February 6, 2023

CC:PA:LPD:PR (REG-106134-22)
Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

RE: REG-106134-22

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, we write with comments on your notice of proposed rulemaking (NPRM) and notice of public hearing on proposed rulemaking published in the Federal Register on December 8, 2022, "Syndicated Conservation Easement Transactions as Listed Transactions."[1] We are most grateful to be able to provide our perspective on several far-reaching issues raised by this rulemaking that are of longstanding interest to NTU and to many taxpayers, well beyond those familiar with Section 170(h) of the Internal Revenue Code.[2]

Introduction

NTU is the nation's oldest taxpayer advocacy organization, founded in 1969 to achieve favorable policy outcomes for taxpayers with Congress and the executive branch. For nearly as long, our experts and advocates have engaged federal policymakers on important questions surrounding taxpayer rights and due process.

As we noted in a 2017 communication to the House Ways and Means Subcommittee on Oversight:

> '...NTU has led efforts in support of Congressional legislation to improve operations of the Internal Revenue Service (IRS) and provide greater balance in the tax enforcement process. During the late 1970s and 1980s, NTU informed Congress of taxpayers who experienced IRS maladministration firsthand, as well as organized a large coalition of civil liberties organizations that successfully persuaded Congress to enact the first 'Taxpayers' Bill of Rights' as part of the Technical and Miscellaneous Revenue Act of 1988.'[3]

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[1] Federal Register. "Syndicated Conservation Easement Transactions as Listed Transactions." Published December 8, 2022. Retrieved from: https://www.federalregister.gov/documents/2022/12/08/2022-26675/syndicated-conservation-easement-transactions-as-listed-transactions (Accessed February 1, 2022.)
[2] The author of these comments is also indebted to the published works of Joseph Bishop-Henchman, Executive Vice President of the National Taxpayers Union Foundation, for much of the case-law-based research and citations that helped inform this document.
[3] Sepp, Pete. "IRS Reform: Resolving Taxpayer Disputes." National Taxpayers Union, September 13, 2017. Retrieved from: https://www.ntu.org/publications/detail/irs-reform-resolving-taxpayer-disputes# (Accessed February 1, 2023.)

NTU served on the National Commission on Restructuring the IRS in the 1990s, and helped craft the codified taxpayer bill of rights included in the 2015 Protecting Americans From Tax Hikes (PATH) Act. More recently, we provided significant technical assistance to Congress for what became the Taxpayer First Act (TFA) of 2019, and worked with stakeholders across government to ensure its enactment into law. We have likewise provided comments on a number of IRS rulemakings which, in our opinion, have an impact on taxpayers well beyond their immediately defined scope.[4] We believe that REG-106134-22 certainly fits such a description.

IRS Should Consider an Entirely New Rulemaking that Better Comports with Section 605 of P.L. 117-328

We observe that this proposed rulemaking, the language of which has appeared in various forms for many years, has been overtaken by events. On December 29, 2022, President Biden signed into law the SECURE 2.0 Act, P.L. 117-328, including its Section 605 that disallows partnership conservation easement deductions where the value exceeds 2.5 times basis. This proposed rulemaking, which pre-dates that enactment and was contemplated in the absence of such a statute, is now unnecessary in some respects (the vast majority of what the regulation seeks to restrict would be non-deductible now) and in conflict with the new statute in others (the scope of the regulation vs. the narrow focus of the statute, "equals" 2.5 times basis vs. "exceeds" 2.5 times basis, etc.). In light of these developments, this proposed rulemaking should be withdrawn, and a more surgical approach reissued in a manner in concord with the new statute. The Service may still conclude this rulemaking is needed, but that analysis has not yet been conducted. Merely proceeding with a few alterations to REG-106134-22, is not, in our opinion, as desirable as proceeding with an entirely new rulemaking, potentially incorporating only a few of REG-106134-22's provisions.

