

# Group Seeks Clarification on Conservation Easement Guidance

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## SUMMARY BY TAX ANALYSTS

Randy Bampfield of the Partnership for Conservation has asked the IRS to address issues regarding guidance (Notice 2017-10) that identifies some syndicated conservation easement transactions and substantially similar transactions as listed transactions, saying that unanswered questions in the guidance have caused confusion and make accurately complying with the guidance challenging.

## FULL TEXT PUBLISHED BY TAX ANALYSTS

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Dear Mr. Dinwiddie, Mr. Moriarty, and Ms. Gross:

Partnership for Conservation represents land trusts, landowners and professional advisors across the United States. We are writing to request guidance concerning participant and material advisor confusion, as well as other significant uncertainties, regarding implementation of the reportable transaction disclosure procedures

outlined in Sections 6011, 6111, 6112 of the Internal Revenue Code (the "Code") and the Treasury Regulations (the "Regulations") thereunder with respect to IRS Notice 2017-10 (the "Notice").

## I. BACKGROUND

On December 23, 2016, the Internal Revenue Service ("IRS") published the Notice. The Notice makes conservation easement donations by flow-through entities (the "Transactions") generating a non-cash charitable contribution deduction in excess of 2.5 times the amount invested listed transactions. Also, the Notice makes any "substantially similar" arrangement a listed transaction.

As a result of the Notice, Section 1.6011-4 of the Regulations and Sections 6111 and 6112 of the Code place substantial reporting obligations on taxpayers and material advisors participating in the Transactions. Taxpayers must disclose their participation on Form 8886, and material advisors must disclose their participation on Form 8918 and also maintain a list of advisees and other material advisors. The failure to meet these obligations or to completely and accurately disclose can result in penalties, measured in hundreds of thousands of dollars.

Given the lack of guidance concerning the implementation of these reporting obligations to previous listed transactions and the lack of guidance contained within the Notice itself, there are several unanswered questions that have caused confusion and make accurately complying with the Notice extremely challenging. Considering the significant penalties for failure to timely, accurately, and completely file the required disclosures, we feel it is imperative to request additional guidance on this matter.

## II. REQUESTS FOR GUIDANCE

Below, you will find several requests for guidance. For ease of reading, we have divided these requests for guidance into three (3) main categories: (1) Non-Profit Specific Issues, (2) Taxpayer Specific Issues and (3) Material Advisors Specific Issues.

### A. Non-Profit Specific Issues

**1. *Whether Land Trusts will be considered Material Advisors.*** Section 301.6111-3(b)(1) of the Regulations defines a material advisor as a person who "provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derives gross income in excess of [\$10,000] for the material aid, assistance, or advice." Assuming a conservation easement donation transaction is substantially similar to the one described in the Notice, a donee 501(c)(3) land trust that signs a Form 8283 and/or completes the Baseline Document Report, at a minimum, provides material assistance in the carrying out of a transaction. Accordingly, to the extent the land trust derives gross income in excess of \$10,000, the land trust is a material advisor. Further, the Notice, while excluding donee land trusts as participants for purposes of I.R.C. §§ 4965 and 6707A, provides no such exclusion of donee land trusts from the possibility of being a material advisor. Yet, a number of interested parties are advising land trusts to not complete Forms 8918 for accepting such donations, creating confusion regarding a donee land trust's disclosure obligations. **Please provide guidance as to whether a land trust will be considered a material advisor to a conservation easement donation substantially similar to the transaction described in Notice 2017-10 (assuming gross income in excess of the threshold amount) for**

**(1) accepting a donation through a transaction substantially similar to the one described in Notice 2017-10 and signing the Form 8283, (2) completing a Baseline Document Report or (3) signing a Form 8283 after subjecting the appraisal to a standard review process.**

