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In this article, Tyson and Gross provide a framework to analyze whether a land trust that receives easements from passthrough entities may be a material adviser in a syndicated conservation easement transaction, and they offer reassurance for land trusts concerned about their reporting obligations.

I. Introduction

On October 8, 2024, Treasury issued T.D. 10007, the final regulations identifying syndicated conservation easement (SCE) transactions as listed transactions. A requirement for deducting a qualified conservation contribution is that the recipient (the donee) is a qualified organization, typically a land trust or a historic preservation entity.[1] Through Notice 2017-29, 2017 IRB 1243, donees have historically been exempt from the material adviser disclosure rules for SCEs.[2] Treasury, however, did not retain this exemption in the SCE regulations.[3]

II. Evolution of Listed Transaction Reporting

A. The 80s and DEFRA

In 1984, the Colts were still in Baltimore, Ronald Reagan was president, and the country's economic conditions had improved.[4] Even so, Congress was concerned that budget deficits would threaten continued economic growth and that the tax base would erode from tax sheltering activity.[5] Some of these concerns were addressed in the Deficit Reduction Act of 1984 (DEFRA), which added reporting rules so the IRS would have more complete and systematic information to evaluate which tax shelters to audit.[6]

DEFRA added new section 6111, which generally required that the principal organizer of a tax shelter disclose the transaction to the IRS and

[1] Section 170(h)(1)(B).

[2] Notice 2017-29, 2017 IRB 1243 ("This notice also provides that for purposes of Notice 2017-10, 2017-10 IRB 544, a donee described in section 170(c) is not treated as a material advisor under section 6111.").

[3] T.D. 10007.

[4] The Colts left Baltimore in the middle of the night on March 28, 1984. Mike Preston, "40 Years After Colts Left, Baltimore Remains a Football City Like No Other," *Baltimore Sun*, Mar. 29, 2024.

[5] Joint Committee on Taxation, "General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984," JCS-41-84, at 5 (Dec. 31, 1984).

[6] DEFRA, sections 141-144; H.R. Rep. No. 98-861 (DEFRA Conference Report) at 977-982, 999 (1984).

obtain a registration number to give to tax shelter participants to include on their tax returns.[7] DEFRA also added new section 6112, which required a tax shelter organizer to maintain lists of investors available upon request to the IRS, lest the organizer be subject to penalties under sections 6707 and 6708.[8]

B. The Aughts, Reportable Transaction Regs, the First Listing Notice, and the AJCA

Fast-forward to Y2K, boy bands, and low-rise jeans. On February 28, 2000, the IRS and Treasury issued the first in a series of proposed and temporary regulations defining a listed transaction[9] as "a transaction the same as or substantially similar to the type of transaction that the IRS determined to be a tax avoidance transaction and identified by notice, regulation, or other published guidance as a listed transaction."[10] Also on February 28, 2000, the IRS issued Notice 2000-15, 2000-12 IRB 1, which identified 10 transactions as listed transactions.[11]

Four years later, in 2004 (when the "it" phone was the Motorola Razr), Congress enacted the American Jobs Creation Act (AJCA). The repeal of the U.S. extraterritorial income exclusion was front and center in the AJCA, the sting of which was cushioned by the domestic production deduction. To defray the cost, Congress strengthened tax shelter disclosure requirements and enhanced penalties for nondisclosure.[12] The registration rules enacted in DEFRA were vague and confusing, so Congress tinkered with section 6111 to provide a single, clear definition of the transactions that must be disclosed and by whom: A material adviser to a reportable transaction must file an information return with the IRS describing the transaction and expected tax benefits.[13]

For this purpose, a material adviser is any person who both (1) provides material aid, assistance, or advice regarding organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction; and (2) directly or indirectly derives gross income for the aid, assistance, or advice exceeding a threshold amount ($10,000 for listed transactions, from which substantially all of the tax benefits are provided to natural persons).[14] A person provides material aid, assistance, or advice if the person makes or provides a tax statement to or for the benefit of a taxpayer or a material adviser.[15] A tax statement is any statement (oral or written), including another person's statement, that relates to the tax aspect of a transaction that causes the transaction to be reportable (including tax result protection).[16] When evaluating material adviser status, this definition is critical.

