June 1, 2017

By US Priority Mail
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station Washington, D.C. 20044

By Hand
Courier’s Desk
Internal Revenue Service
1111 Constitution Avenue, N.W. Washington, D.C. 20224

By Electronic Submission


Dear US Treasury and Internal Revenue Service Officials:

This correspondence responds to the joint request of the Department of the Treasury (Treasury) and the Internal Revenue Service (Service) for public recommendations of tax issues to be included in the 2017-2018 Priority Guidance Plan (PGP) and addressed through regulation, revenue ruling, revenue procedure, notice, or other published administrative guidance via IRS Notice 2017-28 on Recommendations for 2017-2018 Priority Guidance Plan.

Thank you for requesting public input. The Land Trust Alliance (the Alliance) appreciates the Treasury’s and the Service’s acknowledgement that the published guidance process is most successful when it relies on the experience and knowledge of taxpayers and practitioners. Staff and counsel for the Alliance’s over 1,000 member land trusts, as tax-exempt organizations holding perpetual deeds of conservation easement, routinely and regularly apply the rules and regulations implementing conservation contributions pursuant to section 170(h) of the internal Revenue Code (the Code) and section 1.170A-14 of the Treasury Regulations (the Regulations).

After the Service added section 170(h) of the Code to its PGP in September of 2016, the Alliance also received a specific request for feedback from the land trust community made by Ms. Karin Gross of the Service’s Office of Chief Counsel. The Alliance solicited input from its members which resulted in correspondence and a white paper (the White Paper, dated January 30th, 2017) positing that existing Service regulatory authority and statistical data demonstrated that amendments of conservation easements granted pursuant to Code section 170(h) are not a problem requiring new regulation or guidance.
New additional regulation is unnecessary and disproportionate
The Alliance reiterates its conclusion that such new regulation is unnecessary given the extensive amendment-related statistics presented in the White Paper, as well as the potential for overreach in rulemaking unsupported by statistical data and facts, which would fail the reasoned decision-making standard of the Treasury and the Service as required by the Administrative Procedure Act (APA). Any additional regulation is duplicative as a result of the rules already in place providing the Service with broad authority for oversight and enforcement; and power to expand its existing oversight and enforcement authority regarding Code section 501(c)(3) charities.

For convenience, we will reiterate a few of the critical findings of the Alliance’s research. First, easement deed amendments are rare, and when used, necessary to ensure lasting protection of conservation purposes overall. The total number of deed amendments reported in the Alliance survey is nominal: on average, only 0.64 percent each year. Second, land trusts are acting responsibly and in compliance with their tax-exempt status when administering perpetual conservation easements. Of the 0.64 percent of easement deeds amended each year, more than three-quarters of amendments had a neutral, non-detrimental) effect and often increased benefits to conservation values—they added land, created new restrictions, corrected drafting errors, or clarified language in easement deeds, all of which are fully permissible under existing regulation and tax case law. The remaining quarter of the 0.64 percent involved court-ordered resolutions of disputes and other adjustments, all of which were necessary and resulted in the best possible result for protection of the conservation purposes. These statistics include all conservation easements, donated, purchased and extracted, held by Alliance members.

Only a tiny fraction of these amendments, about 2 percent of the 0.64 percent of easements that are amended in any given year or approximately four taxpayers annually, were attributed to categories of amendments that suggested even the potential for a less than neutral impact to protected conservation values. The time alone required for two senior counsel Service employees plus senior Treasury officials to work a year or more on a rule that affects at most four taxpayers annually is not an effective or efficient use of taxpayer funded time, nor responsive to any bona fide need to increase federal regulation of taxpayers or charities. Additional time from the Office of Management and Budget (OMB) and space in the Federal Register, plus collecting and responding to comments, further reduces any negligible benefit compared to the cost.

Statistics demonstrate virtually nonexistent need for new rules
The statistical data and facts presented in the White Paper demonstrate that the occurrence of “detrimental amendments” (i.e., easements that weaken the conservation protections of the easement) is virtually nonexistent. The considerable burdens and complications imposed by additional regulation would therefore vastly outweigh any benefit derived therefrom.

Moreover, any new regulation is rendered unnecessary as a result of the Service’s broad authority for oversight and enforcement and the Service’s power to expand its existing
oversight and enforcement authority regarding Code section 501(c)(3) charities. Any new regulation is further rendered unnecessary as a result of the following factors: (1) the Service’s rulemaking would be beyond its statutory authority and contrary to APA standards for reasoned decision making; (2) the rarity, but necessity, of amendments; and (3) state laws and processes governing decision making relating to real property interests.