B. Taxpayer Specific Issues

1. *Omitted Reportable Transaction Number on Form 8886.* Section 1.6011-4(d) of the Regulations provides "that if the form is not completed in accordance with the provisions of Section 1.6011-4(d) of the Regulations and the instructions to the form, the taxpayer will not be considered to have complied with the disclosure requirements." The instructions to the form provide each taxpayer must include a Reportable Transaction Number ("RTN") on the Form 8886. Section 1.6011-4(e)(1) requires the taxpayer to attach the Form 8886 his or her tax return for 2016, which is due on April 18, 2017. Section 301.6111-3(d)(2) provides that the IRS will provide a material advisor with an RTN after the material advisor discloses the transaction, and the material advisor must provide the RTN to all taxpayers within 60 calendar days from the date the RTN is mailed to the material advisor. The Notice indicates that a material advisor must disclose the listed transaction on or before May 1, 2017. Based on the foregoing guidance, it seems highly unlikely that a taxpayer would have received a RTN by the date his or her Form 8886 is due. **Please provide guidance as to whether a taxpayer failing to provide an RTN (which has not been received by a material advisor by the time of the taxpayer's filing) will be liable for a penalty for an incomplete form. Please also provide guidance on remedies available to the taxpayer if the penalty is assessed.**

2. *Errors Reporting on Line 6 of Form 8886.* According to the instructions to the Form 8886, line 6 requires the taxpayer to provide information "for each individual or entity to whom you paid a fee with regard to the transaction." Section 1.6011-4(b)(3)(iv) of the Regulations states, "you are treated as paying fees to an advisor if you know or should know that an amount you paid will be paid indirectly to the advisor, such through a referral fee or fee-sharing arrangement."

**Please provide the following guidance:**

**(a) What level of detail would the IRS consider sufficient regarding referral fees or fee-sharing arrangements? This information is not generally known to investors, and under an abundance of caution, some taxpayers may be inclined to speculate, thereby causing errors and inaccurate reporting.**

**(b) The instructions to line 6 provide that the taxpayer must report a fee paid with regard to the transaction if the individual provided "tax advice." Does the term "tax advice" include any fees indirectly paid to individuals who helped to structure, organize, implement or manage the Transaction, but did not provide a tax statement directly to the investors (e.g., fees paid to surveyors, title search attorneys, or engineers)?**

**(c) Please provide guidance concerning complete reporting for taxpayers who do not pay a separate fee outside the purchase of membership interests or units in a flow-through entity, but where the transaction calls for payment of certain distribution fees to FINRA registered broker-**

**dealers. The investor is aware of the general flow of funds (as outlined in the private placement memorandum), but has no specific knowledge as to the re-allowance of distribution fees.**

3. *Fees and Parties to the Transaction.* The instructions to line 6 provide that the taxpayer must provide information for "each individual or entity to whom you paid a fee." Section 1.6011-4(b)(3)(iv) provides, "[a] fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the transaction." Neither the instructions to the form, the Notice, nor Section 1.6011-4 explain or define the term "party to the transaction." **Please provide guidance concerning who are considered "parties to the transaction." Is this term interchangeable with participants? Can an individual or an entity be both a participant and a material advisor? Can a potential material advisor be a party to the transaction without being involved in analyzing, implementing, or documenting the transaction? If so, would the taxpayer be required include fees paid to this individual?**

4. *Original Landowners as Participants.* In many transactions, the original landowner(s) contributes the property to a flow-through entity, which ultimately makes the conservation easement donation. The original landowner(s) maintains a minority interest in the flow-through entity owning the property. As a result of the donations, the original landowner(s) receive their pro rata share of the charitable contribution deduction. On page 5 of the Notice, paragraph 2, "[p]articipants include, but are not limited to, investors, the pass-through entity (any tier, if multiple tiers are involved in the transaction), or any other person whose tax return reflects tax consequences or a tax strategy described in Section 2 [of the Notice]." Based upon this definition of participants, the original landowner(s) are likely required to file a Form 8886. **Please provide guidance concerning what would satisfy the original landowner(s) recordkeeping requirement. Please keep in mind that the original landowner(s) does not usually receive marketing materials and does not usually have anyone that makes a tax statement to them.**

5. *8886 Due Date.* According to Section 1.6011-4(e), the Form 8886 must be attached to the taxpayer's tax return and a copy must be mailed to OTSA. The Notice provides, "if, under § 1.6011-4(e)(1), a taxpayer is required to file a disclosure statement after December 23, 2016, and prior to May 1, 2017, that disclosure statement will be considered to be timely if the taxpayer alternatively files the disclosure with the OTSA by May 1." Given the fact that a taxpayer who entered into a transaction in 2016 would have to disclose with his or her tax return on April 18, 2017 (which is after December 23, 2016 and prior to May 1, 2017), there is confusion as to when the Form 8886 is due. **Please provide guidance concerning the due date for Form 8886. Is a taxpayer required to attach the form to his or her tax return on April 18, 2017 even if the taxpayer intends to mail a copy to the OTSA on May 1, 2017?**