Whether through a New Rulemaking or Substantially Revised One, Details Will Matter; and Other Federal Entities' Experience Provide Instructive Guidance

Whichever the course the Service might choose, we believe there are several elements of REG-106134-22 that deserve major scrutiny and improvements before they could comport with Section 605 of P.L. 117-328. The term "substantially similar" in this rulemaking is defined via an almost circular manner, stating "in § 1.6011-4(c)(4) to include 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 or a similar tax strategy." Unfortunately, § 1.6011-4(c)(4) provides very little additional elaboration, except to restate the rulemaking's language and to warn taxpayers

[4] See, for example, Sepp, Pete. Comments, "Estate, Gift, and Generation-Skipping Transfer Taxes; Restriction on Liquidation of an Interest." IRS-REG-163113-02, November 2, 2016. Retrieved from: https://www.ntu.org/publications/detail/irs-considering-backdoor-death-tax-hike. (Accessed February 1, 2023). Sepp, Pete. Comments, "Certain Non-Government Attorneys [are] Not Authorized to Participate in Examinations of Books and Witnesses as a Section 6103(n) Contractor." IRS-2018-0008-0001, June 29, 2018. Retrieved from: https://www.ntu.org/publications/detail/ntu-comments-to-irs-on-private-contracts. (Accessed February 1, 2023). Peter J. Sepp and Andrew Lautz. Comments, "Resolution of Federal Tax Controversies by the Independent Office of Appeals." REG-125693-19, November 14, 2022. Retrieved from: https://www.ntu.org/publications/detail/ntu-offers-comments-to-irs-on-resolution-of-federal-tax-disputes. (Accessed February 1, 2023.)

that there are few guidance details upon which they can rely:

> The term *substantially similar* includes 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 or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term *substantially similar* must be broadly construed in favor of disclosure.

It is true that § 1.6011-4(c)(4) provides two examples from previous listed transaction notices to help define "substantially similar." However, neither example is dispositive to help a taxpayer determine whether their transaction is *not* "substantially similar." Furthermore, listed transactions, by their nature, involve highly complex matters whose only common feature is that the IRS puts participants on notice that they are being scrutinized for higher levels of disclosure and information reporting. Beyond this, applying any tax rule to the facts and circumstances of a particular case necessarily requires detailed and specific definitions in rulemakings of what is "substantially similar". With reportable and listed transactions, this is an especially important benchmark to meet, and should be reused to include both positive and dispositive examples to assist involved parties with meeting their obligations under the law.

The need for such clarity has only grown in the past few years, as those in the land conservation space will attest. Two and half years ago, even supporters of the IRS's "no tolerance" strategy embodied in Notice 2017-10 were left to speculate whether it would lead to "collateral damage" for non-syndicated easement transactions. Peter Reilly, a near-constant critic of SCETs who urged on the IRS's issuance of Notice 2017-10, wrote in 2020 that the IRS's focus on technical aspects of conservation easement deeds would present difficulties for law enforcement: "The problem with those 'gotchas' is that they are traps that people who are not trying to get away with anything can fall into."[5] Such speculation – and outright concern – has only been amplified with this issuance of REG-106134-22.

It need not be this way. Other federal entities have grappled with this very same question of how to define "substantially similar," and provide what we believe to be instructive input for IRS. A recent example of which we are aware comes from the Federal Housing Finance Agency (FHFA), an independent agency which has the mission of ensuring that the housing Government Sponsored Enterprises (GSEs) are "operating in a safe and sound manner to serve as a reliable source of liquidity and funding for the housing finance market throughout the economic cycle." Given that the housing GSEs are currently under taxpayer-backed conservatorship, FHFA serves a function that is not dissimilar from the IRS's oft-stated interest of protecting the revenue base.

[5] Reilly, Peter J. "Is the IRS Burning the Forest to Save It?". Forbes, August 5, 2020. Retrieved from: https://www.forbes.com/sites/peterjreilly/2020/08/05/conservation-easementsis-irs-burning-the-forest-to-save-it/?sh=47caa4cd490 (Accessed February 1, 2023.) See also Sepp, Pete. "News Flash: IRS, Urged to Take Scalpel against Conservation Deduction Issues, Swings Sledgehammer." National Taxpayers Union, August 12, 2020. Retrieved from: https://www.ntu.org/publications/detail/news-flash-irs-urged-to-take-scalpel-against-conservation-deduction-issues-swings-sledgehammer#940ff6549041. (Accessed February 1, 2023).

