



March 16, 2022

The Honorable Ron Wyden  
Chair, Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Mike Crapo  
Ranking Member, Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chair Wyden, Ranking Member Crapo, and Members of the Committee:

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, we write in regard to your March 17 hearing, "Examining Charitable Giving and Trends in the Nonprofit Sector."<sup>1</sup> As a 501(c)(4) nonprofit organization, NTU is directly affected by Congressional efforts to change or reform the federal government's policy treatment of charitable giving – as is NTU's research arm NTU Foundation, a 501(c)(3) nonprofit organization.

NTU has also advised Members of Congress and their staff on a variety of tax policy issues, including the tax treatment of nonprofit organizations, for decades, and we work with dozens of organizations across the ideological spectrum that share our nonprofit status. In other words, NTU has expertise in the subject of the Committee's hearing and would be significantly impacted by any proposals that arise from this hearing.

Specifically, we have endorsed a number of proposals that we believe would make it easier for nonprofit organizations to carry out their missions and for Americans to freely and robustly support those missions. We have also done extensive policy research and issue advocacy with regards to conservation easement tax deductions, a possible topic at the Committee's hearing, and have also

### **NTU Reform Recommendations**

Notwithstanding our concerns with proposals to retroactively increase taxes and penalties in the administration of certain charitable deductions (outlined further below), NTU has offered and/or endorsed several policy proposals in recent years that we believe have bipartisan potential in the nonprofit and charitable sectors.

Each of these proposals would either make it easier for nonprofits to carry out their important missions, either by making it easier for Americans to contribute to nonprofit organizations of their choice or by making it easier for nonprofits to comply with a complex and ever-changing tax code.

When Congress considered extending the charitable contribution deduction for non-itemizers last year, NTU shared some of our concerns and instead pointed to our support for the bipartisan Everyday Philanthropist Act from Sens. Ben Sasse (R-NE) and Tammy Baldwin (D-WI), and Reps. Vern Buchanan (R-FL) and Tom Souzzi (D-NY).

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<sup>1</sup> United States Senate Committee on Finance. "Examining Charitable Giving and Trends in the Nonprofit Sector." March 2022. Retrieved from: <https://www.finance.senate.gov/hearings/examining-charitable-giving-and-trends-in-the-nonprofit-sector> (Accessed March 15, 2022.)

As we wrote in December 2021:

“While this provision [to provide a charitable contribution deduction for non-itemizers] may be well-intentioned, NTU believes there are better alternatives to encourage charitable giving in a fiscally responsible manner. One such framework could be the one proposed in the Everyday Philanthropist Act (H.R. 4585), introduced by Representatives Vern Buchanan (R-FL) and Tom Souzzi (D-NY). Similar to Flexible Spending Accounts (FSAs) that allow Americans to fund medical expenses on a pre-tax basis, this bipartisan legislation would allow workers to utilize Flexible Giving Accounts up to \$2,700 of their annual pre-tax earnings. As NTU President Pete Sepp explained, ‘the legislation draws upon the successful infrastructure that has already been established to support Flexible Spending Accounts, which were created by law in 1978 and have subsequently been refined by IRS guidance.’ While there are likely other alternatives to the \$300 above line deduction, this is one option that would support charitable giving and protect taxpayers’ privacy.”<sup>2</sup>

Indeed, our support for the Everyday Philanthropist Act – which is sponsored by a Member of this Committee, Sen. Sasse – is based in part on the ongoing need to protect the privacy of donors and taxpayers, as we noted in an August 2020 support letter for the legislation:

“Additionally, [the Everyday Philanthropist Act] augments administrability in the sense that if they so choose, employers can provide part of the framework for taxpayers to make donations to charities whether in place of, or as a complement to, any other tax-deductible contributions they may wish to make on their returns. The Flexible Giving Accounts envisioned in the bill should effectively be less susceptible to audit because of the documentation trail they establish, giving some peace of mind to those taxpayers who opt solely for making gifts directly out of their employer-provided compensation.”<sup>3</sup>

NTU also believes that Congress could improve tax administration and compliance for the nonprofit sector, a particularly important consideration given many nonprofit organizations are small and/or resource-constrained.