6. *No Signature Line on Form 8886.* The Notice requires taxpayers who participated in a conservation easement donation transaction for tax years 2010 through 2015, where the period of limitations is still open, to file a Form 8886 with the OTSA. The Form 8886 is intended for current year tax filings, and as such, does not provide the taxpayer the opportunity to sign or date the Form 8886 on a signature line or a jurat. **Please provide guidance as to whether there is a requirement for the taxpayer to sign and date Form 8886 for tax years in which the income tax return has already been filed.**

### C. Material Advisor Specific Issues

1. *Form 13976 and Privacy Concerns.* Section 6112 of Code and the regulations thereunder require a material advisor to keep a list of advisees and other material advisors. Section 301.6112-1(b)(3)(i)(B) of the Regulations requires the list to include the taxpayer identification number (or social security number) of each person required to be included on the list. This is extremely sensitive information that many investors will likely not provide freely to others. **Please provide guidance concerning whether this is a strict requirement and whether there is a remedy for a material advisor that does not include an investor's social security number because the investor or another material advisor did not wish to disclose this information.**

2. *Potential Material Advisors.* Section 301.6111-3(b)(4) of the Regulations provides that an individual or entity becomes a material advisor "when the person or entity (1) provides material aid, assistance or advice, (2) the person directly or indirectly derive gross income in excess of the threshold, and (3) the taxpayer enters into the transaction." In most instances, the transactions that fall within the scope of the Notice will include several investment strategies for the property. The conservation donation strategy is likely one option among several. **Please provide guidance as to whether the parties that assist with the organization of investment strategies that do not result in the donation of the conservation easement are considered material advisors. Is there any safe harbor, besides the protective disclosure, for potential material advisors?**

3. *Timing of Material Advisor Status.* As indicated above, a material advisor becomes a material advisor when that person or entity (1) provides material aid, (2) derives gross income in excess of the threshold, and (3) the taxpayer enters into the transaction. In instances where the transaction provides several investment strategies, the investors are entitled to determine which of the available investment strategies to pursue. In many cases, the investors have the option to defer the decision for several years. **Please provide guidance when a "taxpayer enters into the transaction:" is it when the investors invest in the flow-through entity or when the flow-through entity makes the donation. What if the decision to make a conservation easement donation is deferred until sometime in the future e.g., for instance, the following tax year after guidance was given. If a material advisor becomes a material advisor at the point when the investors make their investment in the flow-through entity, please provide guidance concerning how a material advisor should complete and timely file the Form 8918 when the investors decided not to donate the conservation easement.**

4. *Form 8918 when Qualified Appraisal is not Complete.* Section 301.6111-3(d)(1) of the Regulations provides that the information provided on Form 8918 must "describe the expected tax treatment and all potential tax benefits expected to result from the transaction." For future transactions, Section 301.6111-3(e) provides that the Form 8918 must be filed on the last day of the month that follows the end of the calendar quarter in which the material advisor becomes a material advisor. However, section 1.170A-13(c)(3)(i)(A) provides that "the appraisal cannot be finalized within 60 days before the date of the contribution of the appraised property and no later than the date on which the taxpayer's tax return is due." **Please provide guidance concerning how a material advisor (including an appraiser) should respond on Form 8918 if the appraisal has not been finalized by the date on which the Form 8918 is due.**

5. *Subjective Nature of Description of Reportable Transaction on Form 8886 and 8918.* Section 301.6111-3(d)(1) of the Regulations requires the information disclosed on the Form 8918 must have "described the transaction in sufficient detail for the IRS to be able to understand the tax structure of the reportable transaction and the identity of any material advisor(s) whom the material advisor knows or has reason to know acted as a material

advisor with respect to the transaction." According to section 1.6011-4(d) of the Regulations, this same description requirement is required for a taxpayer's Form 8886 to be considered to be complete. The sufficiency and completeness of the description are subjective in nature. **Please provide guidance regarding remedies available to a material advisor or a taxpayer who files the Form 8918 (or 8886) in good faith, but where the IRS determines the description contained in the documents to be insufficient.**