In December 2022, FHFA issued a final rule on "Prior Approval for Enterprise Products," a proposal of great concern to taxpayers owing to the potential for GSEs to engage in new activities that could add to the financial risk of their balance sheets. According to FHFA, the law requires Fannie Mae and Freddie Mac "to provide advance notice to the Federal Housing Finance Agency (FHFA) before undertaking a new activity and to obtain prior approval from FHFA before offering a new product to the market, and requires FHFA to adopt an implementing regulation on certain points."[6]

Several complex matters presented themselves in formulating a rule regarding pilot projects (e.g., the controversy involving multifamily underwriting). Technical definitions of what "substantially similar" activity or product that might be included or excluded from FHFA review prior to approving a GSE pilot were vitally important, according to many of the 17 public comments that were received. FHFA was highly proactive in absorbing the detailed public comments to refine, clarify, and improve the initial rulemaking, especially around defining this "substantially similar" question. According to FHFA's fact sheet on the final rulemaking: "Public input has provided FHFA with useful information to help refine the rule. As a result, the final rule includes targeted enhancements from the proposed rule."[7]

The result is a streamlined but carefully designed, transparent process for the housing GSEs that will allow FHFA to "verify that exclusion criteria have been satisfied" for permitting GSEs to engage in new activities without the more comprehensive review process normally associated with pilot projects. FHFA's process includes specific definitions for both what is, and what isn't, "new activities" pertaining to "enterprise technology systems that apply mortgage terms and conditions or underwriting criteria." These highly technical terms, conditions, and criteria can rival the language of tax laws, once again demonstrating that a collaborative, non-adversarial public comment process can result in rulemakings that benefit both the regulated and the regulators. In fact, FHFA took the helpful step of publishing a chart indicating what changed and what did not from the initial rulemaking to the final one.

In our opinion FHFA's process in RIN-2590-AA17 is as exemplary as it is praiseworthy, and should serve as a model here. FHFA actively solicited, evaluated, and incorporated stakeholder views into improving the administrability of regulations – again for the benefit not only of those affected by the regulations, but those in charge of carrying out the regulations. Emulation here would produce a regulation that no one could say "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."[8]

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[6] Federal Housing Finance Agency. "Prior Approval for Enterprise Products Final Rule (RIN-2590-AA17)." 87 FR 79217, Published December 27, 2022. Retrieved from: https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Final-Rule-for-New-Enterprise-Products-and-Activities.aspx. (Accessed February 1, 2023.)

[7] Federal Housing Finance Agency. "FHFA FACTSHEET ON THE NEW ENTERPRISE PRODUCTS AND ACTIVITIES FINAL RULE." News Release, December 20, 2022). Retrieved from: https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Final-Rule-for-New-Enterprise-Products-and-Activities.aspx. (Accessed February 1, 2023.)

[8] United States. v. Harriss, 347 U.S. 612, 617 (1954).

Sometimes, "Strategic Ambiguity" Is Harmful to the Government's Interests

While agencies can differ on how much they absorb expert input and incorporate such input into its rules or guidance, the Service could do more in this regard. Indeed, this was a central contention in *Oakbrook Land Holdings, LLC v. Commissioner of Internal Revenue,* in which National Taxpayers Union's sister organization, National Taxpayers Union Foundation, filed an amicus brief.[9]

While the *Oakbrook* case did not survive a petition for certiorari to the U.S. Supreme Court, this is hardly the only voice on the matter of the IRS's consideration of public input. In *CIC Services v. IRS*, *Green Rock v. U.S.*, and other cases, courts have become increasingly sensitive toward the government's need to seriously, and methodically, weigh public opinions on practical aspects of tax regulations.