Congress also included a definition of listed transaction in the code, adopting the following regulatory definition: "a reportable transaction, which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011."[17] Post-AJCA, section 6111 required material advisers to report information identifying the reportable transaction to the IRS. A material adviser who failed to do so faced

[7] DEFRA, section 141(a); DEFRA Conference Report at 977-981; JCT, *supra* note 5, at 475. If the principal organizer failed to disclose the tax shelter, any person who participated in organizing it was responsible for disclosing it, and tertiary responsibility for reporting the shelter lay with anyone who managed or sold the investment. Ordinarily, the rendition of professional advice by an unrelated attorney or accountant would not constitute the organization of a tax shelter. DEFRA Conference Report at 979.

[8] DEFRA, sections 141(b), 142(a), 142(b); *see* DEFRA Conference Report at 981-982, 978-979.

[9] T.D. 8875 added reg. section 301.6112-1T; T.D. 8876 added reg. section 301.6111-2T; T.D. 8877 added reg. section 1.6011-4T.

[10] Reg. section 1.6011-4T(b)(2) (T.D. 8877); reg. section 1.6111-2T(b)(2) (T.D. 8876, 65 F.R. 11218).

[11] Notice 2000-15, 2000-12 IRB 1.

[12] American Jobs Creation Act of 2004. The revenue provisions of AJCA were enacted in Title VIII, including the tax shelter provisions enacted in subtitle B of Title VIII (AJCA sections 811 et seq.); *see* JCT, "General Explanation of Tax Legislation Enacted in the 108th Congress," JCS-5-05, at 361 (May 31, 2005).

[13] JCS-5-05, *supra* note 12, at 370-371.

[14] *Id.* at 371; section 6111(b)(1); reg. section 301.6111-3(b)(1). The threshold amount of gross income is intended to ensure that any penalty imposed on a material adviser under section 6707 is not disproportionate to the benefit received by the material adviser. REG-160872-04, 73 F.R. 78255. The statute confers discretion to Treasury to set amounts different than the statutory threshold amount. Section 6111(b)(1)(A)(ii). For listed transactions in which substantially all tax benefits are to natural persons (looking through partnerships, S corporations, or trusts), the threshold amount is $10,000. Reg. section 301.6111-3(b)(3)(i)(B).

[15] Reg. section 301.6111-3(b)(2)(i); T.D. 10007, 89 F.R. at 81352.

[16] Reg. section 301.6111-3(b)(2)(ii).

[17] Section 6707A(c)(2); *see* H.R. Rep. No. 108-755 at 597 (Oct. 7, 2004). The legislative history cites the definition of listed transaction in reg. section 1.6011-4(b)(2). H.R. Rep. No. 108-755 at 595 and n.454.

increased penalties (for example, the penalty in section 6707 for failing to disclose information regarding tax shelter registration and the penalty in section 6708 for failing to provide complete investor lists upon request by the IRS).[18]

A material adviser must file a completed Form 8918, "Material Advisor Disclosure Statement," that describes the transaction, (including all potential tax benefits and any tax result protection from insurance or otherwise), and identifies other material advisers.[19] The Form 8918 must be filed with the Office of Tax Shelter Analysis by the last day of the month following the calendar quarter during which the adviser became a material adviser for the transaction.[20]

III. SCEs as Listed Transactions

On December 23, 2016, in Notice 2017-10, 2017-10 IRB 544, the IRS identified an SCE as a listed transaction.[21] By then, the IRS had identified as listed (in a notice or revenue ruling) almost 40 transactions.[22]

Soon after, efforts were underway to challenge the validity of listing notices under the Administrative Procedure Act.[23] In *CIC Services*, the government argued that the Anti-Injunction Act barred consideration of the issue, but the Supreme Court disagreed.[24] The courts then repeatedly invalidated the SCE listing notice under 5 U.S.C. section 706 because the IRS did not adhere to notice and comment procedures in the APA (5 U.S.C. section 553).[25]

The IRS tried again. On December 22, 2022, Treasury issued a notice of proposed rulemaking with proposed regulations identifying SCEs as listed transactions.[26] On October 8, 2024, Treasury issued reg. section 1.6011-9 in final form to identify SCE transactions as listed transactions.[27] Reg. section 1.6011-9(b) defines the SCE transaction as follows:

1. a taxpayer receives (1) promotional materials, (2) that offer investors an investment in a passthrough entity, (3) for a possible charitable contribution deduction two and a half times or more the