6. *Multiple Transactions on a Single Form 8918.* Section 301.6111-3(d)(1) provides, "a material advisor may file a single form for substantially similar transactions." Section 1.6011-4(c)(4) provides that a substantially similar transaction is "any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same tax strategy." In some instances, the transaction calls for a donation of a conservation easement to a tax-exempt land trust and a donation of the fee simple interest to another 501(c)(3) entity. **Please provide guidance regarding whether a conservation easement donation followed by that same property's fee simple title being donated to the same or another 501(c)(3) entity may be disclosed on a single Form 8918.**

7. *Form 13976 and Document Retention.* Section 301.6112-1(b)(3)(iii)(B) provides that a material advisor's list of advisees and other material advisors is required to include "copies of additional written materials, including tax analyses or opinions, related to each reportable transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction that have been shown or provided to any person who acquired or may acquire an interest in the transaction." Some transactions covered by the Notice may have been distributed via licensed financial advisors or registered investment advisors, which may have resulted in individualized written analyses of the potential tax treatment for individual investors. These individualized analyses are confidential and many material advisors may be unaware of their existence. **Please provide guidance regarding whether these individualized analyses must be maintained by material advisors. If so, please provide any remedies available to a material advisor deemed to not have complied with the list maintenance requirement because he or she is unaware of individualized analyses.**

8. *Correct Due Date for Forms 8918.* Page 5 of the Notice contains the following sentence:

Further, if under § 301.6111-3(e), **a material advisor** is required to file a disclosure statement with respect to the listed transaction described in this notice by January 31, 2017, that disclosure statement will be considered to be timely filed if **the taxpayer** files the disclosure with the Office of Tax Shelter Analysis by May 1, 2017 (because April 30 is a Sunday).

(emphasis added). Some practitioners have expressed concern that the IRS will interpret "a material advisor" and "the taxpayer" to be separate entities, thereby not extending the Form 8918 due date from January 31, 2017 to May 1, 2017. **Please provide guidance confirming that the due date for Forms 8918 was extended from January 31, 2017 to May 1, 2017.**

### III. CONCLUSION

Obviously, time is of the essence. Some taxpayer participants will be submitting Forms 8886 with their timely filed returns within the next seven weeks. Material advisors will be submitting Forms 8918 on or before May 1, 2017. Most of these questions address issues regarding whether certain participants or material advisors are required to file the respective disclosure forms. IRS Guidance with these issues will clarify who is required to file the disclosure forms, potentially resulting in fewer forms filed as protective disclosures. The fewer forms will lessen the administrative impact on the IRS and allow a more efficient review of the forms that are filed.

Accordingly, we respectively ask that the IRS either 1) fully respond to this Request for Guidance within three weeks or 2) administratively extend the due dates of the disclosure forms by 180 days.

Feel free to call me with questions at (678) 631-9829.

Sincerely,

Randy Bampfield  
Legal Committee Co-Chair

cc:  
Elinor Ramey (via email)

## DOCUMENT ATTRIBUTES

### CODE SECTIONS

SECTION 6011 -- RETURN FILING REQUIREMENT  
SECTION 6111 -- TAX SHELTER REGISTRATION  
SECTION 6112 -- TAX SHELTER LIST REQUIREMENT  
SECTION 170 -- CHARITABLE DEDUCTION  
SECTION 6707A -- REPORTABLE TRANSACTIONS INFORMATION PENALTY  
SECTION 6708 -- TAX SHELTER INVESTOR LIST  
SECTION 6662 -- ACCURACY-RELATED PENALTY  
SECTION 6662A -- REPORTABLE TRANSACTIONS ACCURACY-RELATED PENALTY  
SECTION 6694 -- UNDERSTATEMENT BY RETURN PREPARER  
SECTION 6695A -- GROSS VALUATION MISSTATEMENTS

### JURISDICTIONS

[UNITED STATES](#)

### SUBJECT AREAS

CHARITABLE GIVING   EXEMPTIONS AND DEDUCTIONS  
COMPLIANCE   INFORMATION DISCLOSURE  
TAX AVOIDANCE AND EVASION

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