Exercising the oversight authority that the Service already enjoys without additional rulemaking avoids these risks and has the added benefit of complementing state laws and processes directed at real property interests such as conservation easements. Additional rulemaking would constitute regulatory overreach in an already heavily regulated arena, in which conservation easements are already subject to extensive Service oversight and enforcement authority, as well as to state laws and processes guiding real property interests.

Moreover, proposed rulemaking for conservation easement amendments fails to meet the Treasury’s and Service’s criteria for inclusion on the PGP. As shown by Alliance and independent research, such regulation would not focus resources on guidance items that are most important to taxpayers and tax administration, but instead would unnecessarily increase regulation in an area of overwhelming compliance and therefore divert resources from higher-priority issues. In addition, research has demonstrated that any proposed regulation would not further increase voluntary compliance, because voluntary compliance is already all but universal.

New regulation will not clarify ambiguous areas of the tax law. Taxpayers, easement holders, and their professional advisors have abundant analysis and information available to them, pertaining to qualified conservation contributions under Code section 170(h). This body of conservation law has expanded and deepened over the last forty years, guided by the extensive existing regulatory guidance found in Regulation section 1.170A-14, and by decisions of the U.S. Tax Court. Creating new regulation would not resolve significant issues relevant to many taxpayers because there are not significant issues to resolve, and because only a small portion of taxpayers avail themselves of the qualified conservation contribution. If anything, additional regulation of conservation easement amendment is likely to increase, not reduce, uncertainty surrounding perpetual conservation easements.

**Land trusts are dedicated to ensuring perpetuity of conservation purposes**

The land trust community, led by the Alliance, has demonstrated a deep commitment to ensuring that amendments strengthen conservation easements. This commitment is reflected throughout the Alliance’s most important guidance documents, such as *Land Trust Standards and Practices* and the *Amendment Report*, each discussed in more detail in the White Paper. Sound amendment processes and decisions are also a key indicator for accreditation by the Land Trust Accreditation Commission. Further, Terrafirma Risk Retention Group LLC, providing conservation defense liability insurance for the land trust community as a section 501(n) charitable risk pool, has been essential in enhancing
the protection of conservation lands and plays a critical role in bolstering land trusts’ ability to defend the public benefit and conservation purposes when challenged.

Additional regulation will increase, instead of lessen, the burden on taxpayers and the Service. Given the potential to create conflict with existing applicable state real property laws, additional regulation will increase, instead of lessen, the burden on taxpayers and the Service in trying to reconcile federal tax law with state real property laws. A regulation requiring states’ administrative or judicial review of amendments, for example, would create an additional unfunded mandate on states’ already overburdened regulatory and judicial systems.

Further, rather than addressing “outdated, unnecessary, ineffective, insufficient, or unnecessarily burdensome existing regulations or other guidance,” any proposed regulation portends to confuse and complicate an area where existing guidance is demonstrably effective, appropriate, and germane. Moreover, existing regulations for conservation contributions promote sound and consistent tax administration on a uniform basis given their breadth, depth, and applicability to protected land and landowners living across the entire nation. The existing regulations are drafted in a manner that taxpayers can understand and apply given the pages of detail, explanation, and examples provided, and the numerous high-quality secondary sources available to guide taxpayers in interpreting these regulations.

Last, if the Treasury and the Service are determined to proceed with rulemaking for conservation easement deed amendments, they could simply add language to the existing Regulation section 1.170A-14 to require that such amendments be consistent with state real property laws and all other applicable state law. Any addition to existing Regulation section 1.170A-14 more than the above, or perhaps even any such regulation at all, would likely conflict with Executive Order 13771 (82 FR 9339) “Reducing Regulation and Controlling Regulatory Costs”, and Executive Order 13777 (82 FR 12285) “Enforcing the Regulatory Reform Agenda,” both of which severely restrict the number and type of regulatory guidance projects recommended during the 2017-2018 plan year and thereafter. Regulators in the tax arena can more advantageously focus their time and resources elsewhere in areas that could benefit from clarifying regulation. Thank you again for this opportunity to comment.

Sincerely,

Andrew Bowman
President

C: Karin Gross, Senior Attorney, IRS Office of Chief Counsel
Elinor Ramey, Office of Tax Policy, US Treasury