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United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
JOSHUA SHEINKMAN, DEMOCRATIC STAFF DIRECTOR

John Steven Bush



March 27, 2019

Dear Mr. Bush:

We are writing to you as the Chairman and Ranking Member of the Committee on Finance of the United States Senate. The Committee has exclusive jurisdiction within the Senate over matters of federal taxation, and we are conducting a bipartisan inquiry into syndicated conservation easement transactions that are identified in IRS Notice 2017-10, which was released on December 23, 2016, and amended by IRS Notice 2017-29, which was released on April 27, 2017. By the initial notice, designated transactions having certain characteristics became “listed transactions,” meaning their participants must disclose to the IRS on their tax returns their participation in the transaction, and each transaction’s material advisors have certain disclosure and list-maintenance obligations as well. For your convenience, copies of IRS Notices 2017-10 and 2017-29 are attached.

The Committee seeks information regarding the prevalence and nature of these transactions as well as the Notices’ effect on compliance with our tax laws. Accordingly, please respond to the following questions by **April 30, 2019** and please provide all documents electronically:

1. You are identified either in a database accompanying a Brookings Institution report dated December 20, 2017⁴ as having originated one or more partnership or pass-through entities that appear to be a vehicle for a listed transaction described in IRS Notice 2017-10, or you appear to be associated with such entities based on publicly available information. Such entities appear to be the following:

Benton INV, LLC
CXI Properties, LLC
Duck River Investments, LLC

FCT Investments, LLC
Harmon INV, LLC
NATRSC Investments, LLC

⁴ Available at <https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/>.

Otter Rock Investments, LLC

- a. Are you associated with these entities in any way?
 - b. Is the information contained in the database correct?
 - c. If it is not correct, please describe the nature of the entities listed immediately above, their purposes, and how or whether they created, distributed, or provided tax deductions for charitable contributions pursuant to 26 U.S.C. § 170 to their partners.
2. For each entity from which you distributed to investors tax deductions from the contribution of real property or easements to charity, please provide:
- a. The date(s) the partnership or pass-through entity(s) was formed,
 - b. The date(s) the partnership or pass-through entity(s) acquired the real property and the cost(s) of acquiring the real property involved,
 - c. A description of the real property as recorded in local land and real property tax records,
 - d. The dates that interests in the partnership or pass-through entity(s) were sold to each of the investors,
 - e. The date(s) conservation easements on the real property were granted,
 - f. The 501(c)(3) organization to which the real property or easements were contributed,
 - g. The total amount of deductions allocated and the tax years in which they were allocated,
 - h. The total number of investors in each entity, and
 - i. The total equity investments by all of the partners to the entity.

Please provide copies of all promotional materials provided to investors, or any other communications made prior to an investor's participation in the transaction, including but not limited to presentations, memoranda, letters, emails, and notes, however formal or informal, describing the investment opportunities or the amount of tax benefits expected as a result of or potential result of the investment.

3. For each of the entities responsive to Question #2, indicate whether the appraisals for the contributed properties involved include the dates and costs related to the partnership or pass-through entity acquiring the ownership of the real property. For each, describe the extent to which you provided such information to the appraisers for their appraisals of the contributed property at issue.
4. For all entities responsive to Question #2, please provide copies of all appraisals (or other statements of value) for each contribution of real property, regardless of whether the appraisals were final copies, that were provided to investors, or were used to support the value of a charitable contribution under 26 U.S.C. § 170.

5. For all entities responsive to Question #2, indicate whether you prepared, or arranged to be prepared, assessments (or baseline studies or similar analyses) of the conservation value of the real property. Please provide copies of all such assessments regardless of whether the assessments were final copies, were provided to investors, or were used to support the value of a charitable contribution under 26 U.S.C. § 170.
6. For each of the entities responsive to Question #2 indicate the following:
 - a. Did you provide to anyone legal opinions and/or memoranda as to the federal and/or state tax treatment of the investment for the investor?
 - b. Did you recommend counsel to investors for the purpose of providing legal opinions and/or memoranda?
 - c. The name and contact information for the counsel responsible for drafting and/or aiding in the drafting of such opinion and/or memoranda.
 - d. Please provide copies of all such legal opinions and memoranda associated with each entity responsive to Question #2 above.
7. Did you provide investors with any instructions or guidance as to how to comply with federal or state tax law, whether prior to an investor's entering into the transaction or subsequent to it, including the filing of federal or state tax returns?

