a far better position to judge the documentation that will be needed to effectively enforce the easement.

Clarifying that the act of preparing baseline documentation is an acceptable action by a qualified organization "acting solely in its capacity as a qualified organization" would greatly simplify land trust's review of whether to file as a material advisor for past donations. Because this regulation does not include the three year ownership cut-off for meeting the 2.5 times rule it will unquestionably capture many previous transactions done by our member land trusts if preparation of a baseline is considered a tax statement.

Clarification on inherited and gifted basis:

The preamble and final regulations use the term "investment" many times, which is seemingly targeted at transactions where an interest in land held by a pass-through entity is sold to an investor. But the term "investment" is not specifically defined in the regulation, which we think will cause unnecessary confusion.
Since there are many transactions in which family partnerships hold land, the basis of which was set decades ago, it would be very helpful if the IRS and Treasury Department could clarify that the term "investment" as used in the regulations does not include inherited or gifted land. The confusion caused by this lack of guidance becomes obvious by reviewing a common hypothetical:

Consider an easement by a family partnership in which all parties acquired their interest by inheritance or gift. The father inherited the property 30 years ago, so its basis was set at that date. If the father gifts to his children or grandchildren shares in the partnership, the father's basis is transferred to the donees. If a conservation easement was placed on that property, and the easement donated to a qualifying organization, it would not at all be unusual for such a transaction to produce a deduction that is more than 2.5 times the parties' basis. The preamble suggests that that the IRS believes it is unlikely that, for instance, a transaction involving inherited property held for 20 years would meet all of the elements to be classified properly as a listed transaction subject to disclosure requirements. However, because providing promotional materials is an element of a "syndicated conservation easement transaction" subject to the rule, and the definition of "promotional materials" includes deeds or operating agreements often present in the case of a family partnership, a taxpayer who engages in a conservation transaction related to gifted or inherited property in fact may be subject to substantial uncertainty as to whether the elements are met. This could be clarified through the definition of "investment."

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Clarifying that transactions resulting in the donee's basis being determined by reference to the donor's basis, such as inherited or gifted transactions, are not considered an "investment" under the final regulations would be very helpful to those donors and to their donees. We believe that the IRS has the flexibility to address these clarifications through sub-regulatory guidance, such as an administrative pronouncement.

We would appreciate the opportunity to meet with you or your staff as soon as possible to discuss ways that operational guidance could help clarify these matters for individuals donating conservation easements in good faith. These matters are of great importance, as filing will be required for all past transactions by January 31, 2025. Clarifying these items through operational guidance would help the IRS by minimizing the number of "false positives" the IRS will receive. Additional guidance will also be of immense help to those who have made or received conservation donations with the best of intent but fall within the recently revised regulation.

Sincerely,

Jennifer Miller Herzog
Interim President and CEO, Land Trust Alliance

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