The Business, Entrepreneurship & Tax Law Review

Volume 1
Issue 1 *Spring 2017*

Article 12

2017

Will Regulations Prevent Litigation? An Analysis of The U.S. Treasury Departments 2017 Revenue Proposals Concerning Conservation Easment Deductions

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WILL REGULATIONS PREVENT LITIGATION? AN ANALYSIS OF THE U.S. TREASURY DEPARTMENTS 2017 REVENUE PROPOSALS CONCERNING CONSERVATION EASEMENT DEDUCTIONS

Garrett Pratt*

I. INTRODUCTION

The two following factual scenarios depict two types of property whose landowners have claimed a Conservation Easement Deduction for placing a conservation easement on them under Section 170(h) of the Internal Revenue Code ("Section 170(h)").

Charles and Susan Glass ("the couple") owned ten acres of land featuring "a high undeveloped bluff on 460 feet of shoreline [off of Lake Michigan]"[1] that included threatened vegetation and a spot commonly frequented by bald eagles.[2] The couple donated the 460 feet of shoreline to a "qualified organization" under Section 170(h) and claimed a $100,000

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[1] Glass v. C.I.R., 124 T.C. 258 (2005), *aff'd,* 471 F.3d 698 (6th Cir. 2006).

[2] *Id.*

deduction for the conservation easement they contributed.[3] The Internal Revenue Service ("the Service") audited the couple because it claimed they did not meet Section 170(h)'s "exclusively for conservation purposes" requirement.[4] However, the tax court held that the couple did meet the requirement and qualified for a Section 170(h) deduction because the couple had "gratuitously surrendered valuable property rights . . . which preserve this Nation's natural resources . . . consistent with the statute's [policy] objective."[5]

In contrast, consider Kiva Dunes Golf Course ("Kiva Dunes"), located 12 miles south of Gulf Shores, Alabama, on the Fort Morgan Peninsula.[6] E.A. Drummond, the golf course's developer, purchased nearly 500 acres of beachfront land for $1 million in 1992 to create the golf course.[7] While developing Kiva Dunes, Drummond also contemporaneously constructed a gated, residential resort community surrounding Kiva Dunes, including swimming pools, tennis courts, and

3 *Id.*
4 *Id.* at 259.
5 *Id.* at 283-84.
6 Kiva Dunes Conservation, LLC v. C.I.R., 97 T.C.M. 1 (CCH) 1818 (T.C. 2009).
7 *Id.*

beach access.[8] After opening in 1995, Kiva Dunes has been considered a top-rated golf course.[9]

In 2002, Drummond put a "perpetual conservation easement" on Kiva Dunes and transferred ownership of Kiva Dunes and its easement to a non-profit organization.[10] The easement generally prohibited the development of the land for any purpose other than for a statutorily-recognized conservation purpose, which includes use as a golf course.[11] Drummond claimed a $30.5 million deduction for a charitable contribution for the easement under Section 170(h).[12] The Service, in 2005, audited Drummond and argued that Kiva Dune's easement was an improper Conservation Easement Deduction because the easement's valuation was heavily inflated.[13] During the Service's audit of Drummond, the Service's commissioner, Steven Miller, testified to the United States Senate Finance Committee that "more than 340 [Section 170(h)] easement donors were

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[8] *Id.*
[9] *Id.* at n. 4.
[10] *Id.* at 1.
[11] *Id.* at n. 5. Additionally, the non-profit organization to which Drummond transferred Kiva Dunes concurrently agreed to lease Kiva Dunes to Drummond. *Id.*
[12] *Id.* at 1.
[13] Ryan Dezember, *Famed Coastal Alabama golf Course Kiva Dunes wins $28.7 Million tax Credit*, AL.COM (Jul. 19, 2009, 9:59 AM), http://blog.al.com/live/2009/07/famed_coastal_alabama_golf_cou.html.

either under audit or would be soon."[14] Despite the Service's efforts, after three years of auditing and litigation, the Service conceded that Kiva Dunes qualified for the Section 170(h) deduction.[15] The tax court eventually reduced Drummond's deduction by only $2 million, and Drummond successfully avoided paying any tax penalties.[16]

II. THE CURRENT CLIMATE: THE SERVICE'S CRACK DOWN ON TAXPAYER ABUSE OF THE CONSERCATION EASEMENT DEDUCTION IS A SYMPTOM OF A LACK OF TREASURY REGULATION

Since *Kiva Dunes*, the Service has been cracking down on taxpayer abuse of the Section 170(h)'s Conservation Easement Deduction.[17] As the contrast between *Glass* and *Kiva Dunes* illustrates, the Service is doing so for two reasons.