Please provide copies of all such instructions and guidance as to how investors might comply with federal and state tax law as well as federal and state tax-return filing requirements.

8. With regard to IRS Notices 2017-10 and 2017-29:
 - a. Did you provide investors with any instructions or guidance as to how to comply with the requirements of IRS Notice 2017-10? If so, please provide copies of all such instructions and guidance as to how investors might comply with the requirements of IRS Notice 2017-10.
 - b. For each reportable transaction for which interests in the partnership or pass-through entities were sold or otherwise exchanged after December 23, 2016, please provide copies of any and all communications by you or your agents to partners concerning IRS Notices 2017-10 and 2017-29 or the possible status of the investment as a "listed transaction."
9. Under Federal tax law, individuals designated as material advisors to any reportable transaction must file Form 8918 to disclose certain information about the reportable transaction. A material advisor must also maintain a list identifying each entity or individual to whom the advisor was a material advisor to a reportable transaction.
 - a. Did you file the Form 8918 with the IRS for each transaction identified in IRS Notice 2017-10?

- b. Did you file with the IRS any protective disclosures in response to IRS Notice 2017-10?
 - c. Did you maintain an investor list as required by law?
 - d. Please provide all copies of Form 8918 for each transaction.
 - e. Please provide all copies of your investor lists for each transaction, including the names and addresses of each investor.
10. To what extent did your partnership or pass-through entities include a vote of the partners to determine whether to contribute a conservation easement, hold for investment, or develop the real property?
- a. In any instance, did the partners ever vote in favor of developing the real property? If so, how many such votes in favor of developing the property took place?
 - b. What was the total number of partner votes in which developing real property was at issue?
 - c. In any instance, did the partners ever vote in favor of holding the real property for investment? If so, how many such votes in favor of holding real property for investment took place? What was the total number of partner votes in which holding real property for investment was at issue?
 - d. For each transaction, what was the projected non-tax economic profit for investors of developing the real property?
 - e. For each transaction, what was the projected non-tax economic profit for investors of holding the real property for investment?
For each transaction, what was the projected tax benefit for investors of contributing the real property or an easement on the real property?
 - f. Please provide copies of all minutes, presentations, memoranda, letters, emails, notes, and any other description of the processes by which such votes were conducted, however formal or informal, reflecting the meetings (or other manners of voting) at which the votes discussed in Question #10 were held.
11. To the extent not provided in response to the questions above, please provide copies of all organizational documents for the entities responsive to Question #2, meeting minutes for such entities, all formal or informal documentation relating to the relationship between such entities and their investors, all SEC filings for such entities, and all communications with any state- or local-government agency or official regarding such entities or their associated syndicated conservation easement transactions.
12. For each investment transaction separately provide the percentages and amounts of the total of partners' investment was:
- a. Charged or otherwise retained by (i) you, and (ii) by each non-partner in the entity, as compensation, commissions, or fees,
 - b. Retained as audit or contingency reserves, and

- c. Retained or contributed to a tax-exempt entity to provide for maintenance of the real property or easement held by the tax-exempt entity that received the contribution.

All questions and document requests listed above should be read as including requests for draft materials, materials that were intended for an audience of one individual, and materials intended for an audience of more than one individual. These document requests should also be read as requesting materials maintained in hard-copy form, and such materials with hand-written notes on them should be considered separate from their original-source materials and separately responsive to this request for documents, as are the original-source materials. All uses of “and” and “or” should be read as “and/or,” and singular forms should be read as including the plural forms, and plural forms should be read as including the singular forms. The word/root word “partner” should be read to also mean “member” or similar such individual where entity terminologies so require it in order for any given question or request to make sense given the specific applicable pass-through form at issue.

Furthermore, if you withhold any documents on account of any privilege, please provide a privilege log describing each such document, its date, its author(s), its recipient(s) or intended recipient(s), and the nature of the privilege(s) claimed.

