

The IRS is Not Backing Down: Proposed Regulations Issued Regarding Abusive Tax Shelters Including Certain Syndicated Conservation Easement Transactions

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Less than a month after the heavily followed *Green Valley Investors, LLC*, et al., decision, the IRS issued proposed regulations to identify certain syndicated conservation easement transactions as listed transactions – this time after complying the Administrative Procedure Act (APA) by allowing for public notice and comment.

On November 9, 2022, in *Green Valley*, the U.S. Tax Court held that Notice 2017-10, which designated certain syndicated conservation easement transactions as listed transactions, was invalid and issued in violation of the APA. Since late 2016, by the issuance of Notice 2017-10, the IRS has treated certain syndicated conservation easements as listed transactions, requiring additional information from taxpayers and material advisors, and subjecting taxpayers to additional penalties for underpayment. A listed transaction is one type of reportable transaction that are the same as, or substantially similar to, a transaction specifically identified as a tax avoidance transaction. Among other things, when a transaction becomes a listed transaction, all participants are required to disclose their involvement to the Office of Tax Shelter Analysis within 90 days for all tax years where the assessment limitations period remains open. Failure to comply with the disclosure obligations may subject the taxpayer and material advisors to an extended statute of limitations and penalties. The *Green Valley* decision was significant as the Tax Court clearly stated that it would no longer uphold listed transaction penalties issued under Notice 2017-10 against taxpayers.

The *Green Valley* decision followed a similar Sixth Circuit decision, *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022), where the Sixth Circuit held that another listed transaction Notice regarding trust arrangements to be invalid under the APA. Over the years, the IRS has identified over 30 listed transactions without following the APA's notice and comment procedures. The procedures surrounding Notices like 2017-10 are entirely informal and do not provide an opportunity for the public to submit input regarding the contents of the Notice. However, when the

IRS creates a legislative rule, such as by designating certain transactions to be listed transactions, rather than merely interpreting existing law, the IRS is required to comply with the APA's informal rulemaking process. The APA requires agencies that are issuing a legislative rule to issue a notice of proposed rulemaking and provide the public a meaningful opportunity to comment on the proposal before a final rule can be issued. Based on the comments, the agency then may choose to issue a new proposed rule or modify the rule. While an agency does not need to respond to all comments, any final rule must include an explanatory preamble that includes a response to the significant and relevant issues raised by the public. Therefore, those effected by the designation of certain syndicated conservation easements as listed transactions now have the opportunity to submit comment on the issue. Electronic or written comment can be submitted to the IRS until February 6, 2023.

While the government maintains its position that listed transactions may be identified by notice and other sub-regulatory guidance and that the APA's notice and comment procedures do not apply, the announcement states the intention to issue proposed regulations identifying additional listed transactions in the near future. The conservation easement regulations are set to be finalized in 2023.

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