[18]Sections 6707(b), 6708; H.R. Rep. No. 108-755 at 610-611. The Gulf Opportunity Zone Act of 2005, section 412, made a corrective amendment to section 6111(b)(1)(A). The AJCA also created section 6707A, the penalty for a participant's failure to disclose information about tax shelter transactions. Every taxpayer that participated in a listed transaction and is required to file a tax return must file a disclosure form (Form 8886, "Reportable Transaction Disclosure Statement") with each copy of the tax return for each tax year participating in the listed transaction. For the first filing, the participant must also file the Form 8886 with the IRS Office of Tax Shelter Analysis. Reg. section 1.6011-4(a), (d), and (e); section 7701(a)(1). For listed transactions, participation means either the tax return has tax results from strategy described in the listing guidance, or the taxpayer knows or has reason to know that the benefits are from a listed transaction. Reg. section 1.6011-4(c)(3)(i)(A). A Form 8886-T, "Disclosure by Tax Exempt Entity Regarding Prohibited Tax Shelter Transaction," is also in the IRS's Form 8886 series. The Form 8886-T is used to disclose the tax-exempt entity's participation in a tax shelter transaction, as defined in section 4965(e) (listed and prohibited reportable transactions). Reg. section 1.6033-5(a)(1). For section 4965, the SCE regulations treat qualified organizations as if they are not a party to the transaction. Reg. section 1.6011-9(f); T.D. 10007, 89 F.R. 81347.

[19]Reg. section 301.6111-3(a), (d).

[20]Reg. section 301.6111-3(e); Internal Revenue Manual 20.1.13.2.1.

[21]Notice 2017-10. *Forbes* referred to the notice as the IRS leaving "a lump of coal in the sock of the folks who have used (or were planning to use) pre-packaged conservation easements to lower their taxes." Jay Adkission, "The IRS Leaves a Lump of Coal for Syndicated Conservation Easements in Notice 2017-10," *Forbes*, last updated Jan. 3, 2017. On April 27, 2017, the IRS modified Notice 2017-10 to clarify that a donee was not a material adviser in an SCE transaction. Notice 2017-29.

[22]IRS, "Recognized Abusive and Listed Transactions" (last updated Nov. 13, 2025).

[23]The rulemaking provisions of the APA require that when an agency creates legislative rules, it must generally follow procedures for notice and comment (meaning the agency issues a general notice of proposed rulemaking, allows people to comment, and includes in the final rule a concise statement of its purpose). 5 U.S.C. section 553.

[24]*CIC Services LLC v. IRS*, 593 U.S. 209, at 214-216 (2021) (A material adviser challenged the validity of the listing notice for microcaptive insurance, arguing that the listing notice was an information reporting requirement subject to the notice and comment procedures in the APA. The government argued that the listing notice gave rise to a penalty, which was a tax under the Anti-Injunction Act in section 7421(a), and therefore a suit to restrain the assessment or collection of tax was barred. In a unanimous decision, the Court held for the material adviser).

[25]*Green Rock LLC v. IRS*, 104 F.4th 220 (11th Cir. 2024), *aff'g*, 654 F. Supp. 3d 1249 (N.D. Ala. 2023); *GBX Associates LLC v. United States*, No. 1:22-cv-00401 (N.D. Ohio Nov. 14, 2022); *Green Valley Investors LLC v. Commissioner*, 159 T.C. 80 (2022). The Sixth Circuit considered the APA's application in a different listed transaction (microcaptive insurance), setting aside that listing notice under 5 U.S.C. section 706(2) because the notice did not follow notice and comment procedures required by 5 U.S.C. section 553. *Mann Construction Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022).

[26]REG-106134-22. Two weeks later, Congress enacted section 170(h)(7), which generally treats a contribution of a conservation easement by a partnership (directly or indirectly) as not a qualified conservation contribution if the contribution exceeds two and a half times the sum of each partner's relevant basis in the partnership. Section 170(h)(7)(A). The exceptions are (1) for property held three or more years, section 170(h)(7)(C); (2) for a partnership in which substantially all (90 percent) of the partnership interests are held directly or indirectly by family members, section 170(h)(7)(D) and section 152(d)(2)(A)-(G), reg. section 1.170A-14(n)(3); and (3) a qualified conservation contribution for preservation of any building that is a certified historic structure, section 170(h)(7)(E). Section 170(h)(7) is separate from the listing regulations and should be analyzed separately from the analysis of the listing regulation.