Chiefly, the Service is curbing abuse on the lucrative tax savings the deduction creates. An individual who makes a "qualified conservation-contribution"[18] of real property may deduct up to 50% of his or her adjusted gross income in the year of disposition of the land; a corporation

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[14] *Id.*
[15] Richard Rubin, *IRS Tees Off on Golf Courses' Green Tax Claims*, THE WALL STREET JOURNAL, (Jan. 4, 2016, 8:56 PM) https://www.wsj.com/articles/irs-tees-off-on-golf-courses-green-tax-claims-1451959008.
[16] *Id.*
[17] *Id.*
[18] *See generally* I.R.C. § 170(h) (2015), Treas. Reg. § 1.170A-14 (2009).

that makes a qualifying contribution generally may deduct up to 10 % of its taxable income.[19] Even more enticing, when the donated land's value is greater than the taxpayer's income in the year of disposition, the remaining deduction amount can also be applied to offset taxable income for 15 years following the donation of the conservation easement.[20] While this tax deduction has been used for commendable purposes,[21] there is mounting concern the Conservation Easement Deduction is abused by a small number of wealthy individuals who are avoiding tax liability by overestimating the value of their deductions and claiming deductions on ineligible land; the most notorious of which claim Conservation Easement Deductions for golf courses.[22] In 2012, the most recent year for which data is available, 1,114 taxpayers on average claimed $872,250 in Conservation Easement Deductions; that combined equals almost $1 billion in untaxed

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[19] I.R.C. § 170(h) (2015), Treas. Reg. § 1.170A-14 (2009); *see also* DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 213-17 (2017) (herein "2017 Treasury Proposal"), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2017.pdf.

[20] *See generally* I.R.C. § 170(h) (2015).

[21] Rubin, *supra* note 15; *see also* Glass v. C.I.R., 124 T.C. 258, 258 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006).

[22] Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225, 228 (2016).

income.[23] Some scholars estimate that the U.S. federal government has forgone over $100 million in tax revenue as a result.[24]

The Service is presently litigating approximately two dozen cases across the United States contesting the validity of taxpayers' Conservation Easement Deduction claims "where there does not appear to be a conservation purpose served [in claims involving golf courses]," as Former-Commissioner Miller testified to the Senate Finance Committee.[25] Notably, President Donald Trump also claimed the Conservation Easement Deduction for several golf courses in 1995, 2005, 2014, and 2015, for combined deductions in excess of tens of millions of dollars.[26]

The second reason the Service is currently litigating so many cases is that litigation has been the only way the Service has been able to constrict taxpayer abuse. What makes the Service's current crackdown against taxpayers significant is that it epitomizes the Conservation

[23] Rubin, *supra* note 15.
[24] JOINT COMMITTEE ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE "PROTECTING AMERICANS FROM TAX HIKES" ACT OF 2015, JCX-143-15 (2015).
[25] *Id.*; Dezember, *supra* note 13.
[26] Richard Rubin, *Donald Trump's Tax Numbers Sharpen Focus on Treatment of Losses*, THE WALL STREET JOURNAL (Oct. 3, 2016), http://www.wsj.com/articles/donald-trumps-tax-numbers-tighten-focus-on-treatment-of-losses-1475415294.

Easement Deductions' heavily-litigated forty-year history.[27] The Conservation Easement Deduction has been the source of a significant amount of litigation because the regulations defining Section 170(h)'s key statutory terms of art are overly broad and do not create a clear framework for evaluating the accuracy of Conservation Easement Deduction valuations. While some scholars say the Service's best present hope for reducing abuse is winning cases against taxpayers abusing the Conservation Easement Deduction,[28] which would create binding authority, litigation is only a short-term solution.

In response to this growing problem, the U.S. Department of the Treasury ("the Treasury") has outlined in its "General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals" several recommendations that would lead to new regulations curbing taxpayer abuse of the Conservation Easement Deduction.[29] The proposals would add new requirements and penalties to Section 170(h) and suggest creating an alternative conservation easement tax credit that could eventually

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[27] *See generally* Jessica Jay & Melissa K. Thompson, *An Examination of Court Opinions on the Enforcement And Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches To Date*, CONSERVATION TAX CENTER.
[28] Rubin, *supra* note 15.
[29] 2017 Treasury Proposal, *supra* note 19, at 224-29.

replace the Section 170(h) deduction.[30] The Treasury has proposed for several years promulgating new regulations to constrict Section 170(h)'s breadth and, in its most recent proposals, has made some general indications on how it would curb abuse.[31]

This article examines the Treasury's 2017 proposals refining Section 170(h). This article assesses the likely effects of the Treasury's proposals by discussing their impact in four key ways: (1) the new requirements placed on "qualified organizations" who receive conservation easement contributions; (2) donors' increased substantiation requirements; (3) the exclusion of golf courses from Section 170(h) eligibility; and (4) the pilot conservation easement tax credit program. For each of these, this article will: examine the category's current Section

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[30] *Id.*

[31] *Id.*; *see also* DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 188-94 (2016), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf (herein "2016 Treasury Proposal"); DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2015 REVENUE PROPOSALS 193 (2015), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2015.pdf (herein "2015 Treasury Proposal"); DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2014 REVENUE PROPOSALS 161 (2014), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf (herein "2014 Treasury Proposal"); DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2013 REVENUE PROPOSALS 140 (2013), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf (herein "2013 Treasury Proposal").

170(h) regulatory treatment, if any, outline what the new proposals require, and then walk through the likely effects of these proposals. This article argues that the most efficient regulatory approach available to the Treasury is to ban golf courses from Section 170(h) eligibility and leave all other current regulatory requirements on "qualified organizations" and donors the same to continue to encourage conservation easement donations.