It is sometimes argued that effective tax administration requires "strategic ambiguity" to create a compliance attitude of "better safe than sorry" among taxpayers and preserve flexibility for enforcement. We would disagree. In any area of law, ambiguity not only creates perceptions of unfairness among citizens, it also can result in protracted administrative headaches for the government. Both the former, but particularly the latter, has certainly been the case with IRS's compliance approach to Section 170(h) and Notice 2017-10. The Service has pursued several strategies against SCETs, beginning with valuation challenges of the underlying easements, then moving into "foot faults" with easement agreements and other associated transactions. The near-100 percent audit rate of these transactions has exacted, and will continue to exact, a heavy toll on IRS examination, collection, and litigation resources that threaten other compliance initiatives.[10]

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[9] The amicus brief notes: The IRS has a long-standing view that it need not comply with the APA. See, e.g., CIC Services, LLC v. IRS, 925 F.3d 247, 258 (6th Cir. 2019), cert. granted, 140 S. Ct. 2737 (U.S. May 4, 2020) ("Defendants do not have a great history of complying with APA procedures, having claimed for several decades that their rules and regulations are exempt from those requirements."); Cohen v. United States, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc) ("The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority."); Kristin E. Hickman & Gerald Kerska, Restoring the Lost Anti-Injunction Act, 103 VA. L. REV. 1683, 1714 (2017) ("Even after the Supreme Court's pronouncement in Mayo Foundation that both specific and general authority Treasury regulations carry the force of law, the government has continued to assert that many or even most Treasury regulations are exempt interpretative rules."); Kristin E. Hickman, A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements, 76 GEO. WASH. L. REV. 1153, 1214 (2008) ("Despite Treasury's claims to the contrary, the evidence is strong 20 that Treasury has an APA compliance problem."). The 1986 regulation was a product of this defiance, with Treasury using the bare minimum of "six columns of the Federal Register to address more than 700 pages of timely comments and more than 200 pages of public testimony." Oakbrook, 154 T.C. No. 10 at 23 (Holmes, J., dissenting). Commenters made significant arguments and Treasury failed to address them. A "dialogue" that "responds to significant points raised by the public" it was not. See Home Box Office v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977)

[10] See, for example, Kane, Mitchell, "The Dispute Over Perpetual Conservation Easements Just Got Worse," 106 *Tax Notes State* 717 (Nov. 28, 2022) ("[This litigation at least raises the prospect of casting a cloud over existing, or future, easement transactions that are not abusive and are within the set of transactions that Congress plausibly wanted to encourage. The status quo is thus not obviously the best outcome in terms of the law applicable to the tax treatment of conservation easements under section 170."); IR-2022-17 (announcing 200 new attorney hires to "help the IRS manage the increasing caseload"); IRS Announcement 2022-28 (proposing REG-106134-22 to "eliminate any confusion and to ensure that these decisions do not disrupt the IRS's ongoing efforts to combat abusive tax shelters throughout the nation").

IRS Should Follow through on Safe Harbor Guidance Regarding SCETs

NTU additionally recommends that the interests of both taxpayers and the IRS would be far better served by withdrawing this rulemaking, in light of statutory changes under the Consolidated Appropriations Act, P.L. 117-328, which direct the agency to publish safe harbor deed language by April 28, 2023. Such model language should be detailed and acknowledged by the IRS to be generally applicable and acceptable as lawful in the majority of cases involving conservation easement transactions of *all* types. Such an approach would better serve the Service's goals than this proposed regulation. Treasury and the Treasury Secretary had previously committed to develop safe harbor language for conservation easement deeds.[11]

Safe harbors have been established in other contentious areas of tax law to allow for efficient and effective tax administration while protecting the revenue base. Examples include:

- Revenue Procedure 20-12, a highly complex matter involving structures of taxpayers directly relevant to REG-106134-22, was issued to clarify how the IRS would "treat partnerships as properly allocating, in accordance with section 704(b) of the Internal Revenue Code (Code), the credit for carbon oxide sequestration under section 45Q of the Code (Section 45Q Credit)." The intent, 'to simplify the application of section 45Q to partnerships that are eligible to claim the Section 45Q Credit,' is one model for helping to develop a safe harbor concerning easement transactions involving more than one taxpayer. Rev. Proc. 20-12 included a 3-½ page, highly instructive example of how the safe harbor would apply to a hypothetical partnership involving multiple participants in various stages of the project.
- In another case relevant to SCET valuation matters, some 15 years ago the IRS constructed a safe harbor for complying with Section 409(a) of the Internal Revenue Code, which pertains to fair market value of a private company's common stock.[12] The Service elucidated, in great detail, three different acceptable methods that could be utilized for determining fair market value. While NTU would recommend that a fair market value safe harbor for land donations under SCETs should incorporate the congressionally adopted Uniform Standards of Professional Appraisal Practice, the 409(a) model is notable for striking a balance between taxpayers' needs for certainty and the government's need for transparent compliance.
- In 2019, the IRS modified and clarified safe harbor guidance for the types of expenses that are acceptable for hardship distributions for qualified retirement plans. This procedure, T.D. 9875, is noteworthy in its applicability for the current rulemaking's circumstances by its specificity of listed qualifying expenses for hardship, as well as its construction of a recordkeeping chain between

[11] Letter from Janet Yellen to the Senate Finance Committee (Jan. 20, 2021) (responding to a question about safe harbor guidance for conservation easement deeds with a promise to "strive to meet that goal through the issuance of taxpayer guidance"); National Taxpayer Advocate, 2019 Annual Report to Congress at 203 (recommending that the IRS "[d]evelop and publish guidance to provide safe harbors and/or sample easement provisions to provide taxpayers with examples of how they may construct a conservation easement deed that satisfies the statutory requirements and prevent unnecessary litigation."); see also National Taxpayer Advocate, 2022 Objectives Report to Congress at 144 (stating that the IRS had accepted this recommendation only in part, and that "additional guidance" would be needed to "help taxpayers navigate these complex issues and prevent unnecessary litigation").

[12] The various rulemakings and other IRS communications regarding Section 409A are best compiled in Internal Revenue Bulletin 2007-19, retrieved from: https://www.irs.gov/irb/2007-19_IRB#RR-2007-29. (Accessed February 1, 2023.)

> employee and administrator of the necessary information for determining an immediate and heavy financial need. The matters addressed in this regulation are not unlike those confronted in REG-106134-22, in determining information return and recordkeeping requirements.

Congress has decided that conservation easements would generally be eligible for tax deductions. So safe harbors are appropriate here. One response to these examples might be that particular iterations of taxpayer deduction claims under listed transaction status should not be eligible for safe harbors. Safe harbors can, do, and should exist alongside other compliance strategies, statutes, and regulations, and are essential if the goals include promoting voluntary compliance and serving in the best long-term interests of sound tax administration.

"Deadweight Costs" to Taxpayers and Governments Can Be Refined

We would be remiss if we did not mention the need for the most thorough exploration possible of the taxpayer compliance costs associated with REG-106134-22. The rulemaking states:

> Accordingly, because the proposed regulations are limited in scope to time and manner of information reporting and definitional information, the economic impact of the proposal is expected to be minimal. Further, the Treasury Department and the IRS expect that the reporting burden is low; the information sought is necessary for regular annual return preparation and ordinary recordkeeping. The estimated burden for any taxpayer required to file Form 8886 is approximately 10 hours, 16 minutes for recordkeeping, 4 hours, 50 minutes for learning about the law or the form, and 6 hours, 25 minutes for preparing, copying, assembling, and sending the form to the IRS. The IRS's Research, Applied Analytics, and Statistics division estimates that the appropriate wage rate for this set of taxpayers is $98.87 (2021 dollars) per hour.