In January 2022, we wrote to Members of this Committee on ways Congress could simplify and reform the filing process surrounding Form 990.<sup>4</sup> We recommended:

- Revisiting the cash flow and asset filing thresholds for the Form 990-EZ and the long Form 990, which have not been adjusted for more than a decade, and pursuing additional opportunities to improve the filing process for nonprofit organizations;
- Examining the rationale for both expanded and reduced filing requirements for different areas of the nonprofit sector, where treatment is sometimes unequal;
- Giving specific consideration to a comprehensive IRS report on improving the taxpayer experience – required by the Taxpayer First Act – that would, if certain reforms are enacted, directly affect nonprofit organizations; and

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<sup>2</sup> Lautz, Andrew; and Yopez, Will. “Not All Tax Extenders Are Created Equal - 2021.” NTU, December 1, 2021. Retrieved from: <https://www.ntu.org/publications/detail/not-all-tax-extenders-are-created-equal-2021#h.qe2pfuaeq87q>

<sup>3</sup> Sepp, Pete. “Letter of Support for the Everyday Philanthropist Act.” NTU, August 10, 2020. Retrieved from: <https://www.ntu.org/publications/detail/letter-of-support-for-the-everyday-philanthropist-act>

<sup>4</sup> Sepp, Pete. “Congress Should Explore Form 990 Reform, Simplification in 2022.” NTU, January 31, 2022. Retrieved from: <https://www.ntu.org/publications/detail/congress-should-explore-form-990-reform-simplification-in-2022>

- Examining state-level developments affecting nonprofits that could afford opportunities for harmonization and cooperation at the federal level.

## **Conservation Easement Deductions**

One area of charitable giving tax policy the Committee may re-explore today (and highlighted in a JCT document prepared for the hearing) encompasses the Section 170(h) deduction. As part of NTU's longstanding work on tax administration, we have amassed considerable experience in this area that may interest the Committee. Why should this be the case, given the deduction's relatively minor revenue impact?

For one, the Section 170(h) deduction has ably fulfilled bipartisan Congressional intent by encouraging conservation of land and historic structures through private management – a far more cost-efficient method for taxpayers than outright federal ownership of these properties. Second, and more important from our perspective, despite continuous statements from the IRS and Members in support of 170(h), detrimental actions against the deduction have spoken louder than benign words.<sup>5</sup>

Over our 50-plus-year history, we have encountered instances of tax law enforcement against small groups of taxpayers that have an outsized impact on the entire filing population (e.g. the expansion of summons authority as well as designating cases for litigation). In our recent memory, none have exceeded the collateral damage inflicted on the system of tax administration more than the Service's pursuit of what it calls "syndicated conservation easement transactions" since the issuance of a listed transaction notice in 2016. This includes:

- **Retroactivity.** Although issued in late 2016, Notice 2017-10 has been the basis of a near-100 percent IRS audit rate of partnership-based conservation easement transactions, some dating back many years prior. Audits are, by their nature, backward-looking, yet they are normally confined to establishing whether a taxpayer faithfully complied with laws, rules, and other guidance that were firmly anchored in place during the year for which the examination was launched. Current IRS audits of partnership easements are often based on the Service's shifting interpretations of laws and rulings, some of them upending decades of established understanding of how Section 170(h) deductions should be structured. Some legislation in Congress would effectively ratify and validate this flawed approach.
- **Arbitrary Litigation Strategies.** Going with the Service's extremely aggressive assertion of retroactive application of its shifting positions in audits has been its similarly fluid stance in court. The resulting caseloads have now strained to the breaking point a tax jurisprudence system that is simultaneously bearing the administrative fallout of the pandemic. The first wave of IRS lawsuits challenging Section 170(h) deductions tended to center on the appraised value of the conservation easements underlying the taxpayers' claims. Yet, after a string of court losses where the government fatuously argued zero or minimal value to all the easements under scrutiny, further waves of IRS litigation made far more exotic arguments against "foot faults" involving highly technical details of easement agreements themselves – details which the entire conservation and historic preservation communities had long regarded as settled features. As David Wooldridge, an attorney representing taxpayers in a conservation easement case,

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<sup>5</sup> For background, see: Hickman, Bryan. "Environmental Tax Deduction At Risk Due to Overzealous IRS." NTU, July 29, 2019. Retrieved from: <https://www.ntu.org/publications/detail/environmental-tax-deduction-at-risk-due-to-overzealous-irs>; See also: Sepp, Pete. "Shortsighted: How the IRS's Campaign against Conservation Easement Deductions Threatens Taxpayers and the Environment." NTU, November 29, 2018. Retrieved from: <https://www.ntu.org/publications/page/shortsighted-how-the-irss-campaign-against-conservation-easement-deductions-threatens-taxpayers-and-the-environment>