III. Seven Significant Events in Section 170(h)'s History

The Conservation Easement Deduction is codified in Internal Revenue Code ("the Code") Section 170(h)(1). It states that "a 'qualified conservation contribution' [is] – (A) of a qualified real property interest, (B) to a qualified organization, (C) [made] exclusively for conservation purposes."[32] The statute's current form has changed significantly over time. While there is no comprehensive history on Section 170(h),[33] there are seven events that are significant to its history.

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[32] I.R.C. § 170(h)(1) (2015).
[33] McLaughlin, *supra* note 22. However, McLaughlin is the pre-eminent scholar on the Conservation Easement Deduction and her forthcoming publication is an exhaustive history of the Conservation Easement deduction as well as a thorough analysis of contemporary cases. *Id.* "To date, there has been no comprehensive analysis of the case law involving alleged overvaluation of conservation and façade easements for § 170(h) deduction purposes. This article fills that void." *Id.* at 230.

The Service first authorized a conservation easement contribution to be a charitable income tax deduction in 1964 in Revenue Ruling 64-205[34] when the Service held "[a] gratuitous conveyance to the United States of America of a restrictive easement in real property . . . to preserve the scenic view of certain public properties, is a charitable contribution within the meaning of Section 170(h) of the Internal Revenue Code."[35]

Second, in the 1980s, following the enactment of the Tax Reform Act of 1976, "land trusts and public agencies began to use conservation easements routinely for protecting conservation lands."[36] This is significant because modernly land trusts and conservation public agencies are the recipients of Conservation Easement Deductions.[37] Third, the Tax Reform Act became a part of the Code in the Tax Treatment Act of 1980

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[34] Internal Revenue Serv., *Understanding IRS Guidance – A Brief Primer*, IRS.GOV (July 6, 2016), https://www.irs.gov/uac/understanding-irs-guidance-a-brief-primer. A revenue ruling is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations. It is the conclusion of the IRS on how the law is applied to a specific set of facts. Revenue rulings are published in the Internal Revenue Bulletin for the information of and guidance to taxpayers, IRS personnel, and tax professionals. *Id.*

[35] Rev. Rul. 64-205, 1964-2 C.B. 62.

[36] ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 7 (Laurie Risino & Jessica Jay, eds., 1st ed. 2015).

[37] Nancy McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations - A Responsible Approach*, 31 ECOLOGY LAW QUARTERLY 1, 1 (2004).

("the 1980 Act"), which significantly altered the 1976 legislation.[38] To take the Conservation Easement Deduction, the 1980 Act required that a taxpayer prove the conservation easement will last for no less than 30 years and be made exclusively for conservation purposes to a qualifying organization.[39] It also defined "conservation purposes" to mean: (1) the preservation of land areas for public outdoor recreation, education, or scenic enjoyment; (2) the preservation of historically important land areas or structures; or (3) the protection of natural environmental systems.[40] The above conservation purposes are the same as those listed in Section 170(h)'s current codification. It is notable that Daniel Halperin, the Treasury's Deputy Assistant Secretary for Tax Policy, fortuitously expressed concern as to "whether procedures exist[ed] to insure that [a conservation easement] will continue to be used for conservation purposes and for the benefit of the general public."[41]

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[38] Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements (pt. 1)*, 45 REAL PROP. TR. & EST. L. J. 473, 478 (2010).
[39] *Id.* at 476.
[40] *Id.*
[41] *Miscellaneous Tax Bills: Hearing Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 96th Cong. 3-4 (1979) (statement of Hon. Daniel I. Halperin, Deputy Assistant Secretary for Tax Policy, Department of the Treasury).

Fourth, Congress passed moderate reforms to Section 170(h) in 2006 outlining new circumstances in which penalties for deduction abuse were warranted and increasing the amount of substantiation required for an appraisal to meet all "qualified appraisal's" requirements.[42] Overall, however, Section 170(h)'s reform helped taxpayers take advantage of the Conservation Easement Deduction rather than curtail abuse.[43]

Fifth, Senators Max Baucus (Democrat-Montana) and Orrin Hatch (Republican-Virginia) sponsored and authored the Rural Heritage Conservation Extension Act of 2013 which would have amended the Code to do two things.[44] First, it would have made Conservation Easement Deduction levels permanent. Second, it would have banned the use of Conservation Easement Deductions for a contribution for "contributions of an easement for use on, or intended use on, a golf course."[45] The language of the Senate bill tracks verbatim the language used by the Treasury in its Green Book proposal in fiscal year 2013.[46]

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[42] McLaughlin, *supra* note 22 at 229, n. 10*; see also* Pub. L. No. 109-280, 120 Stat. 780, §§ 1213, 1219 (2006).
[43] McLaughlin, *supra* note 22 at 229, n. 10.
[44] Rural Heritage Conservation Extension Act, S. 526, 113th Cong. (2013).
[45] *Id*.
[46] *Compare to* 2013 Treasury Proposal, *supra* note 31.

Sixth, Representative Jim Gerlach (Republican-Pennsylvania) a similar bill was proposed in the House of Representatives in 2014 without a ban on golf courses, but it also was not enacted.[47]

Finally, in 2015 Congress passed legislation modifying Conservation Easement Deductions without a ban or limitation on golf courses under Section 170(h).[48] Some scholars argue that since 2006, Congress has effectively ignored the Conservation Easement Deduction's main sources of abuse as reflected in ongoing litigation between the Service and taxpayers, and Congress has done nothing except codify "enhanced incentives" to benefit taxpayers taking the Conservation Easement Deduction, even when their valid conservation purpose is not apparent.[49] Analysis of the Treasury's proposals, as follows in Sections III, IV, V, and VI of this article explain how the Treasury proposes rectifying these abuses.