Since 1999, our sister organization National Taxpayers Union Foundation has conducted detailed examinations of compliance costs with various portions of the Tax Code, examining in detail the implications of particular changes to the laws in light of the Paperwork Reduction Act, P.L. 96-511. For example, we have noted significant swings in business tax compliance burdens that defy immediate explanation:

> The IRS had previously reported that there were 'no capital/start-up or ongoing operation/maintenance costs' associated with Form 4562, used for calculating Depreciation and Amortization (imposing 448 million compliance hours). In response to that NTU [Foundation] commented: It is, of course, implausible that a form that imposes a time cost of nearly 450 million hours has no out-of-pocket costs associated with it, suggesting that compliance burdens could remain significantly underreported in some ways.
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> As that illustrates, in many cases the IRS simply does not have sufficient feedback from taxpayers to incorporate an expense estimate with many forms. Many of the collections in the database include the same IRS note listed above for Form 4562. This includes the notorious Form 1099-B, which takes up

> over 674 million hours of compliance. It is astonishing that the IRS expects to receive 1.4 billion submissions of this form, nearly 4 filings for every person in the country.

Note that the context of this discussion centers on information returns, which are not unlike Form 8886 in the types of obligations they impose upon taxpayers. Indeed, researchers have previously noted the volatility of attempting to estimate compliance costs connected to taxpayer activities that may present few up-front filing activities, but do entail a great deal of "back-end" recordkeeping chores. In accordance with the Paperwork Reduction Act, the Internal Revenue Service commissioned a study by Arthur D. Little to survey taxpayers about the amount of time they spent on tax compliance activities for the 1983 tax year. This landmark study has since been critiqued, refined, and built upon for more than three decades. But among the more cogent summations of the Little study came from Professor James L. Payne in the 1993 book *Costly Returns*:

> Against [the] tendency to overreport [filling out tax returns] is a tendency to overlook many types of tax compliance activities when they take place in small, undramatic ways… One compliance task that is almost certain to be underreported is learning about tax requirements. Throughout our lives, we spend a great deal of time reading about tax requirements and discussing tax issues with friends and acquaintances. All this attention is unlikely to be specifically recalled as tax compliance labor… On balance then, the self-report of tax compliance activities would seem to have two offsetting biases: the tendency to exaggerate intense work done on a frustrating task, and the tendency to overlook smaller tasks and "background" tax compliance activities.[13]

Thus, in our experience, the estimated burden associated here with Form 8886 is likely understated. In the past, IRS has employed wage rates for taxpayers that are often far too low. For example, in REG–108060–15 regarding Section 385 earnings stripping (whose documentation rules were delayed prior to passage of the Tax Cuts and Jobs Act of 2017). In its own estimate of private-sector compliance costs, the government apparently assumed that the compensation for employees who would need to advise companies on compliance with the Section 385 rule would amount to $18 per hour – an absurdly low figure.[14]

The compensation amount for estimating compliance costs related to Form 8886, reported in REG-106134-22, at $98.97, is not absurd, but is still, in our opinion, likely low. A listed transaction necessarily requires a higher level of scrutiny, disclosure, and legal liability for a taxpayer than any other kind of tax reporting obligation. It would therefore not be surprising if a high-level tax professional would be enlisted to fulfill such an obligation. As of 2022, the average hourly fee for an accountant to perform tax-related duties was $174 according to the National Society of Accountants, while the hourly rate for a tax attorney can be between $200 and $450. It would therefore not be inappropriate for the paperwork burden estimate and associated costs reported in REG-106134-22 to be off by a factor of two or three.

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[13] Payne, James L. *Costly Returns: The Burdens of the U.S. Tax System*, (San Francisco: ICS Press, 1993); pp. 20-21.

[14] Sepp, Pete. "Comments to the Acting IRS Commissioner on Tax Reform Implementation." National Taxpayers Union, November 1, 2018. Retrieved from: https://www.ntu.org/publications/detail/ntu-comments-to-the-acting-irs-commissioner-on-tax-reform-implementation. (Accessed February 1, 2023).

It is not only the amount of time and out-of-pocket expense for each taxpayer that must be considered here, but rather the burden on multiple parties to a single tax transaction who are judged to be material advisors or other responsible persons. Since listed transactions are tools of high scrutiny, many individuals with only peripheral involvement in SCETs could file Forms 8886 (or 8918) simply out of an abundance of caution.