*Belair Woods, LLC*, noted, “Proceeds clauses similar to the one in *Belair* appear in most conservation easement deeds that were granted prior to IRS raising this issue in *Rose Hill*, and many granted afterwards. These include the so-called syndicated conservation easements, but they also include most easements that would be considered ‘traditional.’ The Service’s position therefore would invalidate easement deductions for a majority of existing conservation easements, both traditional and ‘syndicated.’”<sup>6</sup> This should be unacceptable to thoughtful policymakers.

- **Taxpayer Rights Reversals.** Throughout NTU’s history, we have witnessed the development of IRS tactics intended to target one perceived problem which evolved into widespread use. In its zeal to scrutinize taxpayers claiming 170(h) deductions, the IRS has trampled on key protections that NTU has actively championed for many years, including supervisor approval requirements for penalty determinations, due process for appraisers, access to independent administrative appeals, the acknowledgment of facts process for information document requests, confidentiality of communication between taxpayers and advisors, and Administrative Procedure Act (APA) conventions in crafting guidance. As a leading advocate of no fewer than five significant taxpayer protection bills signed into law since 1988, NTU implores you to consider this rising toll on the good work of your predecessors in establishing procedural balance for enforcement of our tax laws.

Even as they criticized so-called “syndicated transactions” in an August 2020 report both the Chair and Ranking Member of this Committee recognized Section 170(h) as “an important tool for the preservation of our environment” and “a program that’s critical to preserving open lands.”<sup>7</sup> If these statements are to hold true today, then Congress can make calibrations to the law that will uphold 170(h), protect taxpayers, and serve the government’s long-term interests. A media account in December 2021 seemed to indicate that lawmakers might consider 170(h) changes that would be prospective in nature; if true, this would represent major progress toward a rational response. Other steps, which we have often recommended, include:

- A legislative branch directive for the IRS to develop “safe harbor” guidance surrounding easement deduction structures (a process the National Taxpayer Advocate has recommended in reports to Congress, and which Treasury Secretary Yellen expressed interest in pursuing during her 2021 confirmation hearing);
- Creation of an expert panel to resolve complex questions of valuation in easements, modeled after a similar body created to provide clarity for donations of art;
- Follow-on legislation that would clarify and require vigorous implementation of the Taxpayer First Act of 2019, including a taxpayer’s right to appeal; and
- Where possible, adopting by statute the recommendations for conservation easement deductions offered through the IRS Advisory Council through a detailed report in 2009. Given the recent Oakbrook ruling, and the prospect for litigation in this space the government may lose, Congress might better focus its attention on clarifying directly the terms of a legitimate easement agreement as well as subjecting the IRS to prudent notice and comment requirements than seeking punitive legislation driven by prospective (and tenuous) revenue scores.

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<sup>6</sup> Reilly, Peter J. “Conservation Easements: Is IRS Burning The Forest In Order To Save It?” *Forbes*, August 5, 2020. Retrieved from: <https://www.forbes.com/sites/peterjreilly/2020/08/05/conservation-easements-is-irs-burning-the-forest-to-save-it/?sh=617850624904> (Accessed March 16, 2022.)

<sup>7</sup> United States Senate Committee on Finance. “Finance Committee Releases Report on Syndicated Conservation-Easement Transactions.” August 25, 2020. Retrieved from: <https://www.finance.senate.gov/chairmans-news/finance-committee-releases-report-on-syndicated-conservation-easement-transactions> (Accessed March 16, 2022.)

As we have written before, solving the administrative issues that have arisen under Section 170(h) in a fair, responsible, and consistent manner would serve the government, taxpayers, and practitioners far better than retroactive, punitive legislation giving cover to an IRS that has lost all perspective on this area of law – and, in the process, threatening taxpayers who will never even contemplate claiming conservation easements.

We appreciate your consideration of NTU's research and reform recommendations on the important subject of your March 17 hearing. Should you have any questions, we are at your service.

Sincerely,

Pete Sepp  
President, National Taxpayers Union

Andrew Lautz  
Director of Federal Policy, National Taxpayers Union

CC: Members of the Senate Committee on Finance