Should you have any questions, please contact John Schoenecker of the Chairman’s staff and Chris Arneson of the Ranking Member’s staff at 202-224-4515. Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on Finance



Ron Wyden
Ranking Member
Senate Committee on Finance

Listing Notice--Syndicated Conservation Easement Transactions

Notice 2017-10

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested. This notice alerts taxpayers and their representatives that the transaction described in section 2 of this notice is a tax avoidance transaction and identifies this transaction, and substantially similar transactions, as listed transactions for purposes of § 1.6011-4(b)(2) of the Income Tax Regulations (Regulations) and §§ 6111 and 6112 of the Internal Revenue Code (Code). This notice also alerts persons involved with these transactions that certain responsibilities may arise from their involvement.

SECTION 1. BACKGROUND

Section 170(f)(3)(B)(iii) of the Code allows a deduction for a qualified conservation contribution. A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. Section 170(h)(1) through (5); § 1.170A-14. A qualified real property interest includes a restriction, granted in perpetuity, on the use that may be made of real

property. Section 170(h)(2)(C). For purposes of this notice, a qualified real property interest is referred to as a conservation easement.

The Treasury Department and the IRS have become aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to claim charitable contribution deductions in amounts that significantly exceed the amount invested. In such a syndicated conservation easement transaction, a promoter offers prospective investors in a partnership or other pass-through entity (“pass-through entity”) the possibility of a charitable contribution deduction for donation of a conservation easement.

The promoters (i) identify a pass-through entity that owns real property, or (ii) form a pass-through entity to acquire real property. Additional tiers of pass-through entities may be formed. The promoters then syndicate ownership interests in the pass-through entity that owns the real property, or in one or more of the tiers of pass-through entities, using promotional materials suggesting to prospective investors that an investor may be entitled to a share of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor’s investment. The promoters obtain an appraisal that purports to be a qualified appraisal as defined in § 170(f)(11)(E)(i) but that greatly inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property. After an investor invests in the pass-through entity, either directly or through one or more tiers of pass-through entities, the pass-through entity donates a conservation

easement encumbering the property to a tax-exempt entity. Investors who held their direct or indirect interests in the pass-through entity for one year or less may rely on the pass-through entity's holding period in the underlying real property to treat the donated conservation easement as long-term capital gain property under § 170(e)(1). The promoter receives a fee or other consideration with respect to the promotion, which may be in the form of an interest in the pass-through entity. The IRS intends to challenge the purported tax benefits from this transaction based on the overvaluation of the conservation easement. The IRS may also challenge the purported tax benefits from this transaction based on the partnership anti-abuse rule, economic substance, or other rules or doctrines.

SECTION 2. FACTS

A transaction described in this section is a listed transaction. An investor receives promotional materials that offer prospective investors in a pass-through entity the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment. The promotional materials may be oral or written. For purposes of this notice, promotional materials include, but are not limited to, documents described in § 301.6112-1(b)(3)(iii)(B) of the Regulations. The investor purchases an interest, directly or indirectly (through one or more tiers of pass-through entities), in the pass-through entity that holds real property. The pass-through entity that holds the real property contributes a conservation easement encumbering the property to a tax-exempt entity and allocates, directly or

through one or more tiers of pass-through entities, a charitable contribution deduction to the investor. Following that contribution, the investor reports on his or her federal income tax return a charitable contribution deduction with respect to the conservation easement.

SECTION 3. LISTED TRANSACTIONS

Transactions entered into on or after January 1, 2010, that are the same as, or substantially similar to, the transaction described in section 2 of this notice are identified as “listed transactions” for purposes of § 1.6011-4(b)(2) and §§ 6111 and 6112 effective December 23, 2016. Persons entering into these transactions on or after January 1, 2010, must disclose the transactions as described in § 1.6011-4 for each taxable year in which the taxpayer participated in the transactions, provided that the period of limitations for assessment of tax has not ended on or before December 23, 2016. Material advisors, including appraisers, who make a tax statement on or after January 1, 2010, with respect to transactions entered into on or after January 1, 2010, have disclosure and list maintenance obligations under §§ 6111 and 6112. See §§ 301.6111-3, 301.6112-1.