Given the broad sweep of REG-106134-22, certainly rivaling if not exceeding the original Notice 2017-10, NTU has commented previously how the burdens can add up quickly. A single conservation easement partnership could easily involve 50 investors and 20 material advisors, each of whom would need to prepare the Form 8886 or 8918. Using the IRS's own figures, Notice 2017-10 racked up 1,475 more hours of paperwork requiring the services of highly-compensated tax professionals. The labor and out-of-pocket expense associated with this one exercise would likely exceed one million dollars for a single year – resources that instead could have been directed toward more conservation efforts or other productive pursuits.

Overbroad regulations can – indeed, are sometimes designed to – sweep in many more taxpayers who are honestly attempting to claim and report Section 170(h) deductions. REG-106134-22's deadweight loss must be considered more fully in the drafting of regulations and the reporting and filing burdens imposed by them, utilizing tools that could range from Job Aids to symposia called by the Research, Applied Analytics, and Statistics division, the National Taxpayer Advocate, the IRS Advisory Council, NTU, or other bodies.[15]

We would also point out that the obligatory Unfunded Mandates Reform Act (UMRA) statement accompanying REG-106134-22 should be much more than a perfunctory exercise. The additional information reporting requirements, along with the heightened compliance burdens associated with any listed transaction, could plausibly impact state or local tax administration as well. Conservation easement-based tax relief programs exist in roughly one-third of the states today, while at least an additional third offer conservation tax relief programs whose administration could, at certain points, intersect with some of the administrative requirements of Section 170(h) as well as the dictates of REG-106134-22.[16]

Given this context, it seems at least possible that the UMRA trigger of $100 million could, upon careful analysis, be triggered in the case of this rulemaking. Among the potential burdens would be the necessity to update state or even local regulations concerning the acceptance of land donations, harmonization of information reporting with the requirements of REG-106134-22, and cooperation with examination proceedings that might arise from the listed transaction notice. The fact that few estimates seem to have been conducted so far of the existing burden on state and local tax law enforcement of Notice 2017-10 is of concern to NTU. The IRS should consider directing recently enhanced budgetary funding toward more comprehensive

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[15] Brady, Demian. "Public Comments on IRS Tax Forms Can Help Ease Filing Burdens." National Taxpayers Union Foundation, March 17, 2022. Retrieved from: https://www.ntu.org/foundation/detail/public-comments-on-irs-tax-forms-can-help-ease-filing-burdens. (Accessed February 1, 2023). "…With better data, the IRS and policymakers will have a better idea of problem areas of the tax code, those which impose undue time and expense burdens relative to the amount of taxes they collect."

[16] See, for example, Congressional Sportsmen's Foundation. "Conservation Tax Incentives." Retrieved from: https://congressionalsportsmen.org/policies/state/conservation-tax-incentives. (Accessed February 1, 2023.) Also, George, Susan. "CONSERVATION IN AMERICA: State Government Incentives for Habitat Conservation. A Status Report." Defenders of Wildlife, March, 2002, retrieved from: https://defenders.org/sites/default/files/publications/conservation_in_america_state_profiles.pdf. (Accessed February 1, 2023). In the 20 years since this report was first published, state tax and other conservation incentive programs have likely proliferated in number and in type.

research and analysis not only of the taxpayer compliance burdens associated with IRS rulemakings, but also of the concomitant UMRA implications.

Conclusion

As we noted in the beginning of these comments, NTU is concerned that the approaches developed in REG-106134-22 could eventually apply to much larger portions of the tax filing population than those availing themselves of improper Section 170(h) deductions. At stake here are matters such as the quality, quantity, and timing of notice-and-comment procedures, IRS's utilization of public comments to meaningfully improve tax administration, and the Service's exploration of alternatives (such as safe harbors) to encourage compliance, particularly in light of enactment of P.L. 117-328.

Please contact us at president@ntu.org for additional questions or comments, or regarding our request to speak at the agency's public hearing. Thank you for your consideration.

Sincerely,

Pete Sepp, President

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