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[47] Conservation Easement Incentive Act, H.R. 2807, 113th Cong. (2014).
[48] Land Trust Alliance, *Federal Law Affecting Donations of Conservation Easements*, 1, http://s3.amazonaws.com/landtrustalliance.org/StatuteConservationEasementDonations.pdf.
[49] 2016 Treasury Proposal, *supra* note 31, at 189. "Court cases over the last decade have highlighted donors who have taken large deductions for overvalued easements and for easements that allow donors to retain significant rights or that do not further important conservation purposes." *Id.*

IV. New Regulatory Requirements Imposed on "Qualified Organizations" Frustrate the Policy Goals of Section 170(H)

A. *Current Regulatory Scheme*

The current regulations set forth that to become a "qualified organization" for Conservation Easement Deduction purposes, a recipient donee organization must: (1) be one of four qualifying organizations, (2) demonstrate commitment to protect the donated land's expressed conservation purposes, and (3) "have the resources to enforce the restrictions."[50] Each requirement is outlined further below.

First, the regulations require that a "qualified organization" is: a governmental unit under Section 170(b)(1)(A)(v)[51], an organization under Section 170(b)(1)(A)(vi)[52], a 501(c)(3) charitable organization that meets the section 509(a)(2) public support test,[53] or requirements of section

[50] Treas. Reg. § 1.170A-14(c)(1) (2009).
[51] I.R.C. § 170(b)(1)(A)(v) (2015) defines this governmental unit in reference to § 170(c)(1). That subsection defines such governmental units as "[a] State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia. . ." § 170(c)(1) (2015).
[52] § 170(b)(1)(A)(vi) defines this governmental unit in reference to § 170(c)(2) that "normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under section 501(a)) from a governmental unit referred to in subsection (c)(1) or from direct or indirect contributions from the general public." *Id.*
[53] § 509(a)(2) defines such an organization that "(A) normally receives more than one-

509(a)(3)[54] and "is controlled by an organization described within that subsection."[55] Second, to satisfy the "commitment to the conservation purposes" requirement, a conservation group organized or operated primarily or substantially for one of the conservation purposes specified in section 170(h)(4)(A) is required.[56] Third, the requirement that the donee organization have the resources to enforce the easement does not require that the organization "set aside funds to enforce the restrictions."[57] These

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third of its support in each taxable year from any combination of: (i) gifts, grants, contributions, or membership fees, and (ii) gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity which is not an unrelated trade or business (within the meaning of section 513), not including such receipts from any person, or from any bureau or similar agency of a governmental unit (as described in section 170(c)(1)), in any taxable year to the extent such receipts exceed the greater of $5,000 or 1[%] of the organization's support in such taxable year, from persons other than disqualified persons (as defined in section 4946) with respect to the organization, from governmental units described in section 170(c)(1), or from organizations described in section 170(b)(1)(A) (other than in clauses (vii) and (viii)), and (B) normally receives not more than one-third of its support in each taxable year from the sum of-- (i) gross investment income (as defined in subsection (e)) and (ii) the excess (if any) of the amount of the unrelated business taxable income (as defined in section 512) over the amount of the tax imposed by section 511." *Id.*

[54] § 509(a)(3) defines such an organization as one that is "(A) is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in paragraph (1) or (2), (B) is-- (i) operated, supervised, or controlled by one or more organizations described in paragraph (1) or (2), (ii) supervised or controlled in connection with one or more such organizations, or (iii) operated in connection with one or more such organizations, and (C) is not controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations described in paragraph (1) or (2)." *Id.*

[55] Treas. Reg. § 1.170A-14(c)(1) (2009).

[56] *Id.*

[57] *Id.*

are the only substantial current requirements placed on recipient donee organizations.

B. *The Treasury's Proposal Significantly Increases the Amount of Requirements and Liability a "Qualified Organization" Takes on as a Conservation Easement Deduction Donee*

The Treasury proposal suggests that additional regulations should be promulgated to increase the requirements placed on "qualified organizations" that receive a Conservation Easement Deduction qualifying property easement.[58] The proposal outlines five new requirements.

First, the new "qualified organization" regulations recommend prohibiting a "qualified organization" from being "related to a donor or to any person that is or has been related to the donor for at least ten years."[59] Second, the proposal mentions the regulations be amended to require all "qualified organizations" to have "sufficient assets and expertise to be reasonably able to enforce the terms of all easements it holds."[60] Third, the proposal suggests that it become mandatory that all "qualified organizations" have "an approved policy for selecting, reviewing, and

[58] 2017 Treasury Proposal, *supra* note 19, at 213-17.
[59] *Id.* at 215.
[60] *Id.*

approving conservations [*sic*] easements that fulfill a conservation purpose."[61] Fourth, the proposal would subject any organization that knows or should have known that it accepted an overvalued easement or an easement that does not "further an appropriate conservation purpose" to penalties.[62]