For rules regarding the time for providing disclosure of a transaction described in this notice, see §§ 1.6011-4(e) and 301.6111-3(e). However, if, under § 1.6011-4(e)(1), a taxpayer is required to file a disclosure statement with respect to a transaction described in this notice after December 23, 2016, and prior to May 1, 2017, that disclosure statement will be considered to be timely filed if the taxpayer alternatively

files the disclosure with the Office of Tax Shelter Analysis by May 1 (because April 30 is a Sunday). In addition, for purposes of disclosure of transactions described in this notice, the 90-day period provided in § 1.6011-4(e)(2)(i) is extended to 180 days. 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).

Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the syndicated conservation easement transaction described in section 2 may already be subject to the requirements of §§ 6011, 6111, 6112, or the regulations thereunder. The transaction described in section 2 is identified as a listed transaction regardless of whether the transaction has the characteristics described in section 1 of this notice.

Whether a taxpayer has participated in the listed transaction described in section 2 of this notice will be determined under § 1.6011-4(c)(3)(i)(A). Participants 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.

For purposes of this notice, a donee described in § 170(c) shall not be treated as a party to the transaction under § 4965 or a participant under § 1.6011-4.

Participants required to disclose these transactions under § 1.6011-4 who fail to do so will be subject to penalties under § 6707A. Participants required to disclose these transactions under § 1.6011-4 who fail to do so may also be subject to an extended period of limitations under § 6501(c)(10). Material advisors required to disclose these transactions under § 6111 who fail to do so may be subject to the penalty under § 6707. Material advisors required to maintain lists of investors under § 6112 who fail to do so (or who fail to provide such lists when requested by the IRS) may be subject to the penalty under § 6708(a). In addition, the IRS may impose other penalties on persons involved in these transactions or substantially similar transactions, including the accuracy-related penalty under § 6662 or § 6662A, the § 6694 penalty for understatements of a taxpayer's liability by a tax return preparer, and the § 6695A penalty for certain valuation misstatements attributable to incorrect appraisals.

The Treasury Department and the IRS recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the type of transaction described in this notice. These taxpayers should take appropriate corrective action and ensure that their transactions are disclosed properly.

DRAFTING INFORMATION

The principal authors of this notice are Angella L. Warren and Maxine M. Woo-Garcia of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice contact Ms. Warren at (202) 317-7003 (not a toll-free call) or Ms. Woo-Garcia at (202) 317-7011 (not a toll-free call).

Syndicated Conservation Easement Transactions Identified in Notice 2017-10

Notice 2017-29

On December 23, 2016, the IRS released Notice 2017-10, 2017-4 IRB 544, identifying syndicated conservation easement transactions described in section 2 of that notice and substantially similar transactions as listed transactions for purposes of § 1.6011-4(b)(2) of the Income Tax Regulations and §§ 6111 and 6112 of the Internal Revenue Code. Section 3 of Notice 2017-10 provides that in the case of a participant with a disclosure obligation with respect to these transactions under § 1.6011-4(e)(2)(i) (regarding subsequently listed transactions), the disclosure is due to the IRS Office of Tax Shelter Analysis on June 21, 2017. In response to requests for additional time for participants to meet the disclosure obligation with respect to these transactions under § 1.6011-4(e)(2)(i), this notice extends the due date for participants filing disclosures under § 1.6011-4(e)(2)(i) from June 21, 2017, until October 2, 2017.

The due date for disclosure by material advisors under § 301.6111-3(e) and participants who have disclosure obligations under § 1.6011-4(e)(1) (regarding returns filed after December 23, 2016) with respect to the transaction described in section 2 of Notice 2017-10 is unchanged by this notice and remains May 1, 2017.

This notice also provides that for purposes of Notice 2017-10, a donee described in § 170(c) is not treated as a material advisor under § 6111.

EFFECT ON OTHER DOCUMENTS

Notice 2017-10 is modified.

DRAFTING INFORMATION

The principal author of this notice is Maxine Woo-Garcia of the Office of the Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice contact Ms. Woo-Garcia at (202) 317-7011 (not a toll-free call).