[27]T.D. 10007, 89 F.R. 81341-81358.

taxpayer's investment in the passthrough entity;
2. the taxpayer acquires an interest (directly or indirectly) in the passthrough entity that owns or acquires the property;
3. the passthrough entity that owns the real property contributes a conservation easement on the real property and allocates the charitable contribution deduction to the taxpayer; and
4. the taxpayer claims a deduction for the charitable contribution on the taxpayer's federal income tax return.

The order of the steps is irrelevant.[28]

Note the following points from the final regulations and accompanying preamble:

- There is no exemption from disclosure for the three types of transactions carved out of the statutory disallowance regime in section 170(h)(7)(C)-(E) (that is, conservation easements on property held at least three years, conservation easements donated by family partnerships, and conservation easements for historic preservation).[29]
- Disclosure is required both for conservation easements and donations of land in fee simple.[30]
- To determine whether promotional materials offer investors in a passthrough entity the possibility of being allocated a charitable contribution deduction that is greater than or equal to two and a half times the taxpayer's investment in the passthrough entity, the focus is on the taxpayer's investment in the passthrough entity.[31]
- Unlike Notice 2017-29, the final regulation provides no blanket exception for land trusts from the definition of a material adviser.[32]
- The final regulations define promotional materials broadly.[33]

IV. Framework for Material Adviser Status Under Reg. Section 1.6011-9

When evaluating a material adviser's disclosure obligation, the devil is in the details, and the details are in the regulations. The facts should be analyzed using a two-pronged approach: (1) Is the transaction an SCE as defined by reg. section 1.6011-9 and, if so, (2) is the candidate a material adviser under reg. section 301.6111-3(b)(1) regarding that SCE transaction? If the answer to either is no, then the candidate is not a material adviser and need not file Form 8918 with the IRS. The order of steps is immaterial. Based on the information available to the candidate, it might be more prudent to first evaluate whether the candidate provided a tax statement or received fees exceeding $10,000 for the tax statement(s). This is particularly true if the candidate lacks full knowledge of all aspects of the transaction. If the candidate did not provide a tax statement or receive fees exceeding $10,000 for the tax statement(s), then there is no need to inquire further for purposes of the candidate's disclosure of the transaction as a material adviser.

A. Prong 1: Transaction Status as an SCE Under the Listing Regulation

Under the first prong, analyze each of the four elements of an SCE as articulated in reg. section 1.6011-9.[34] In the first element (that is, reg. section 1.6011-9(b)(1)), each subelement should be separately examined:

- Did promotional materials offer the possibility of a charitable contribution deduction equal to or exceeding two and a half times the taxpayer's investment in a passthrough entity?
- Did the taxpayer actually receive the promotional materials? One investor's receipt of promotional materials does not

[28] Reg. section 1.6011-9(b); T.D. 10007, 89 F.R. at 81350.

[29] T.D. 10007, 89 F.R. at 81345.

[30] Reg. section 1.6011-9(c)(7).

[31] Reg. section 1.6011-9(b).

[32] T.D. 10007, 89 F.R. at 81353; *see supra* note 21 (discussing the exclusion in Notice 2017-29 of a donee from the definition of a material adviser in an SCE transaction).

[33] Reg. section 1.6011-9(c)(4), 89 F.R. at 81352.

[34] The definition, consisting of four elements, is listed in the text preceding note 28.

necessarily trigger receipt of promotional materials by all investors.[35]

- Review the promotional materials for language about a deduction of two and a half times or more of the investor's investment.[36] Although the regulations define promotional materials broadly, for there to be a listed transaction, the promotional materials must offer a deduction equal to or exceeding two and a half times the investor's investment.[37]
- The two and a half times is of the taxpayer's investment amount, which is determined under the anti-stuffing method or the relevant basis method. These methods both rely on the basis allocable to the real property on which the easement is placed.[38]

The other elements are easier: Did the taxpayer acquire an interest (directly or indirectly) in the passthrough entity that owns or acquires the real property?[39] Did the passthrough entity that owns the real property donate an easement (or donate the property in fee simple) and allocate a deduction (directly or indirectly) to the taxpayer?[40] Did the taxpayer claim a deduction for the contribution?[41] Remember that the order of the actual transaction steps is immaterial.[42] If the transaction is not an SCE, end the analysis; disclosure is not required.