Last, to increase transparency between the Service and taxpayers, the proposal outlines requiring Conservation Easement Deduction donees to increase the amount of information they report about the property's fair market values.[63] The Treasury would do this by amending Section 6033 "to require electronic reporting and public disclosure by donee organizations regarding deductible contributions of easements that is sufficient for transparency and accountability."[64] The Treasury proposal suggests five specific pieces of information that must be electronically and publicly reported by donee organizations.[65]

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 215-16.
[65] *Id.* at 216. The information the proposal suggests donee organizations release electronically and publicly include: (1) detailed descriptions of the subject property and restrictions imposed on the property, (2) the conservation purposes served by the easement, (3) any rights retained by the donor or related persons, (4) the fair market value of both the easement and the full fee interest in the property at the time of the

C. *Analysis of Proposal*

The analysis of the five new requirements are considered individually and then in the aggregate. The proposal's suggestion banning Conservation Easement Deduction from eligibility organizations that have a family relation to a conservation easement donor stems from a concern that landowners are granting conservation easements that are merely fictitious because the landowner is free to use the land without significant impediment by an easement holder. The Treasury had not included this recommendation in its annual revenue proposals until the 2016 Fiscal Year.[66] Despite its rationale, this new suggestion is unprecedented within the charitable contributions of Section 170 because no such restriction has been codified or regulation promulgated. As a result, it is unlikely the Treasury will ever promulgate such a regulation.

Next, the Treasury's suggestion that "qualified organizations" have sufficient assets and expertise to attempt to curb Conservation Easement Deduction abuse is merely a rewording of the current regulation's "have

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contribution; and (5) a description of any easement modifications or actions taken to enforce the easement that were taken during the taxable year. *Id.*

[66] 2016 Treasury Proposal, *supra* note 31.

the resources to enforce the restrictions" requirement.[67] The new language then should not be re-promulgated because it is surplusage.[68] However, the proposal sets out new requirements for a donee organization by requiring "qualified organizations" to have "expertise to be reasonably able to enforce the terms of all easements it holds."[69] The current requirement, that a "qualified organization" merely "demonstrate commitment to protect the donated land's expressed conservation purposes" is a less difficult standard for "qualified organizations" to meet for two reasons.

First, "demonstrating commitment" on its face requires a lower standard of behavior on the donee organization's behalf in relation to a conservation compared to "expertise to be reasonably able to enforce the terms" because the current regulation's "demonstrating commitment" standard merely requires that the "qualified organization" be a conservation group organized or operated primarily or substantially for

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[67] Treas. Reg. § 1.170A-14(c)(1) (2009).

[68] While it may appear that a shift in register from "resources" to "assets" that a "qualified organization" indicates the Treasury is more precisely requiring that a "qualified organization" have finances available to enforce the terms of a conservation easement it controls, current regulations already indicate that the Treasury interprets the current "resources" requirement to mean financial resources. *See id.* (stating that current regulations do not require that the organization "set aside funds to enforce the restrictions.").

[69] 2017 Treasury Proposal, *supra* note 19, at 224.

one of the conservation purposes specified in Section 170(h)(4)(A).[70] These purposes are the same ones required by a donor of a conservation easement. In contrast, it is unclear to what standard an organization claiming a primary or substantial conservation purpose will need to rise to become an "expert" under the Treasury's proposal. This could render ineligible current "qualified organizations" from being able to receive Conservation Easment Deduction contributions in the future.

Second, the new proposals consider a "qualified organization" and its capability to enforce, in the aggregate, all of the conservation easements it accepts. Unless carefully drafted, the proposal's new requirement suggesting that "qualified organizations" be conservation experts able to enforce the terms of an easement will lead to greater uncertainty for donors and donees because both groups will be unsure

[70] Treas. Reg. § 1.170A-14(c)(1) (2009); *see also* I.R.C. § 170(h)(4)(A) (2015):

> "(A) In general.--For purposes of this subsection, the term 'conservation purpose' means-- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public, (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, (iii) the preservation of open space (including farmland and forest land) where such preservation is-- (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or (iv) the preservation of an historically important land area or a certified historic structure."
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> *Id.*

whether the donee will sufficiently qualify as an expert according to the Treasury.

The third suggestion from the proposal makes mandatory that all "qualified organizations" use a pre-approved plan for evaluating its decision to accept conservation easements. Scholars have opined that these organizations, which over the past thirty years have consisted primarily of land trust associations, should set standardized accreditation requirements[71] to ensure the accuracy of the valuation of conservation easements and that the conservation easements are granted for worthwhile conservation efforts. The goals suggested by tax scholars are consistent with the Treasury's goals of improving tax administration by removing oversight of conservation value from the Service.[72] The obvious benefits of the proposal's new requirements are that, if properly drafted, these regulations should encourage "qualified organizations" to ensure that they select conservation easements that are properly valued and are for valid conservation purposes under Section 170(h) and its regulations. Regulations exhaustively outlining how a "qualified organization" should

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[71] McLaughlin, *supra* note 37, at 9.
[72] 2017 Treasury Proposal, *supra* note 19.

choose conservation easements also should promote transparency in the determination process of the value and conservation purpose for a conservation easement which currently is, from the Treasury's perspective, a relatively opaque process.[73]

The fourth suggestion the proposal lays out is a penalty for any organization that knows or should have known that a conservation easement that it accepted was improperly valued or does not serve a qualifying conservation purpose. This penalty is unprecedented not only within Section 170's charitable deductions, but in the entire Tax Code. The only analogy available is one from the Bankruptcy Code that imposes similar penalties.[74]

The fifth suggestion the proposal makes in reference to "qualified organizations" is that they be required to make certain public and electronic disclosures about every conservation easement they accept.