B. Prong 2: Status as a Material Adviser vis-a-vis the SCE Transaction

1. Tax statement.

As explained previously,[43] a person is not a material adviser unless the person provides a tax statement to or for the benefit of a taxpayer or another material adviser that relates to the tax aspect of the SCE transaction.[44] Documents typically associated with open space easement donations are the easement deed; Form 8283, "Noncash Charitable Contributions"; a contemporaneous written acknowledgment; the baseline documentation report (baseline); an appraisal; and representations regarding the land trust's status as a qualified organization. These documents are not considered tax statements unless they contain a statement about the tax aspect of the transaction that causes the transaction to be reportable (such as that the investor may receive a deduction of two and a half times or more the investor's investment in the passthrough entity). It's questionable whether such a statement is in (or would ever appropriately be in) these documents.

Moreover, although Form 8283 reports the passthrough entity's basis in the real property and the amount of the deduction claimed, without more, that information is not a statement making the transaction a listed transaction (that is, there is no statement to a taxpayer about a deduction that is two and a half times or more the taxpayer's investment). Similarly, the Uniform Standards of Professional Appraisal Practice require the recent sales history of the property to be analyzed, which is not an investor's basis in the partnership and not the amount of a deduction allocated to an investor.[45] The preamble to the listing regulation acknowledges much of this, saying that a typical deed does not contain statements related to the

[35] T.D. 10007, 89 F.R. at 81352.

[36] Promotional materials are defined broadly as written or oral communication regarding the transaction provided to investors and include specific examples of marketing materials; appraisals (including preliminary and draft appraisals and the appraisal attached to the taxpayer's tax return); websites; transactional documents (deeds of conveyance, private placement memoranda, tax opinions, operating agreements, subscription agreements, statements of the anticipated value of the conservation easement, and statements of the anticipated amount of the charitable contribution deduction); tax analyses or opinions relating to each reportable transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction and have been shown or provided to any person who acquired or may acquire an interest in the transactions (or to their representatives, tax advisers, or agents) by the material adviser or any related party or agent of the material adviser. Reg. section 1.6011-9(c)(4), reg. section 301.6112-1(b)(3)(iii)(B).

[37] The preamble says: "The broad definition of promotional materials does not mean that the 2.5 times rule will always be met." Preamble to T.D. 10007, 89 F.R. at 81352.

[38] Reg. section 1.6011-9(b)(1) and (d)(4). The relevant basis method is based on the calculations for section 170(h)(7), see *supra* note 26, as explained in reg. section 1.170A-14(k).

[39] Reg. section 1.6011-9(b)(2).

[40] Reg. section 1.6011-9(b)(3) and (c)(7).

[41] Reg. section 1.6011-9(b)(4).

[42] T.D. 10007, 89 F.R. at 81352.

[43] *See* the text accompanying notes 15-16.

[44] Reg. section 301.6111-3(b)(2)(i) and (ii); T.D. 10007, 89 F.R. at 81352.

[45] *See, e.g.*, *Plateau Holdings LLC v. Commissioner*, T.C. Memo. 2020-93 at *34 (noting that the IRS's valuation expert was unaware of the price an indirect partnership paid (*i.e.*, its outside basis/investment in the partnership) for 98.99 percent of the partnership that donated the conservation easement eight days earlier).

tax aspects of the transaction causing it to be reportable.[46] The preamble also says:

> Signing the Form 8283 and the contemporaneous written acknowledgement and making representations regarding the donee's status as a qualified organization are not considered to be making a tax statement under section 301.6111-3(b)(2)(ii)(A). Therefore, a donee does not provide material, [sic] aid, assistance, or advice under section 301.6111-3 merely by signing the Form 8283 (Section B) and the contemporaneous written acknowledgement.[47]

Land trusts should retain the documents they provide to potential donors. Even if the transaction is an SCE, if the land trust provided no tax statement (meaning a statement about the tax aspects of the transaction that make it an SCE, such as a deduction of at least two and a half times the investor's investment in the passthrough entity), then the land trust is not a material adviser and is not required to file Form 8918.