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[73] Currently, the Treasury has no way of knowing whether or not a conservation easement has been properly valued for Section 170(h) purposes until a taxpayer is audited by the Service. A taxpayer making a conservation easement selects an appraiser who has discretion to value the conservation according to the valuation methods outlined by Section 170(h) and its regulations. *Id.* at 224.

[74] *See* I.R.C. § 6694(a)(1)(B) (2015) (stating that "If a tax return preparer— (B) knew (or reasonably should have known) of the position, such tax return preparer shall pay a penalty with respect to each such return or claim in an amount equal to the greater of $1,000 or 50[%] of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.).

There is no current public reporting requirement for donee organizations upon receipt of a conservation easement under Section 170(h) which will likely add to the transaction costs associated with Section 170(h) conservation easement contributions.

Combined, the five additional requirements that the proposal places on "qualified organizations" are intended to ensure the accuracy of donor valuations of conservation easements and that such easements are only granted to land that furthers important governmental conservation goals that produce significant public benefit. The Treasury views these "qualified organizations" as almost quasi-governmental regulatory authorities who can validate the accuracy of a donor's intent in contributing a conservation easement. Placing this new set of responsibilities on "qualified organizations" should increase transparency between taxpayers and the Treasury.

However, the five new proposals substantially increase the regulatory requirements placed on "qualified organizations" and subject them to penalties in an unprecedented fashion. Currently, "qualified organizations" who receive conservation easements generally pay nothing for them; most donees, usually land trusts associations that receive conservation easements require that donor's pay all transaction costs related to the conservation easement contribution.[75] This amount can be substantial under the current regulatory scheme, amounting at times up to $10,000 or more a donor must pay to donate an easement of his or her land.[76] Therefore, in the aggregate, the increased regulatory burden placed on organizations who may receive these easements likely will increase the transaction costs associated with accepting responsibility for a Section 170(h) conservation easement and decrease the number of organizations who hold themselves out as "qualified organizations."

Increasing the transaction costs of a Section 170(h) contribution will likely deter landowners from donating conservation easements. Surveys of Conservation Easement Deduction donor intent indicate that increased transaction costs dissuade landowners from making such

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[75] McLaughlin, *supra* note 37, at 26, n. 93; *see also* William T. Hutton, *The Munificent Conservation Easement*, 9 CALIFORNIA LICENSED FORRESTERS ASS'N. (2002), http://www.clfa.org/documents/Archives/The-Munificent-Conservation-Easement.pdf (noting that the donation of an easement is nearly always conditioned upon a simultaneous cash gift sufficient to cover the generally predictable costs of the land trust's monitoring responsibilities and the contingent and unpredictable costs of future enforcement proceedings).

[76] McLaughlin, *supra* note 37, at 26; *see also* Lynn Asinof, *Your Money Matters: Conservation Easements Lighten Taxes*, THE WALL STREET JOURNAL C15 (Aug. 9, 1999) (noting that the easement donation process "typically takes many months, can cost $5,000 to $10,000 or more, and may require creation of an endowment for the parcel").

contributions.[77] Additionally, decreasing the number of potential donees likely means that those organizations that remain "qualified organizations" must either ensure they have to increase their financial resources to enforce the increased number of easements they accept, or they will have to reject conservation easement contributions. If the number of "qualified organizations" decreases, and those that do qualify take on their maximum number of easements possible in accordance with their amount of required substantial assets, landowners will not be able to find "qualified organizations" to which they can donate their land. As a result, landowners will not be able to take a Conservation Easement Deduction for their land and will likely not place an easement on their land, leaving land open to future development. If "qualified organizations" become saturated, landowners would effectively become unable to take the deduction, which would frustrate Section 170(h)'s broad policy goal of preserving the amount of undeveloped land in the United States.[78]

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[77] McLaughlin, *supra* note 37, at 43-47 (analyzing three key national surveys of conservation easement donor intent that concludes that reasons for such donations included "strong personal attachment to and concern about the long-term stewardship of their land" and "for tax incentives").

[78] S. REP. NO. 96-1007, at 9-10 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6736, 6744-45 "The committee believes that the preservation of our country's natural resources and cultural heritage is important, and the committee recognizes that conservation easements

Empirical studies strongly indicate that in the recent history of Section 170(h), a significant amount of undeveloped land has been donated that would not have been otherwise.[79]

Indeed, adding additional requirements to "qualified organizations" will likely decrease the number of conservation easements made because it runs counter to the well-established correlation between federal tax incentives and their positive effect on the number of conservation easements contributed.[80] Congress and the Treasury have desired to use federal tax incentives to produce more conservation easements since the 1980s.[81]

Other sources have also indicated the importance of the Conservation Easement Deduction's incentives to encourage landowners to place conservation easements on their lands. Notably, in a 2013 letter

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now play an important role in preservation efforts. The committee also recognizes that it is not in the country's best interest to restrict or prohibit the development of all land areas and existing structures. Therefore, the committee believes that provisions allowing deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures. Accordingly, the committee has agreed to extend the expiring provisions of present law on a permanent basis and modify those provisions in several respects." *Id.* at 9.