2. Gross income exceeding $10,000 for material aid, assistance, and advice.

A material adviser directly or indirectly derives gross income exceeding $10,000 for providing material aid, assistance, and advice "with respect to" the SCE.[48] Because the gross income is "with respect to" the listed transaction, amounts paid to a person, including an adviser, in that person's capacity as a party to a transaction are excluded from consideration.[49] For example, if a land trust requests a donation from the donor for preparing a baseline documentation report or for stewardship monitoring, those amounts are in the land trust's capacity as a party to the transaction and excluded from the gross income calculation. If the donor is paying the land trust for closing costs (such as escrow fees, transfer taxes, and title policy), those fees are also in the land trust's capacity as a party to the transaction. If the fees received by an organization are not for material aid, assistance, and advice "with respect to" the SCE (or, said differently, if the fees were only paid to the land trust in its capacity as a party to the transaction), then the organization is not a material adviser and is not required to file Form 8918.

C. No Safe Harbor Excluding Land Trusts From Status as a Material Adviser

Although the final regulations do not categorically exclude a donee from being considered a material adviser, the preamble makes this exclusion explicit for a donee acting solely in its capacity as a qualified organization[50]:

> The Treasury Department and the IRS conclude that a qualified organization acting solely in its capacity as a qualified organization by, for example, accepting a conservation easement and separate payments or contributions to monitor and enforce that easement, provided such contributions are in fact used for such purpose, would not be considered a material advisor.

V. Best Practices

Donees should review transactions on their own behalf and not as tax advisers to donors. A land trust has no legal obligation to educate potential donors about the listed transaction regulations or to determine whether the transaction is or could be a listed transaction. A land trust that stays in its lane avoids blurring the line between being a counterparty to the transaction (that is, not a material adviser) and potentially providing tax statements about a transaction that is an SCE (that is, an element of being a material adviser). Further, donees should not provide tax advice to donors because donees and donors (and their successors) are counterparties to a transaction with interests that potentially conflict.

Following is a list of best practices for a land trust seeking to avoid treatment as a material adviser:

[46] T.D. 10007, 89 F.R. 81352, at n.7; T.D. 10007, 89 F.R. at 81354.

[47] T.D. 10007, 89 F.R. at 81354.

[48] Reg. section 301.6111-3(b)(1).

[49] Reg. section 301.6111-3(b)(3)(ii); T.D. 10007, 89 F.R. at 81353.

[50] T.D. 10007, 89 F.R. at 81354.

- Do not provide transaction-specific tax advice to a potential donor. To the extent tax information is provided, it should only be information that the donee generally provides to all donors about conservation easements. The communication should state that the information provided relays general rules, and that donors should consult their tax adviser for information specific to their facts.
- Explicitly communicate to potential donors that the donee will not provide donor-specific tax advice. Avoid providing tax calculators or making them available to help the donor calculate a potential tax deduction.
- Document the donee's activities (for example, for land trusts, describe the process and standards for the donee's review, coordinate property inspections, obtain any necessary property and title information, and identify the conservation purpose).
- Identify whether those documented activities were solely in the donee's capacity as a qualified organization and a party to a transaction.
- Identify and document the monetary amounts the donee received from the transaction and identify what each amount was for (for example, stewardship, baseline, etc.).
- At the close of the transaction, the donee should document its analysis of whether the donee was a material adviser, sign and date it, and maintain it in the transaction file.
- In most cases, the donee will not know whether the transaction is an SCE, and if the land trust does not know, this lack of knowledge should be noted.

By implementing these practices, donees should be able to confidently confirm that they are not material advisers.

VI. Conclusion

Material adviser status in conservation easement transactions is determined by laying the SCE listing regulation atop of the material adviser regulations. If the land trust either did not provide a tax statement about the status of the transaction as an SCE, or if it did not receive a fee for providing material aid, assistance, or advice, then the land trust is not a material adviser.

If the land trust is not a material adviser, it is not required to file Form 8918. Neither the material adviser statute, the accompanying regulations, nor the SCE listing regulation requires a donee to investigate each owner's basis in the entity or the communications the investors may or may not have received. Thus, if a donee chooses to investigate the investor's basis or the communications the investor receives from others, the land trust may be veering outside its role as a counterparty to the transaction.[51]

Ideally, the IRS will issue some form of guidance reinstating Notice 2017-29's declaration that donees are not material advisers. If the IRS is unable or unwilling to provide that assurance, then its confirmation that the material adviser regulations do not require a land trust to investigate the transaction is a next-best alternative.[52] ■

[51] Moreover, donees are often nonprofits, typically with a skeleton staff and lean budget, lacking the resources and wherewithal to conduct such an investigation.

[52] T.D. 10007, 89 F.R. at 81354.