[79] *Id. See also* David Marone, *Conservation Easements: Protection in Perpetuity* (Oct. 3, 2016, 4:39 PM), THE WALL STREET JOURNAL, http://www.wsj.com/articles/donald-trumps-tax-numbers-tighten-focus-on-treatment-of-losses-1475415294.

[80] McLaughlin, *supra* note 37, at 21.

[81] *Id.* at 50.

from the Western Governors' Association to the Senate Finance Committee, in response to the pending "Rural Heritage Conservation Extension Act of 2013" and its House of Representatives' counterpart the "America Gives More Act," the Western Governors' Association affirmed its belief that "providing economic incentives for landowners to voluntarily participate in conservation efforts is likely to achieve more efficient and cost-effective [conservation] results."[82] Multiple surveys done nationwide have also indicated that donors contribute Conservation Easement Deductions not purely for conservation purposes but predominantly for significant federal income tax savings.[83]

To avoid discouraging landowners from making conservation easement contributions and limiting the number of "qualified organizations," the Treasury could ban the applicability of Section 170(h) for golf courses for the reasons set forth in Section V of this article. If the Treasury still maintained that limitations were necessary for all Section 170(h) contributions, it should temper their current proposals in two ways.

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[82] Letter from Brian Sandoval, Governor, State of Nev., and John Kitzhaber, Governor, State of Or., to the Senate Fin. Comm., WESTERN GOVERNORS' ASS'N (Oct. 2, 2014), http://www.westgov.org/letters-testimony/344-wildlife/802-letter-support-for-conservation-easements-legislation.

[83] McLaughlin, *supra* note 37, at 43-47.

First, the Treasury should abandon penalties on "qualified organizations" who "should have known" that upon audit by the Service reveal that the conservation easement was overvalued or did not adequately further a conservation purpose. This standard exists nowhere else in the Tax Code. Taxpayers and "qualified organizations" will be unsure for a significant period of time what conduct establishes that a "qualified organization" should have known that a conservation easement was overvalued or for improper conservation purposes until private letter rulings, revenue procedures, revenue rulings, regulations, and tax court cases are filed to test this new requirement. Additionally, such a penalty should be abandoned because "qualified organizations" do not receive any direct monetary benefit by receiving a conservation easement; imposing a financial penalty on a "qualified organization" targets the wrong group. Any penalty should be imposed on conservation easement donors. However, it does seem reasonable that knowingly accepting an improperly valued conservation easement should be penalized because this standard is a common creature of the Code and easier for the Service to establish in an audit contesting the validity of a conservation easement. But overall, the

Treasury should not adopt a "should have known" penalty on "qualified organizations."

Second, the Treasury should temper its current proposals by not requiring that "qualified organizations" have the expertise to enforce all conservation easement restrictions without explaining in detail through regulations how that raises the current standard of behavior and action for "qualified organizations." Otherwise, current "qualified organizations" will likely lose eligibility and no longer be able to accept conservation easements. Overall, the Treasury should be weary of the effects the five new requirements the proposal suggest will have on "qualified organizations," their potential frustrating effect on the Conservation Easement Deduction's legislative purpose, and on the amount of conservation easements donated.

V. THE PROPOSAL INCREASES SUBSTANTIATION REQUIREMENTS ON DONORS WITHOUT SETTING CLEAR GUIDELINES

A. *Current Regulatory Scheme*

"Conservation purpose" means one of four things under current regulations:

> (i) The preservation of land areas for outdoor recreation by, or the education of, the general public, within the meaning of paragraph (d)(2) of this section,
>
> (ii) The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, within the meaning of paragraph (d)(3) of this section,
>
> (iii) The preservation of certain open space (including farmland and forest land) within the meaning of paragraph (d)(4) of this section, or
>
> (iv) The preservation of a historically important land area or a certified historic structure, within the meaning of paragraph (d)(5) of this section.[84]

Currently, the preservation of open space in Section 1.170A-14(d)(4)(1) requires that it must be done to achieve a "clearly delineated federal, state, or local governmental conservation policy" and create significant public benefit,[85] or be for public "scenic enjoyment" that creates substantial public benefit.[86] The proposal, then, would expand the current requirement for conservation easements of all types, not just those that preserve open spaces. This section of the regulation also outlines in great detail how a donor must demonstrate that the contributed land serves a "clearly delineated [governmental] conservation policy"[87] and

[84] Treas. Reg. § 1.170A-14(d)(1) (2009).
[85] § 1.170A-14(d)(4).
[86] *Id.*
[87] *Id.*

determining whether the conservation easement produces a satisfactory public benefit.[88] To establish that a conservation policy is met by a conservation easement, the regulations provide that conservation easements must "further a specific, identified conservation project" and lists several examples of what types of purposes are plainly satisfactory.[89]

To yield significant public benefit, the conservation easement must satisfy a facts and circumstances inquiry that determines whether the property satisfies certain unweighted factors.[90] The regulations currently provide 11 such factors that the Service will take into account upon auditing a taxpayer claiming a Conservation Easement Deduction.[91] The

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88 *Id.*

89 *Id.* "This requirement will be met by donations that further a specific, identified conservation project, such as the preservation of land within a state or local landmark district that is locally recognized as being significant to that district; the preservation of a wild or scenic river, the preservation of farmland pursuant to a state program for flood prevention and control; or the protection of the scenic, ecological, or historic character of land that is contiguous to, or an integral part of, the surroundings of existing recreation or conservation sites. For example, the donation of a perpetual conservation restriction to a qualified organization pursuant to a formal resolution or certification by a local governmental agency established under state law specifically identifying the subject property as worthy of protection for conservation purposes will meet the requirement of this paragraph." *Id.*

90 *Id.*

91 *Id.*

> "(1) The uniqueness of the property to the area;
> (2) The intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);
> (3) The consistency of the proposed open space use with public programs (whether Federal, state or local) for conservation in the

proposal does not indicate that the Treasury will promulgate additional regulations to more concretely determine whether a conservation easement creates the necessary amount of public benefit to qualify for the Conservation Easement Deduction.

It is noteworthy that "clearly delineated conservation purpose" and "significant public benefit yield" are statutory requirements that are unprecedented.[92] These dual requirements have no companions in any place in the Tax Code. They did not come in existence until the Tax

> region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area;
> (4) The consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by organizations referred to in § 1.170A–14(c)(1), in close proximity to the property;
> (5) The likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;
> (6) The opportunity for the general public to use the property or to appreciate its scenic values;
> (7) The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;
> (8) The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;
> (9) The cost to the donee of enforcing the terms of the conservation restriction;
> (10) The population density in the area of the property; and
> (11) The consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection." *Id.*

[92] *See* Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, 94 Stat. 3521 (1980).

Treatment Extension Act of 1980 and have only been given elaboration based on a Senate Finance Committee report.[93]

B. *The Treasury's Proposals*

The proposal describes modifying the current definition of "conservation purposes" by requiring "all contributed easements further a clearly delineated Federal conservation policy (or an authorized State or tribal government policy) and yield significant benefit."[94] Additionally, the proposal would increase the amount of "conservation purpose" substantiation required by a donor, by requiring him or her to give exhaustive summaries of the conservation purpose served by the easement and the public benefits it will yield.[95] An organization and its managers would incur a penalty if they warrant certain "values that they know (or should know) are substantially overstated."[96] This is a departure from the current regulatory scheme that only requires such conservation purpose substantiation for the preservation of open spaces. As described below in § IV(C) of this Article, the Treasury will likely apply the "conservation

[93] McLaughlin, *supra* note 37, at 14-15.
[94] 2017 Treasury Proposal, *supra* note 19.
[95] *Id.* at 215. Additionally, a donor must substantiate and warrant that the fair market value of the easement is accurate. *Id.*
[96] *Id.*

purposes" and "public benefit" regulations for preservation of open spaces purposes to all conservation easements irrespective of a conservation easement's conservation purpose.

C. *Analysis of Proposal*

Given that a current subsection of Section 170(h) already contains exhaustive regulations outlining what constitutes an appropriate governmental conservation purpose and requisite public benefit, it is likely that the Treasury will base any new regulations on these current ones for their expanded application to all types of land eligible for the Conservation Easement Deduction. Application of the current regulations will have three significant implications for Conservation Easement Deduction donors.

First, the proposal's requirement that a conservation easement "further a specific, identified conservation project"[97] likely will create uncertainty for taxpayers unless, like the current regulations, more examples are included illustrating what conservation easements accomplish such purposes. Second, the current "facts and circumstances" inquiry based on 11 un-weighted factors to determine whether a

[97] Treas. Reg. § 1.170A-14(d)(1) (2009).

conservation easement's conservation purpose yields significant benefit will similarly create significant taxpayer uncertainty. Unless a more formulaic method for determining substantial public benefit is promulgated, taxpayer uncertainty seems inevitable for all Conservation Easement Deduction donors. Lastly, given the new substantiation requirements placed on donors for valuation and conservation purposes, this will likely increase transaction costs associated with the conservation easement contribution. Given that an increase in transaction costs decreases the amount of conservation easements donated, these provisions frustrate the Conservation Easement Deduction's purpose.[98] Taxpayers will expend more in receiving expert determinations whether their conservation easements yield enough public benefit for a qualifying

[98] S. REP. NO. 96-1007, at 9-10 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6736, 6744-45:

> "The committee believes that the preservation of our country's natural resources and cultural heritage is important, and the committee recognizes that conservation easements now play an important role in preservation efforts. The committee also recognizes that it is not in the country's best interest to restrict or prohibit the development of all land areas and existing structures. Therefore, the committee believes that provisions allowing deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures. Accordingly, the committee has agreed to extend the expiring provisions of present law on a permanent basis and modify those provisions in several respects."

Id.

conservation purpose. Another potential transaction cost may be a taxpayer seeking a private letter ruling from the Service to determine whether his or her conservation easement is for a valid conservation purpose that yield significant public benefit. Receiving such a ruling is expensive,[99] but given the average amount donors receive in the deduction, taxpayers likely will want to guarantee their conservation easement meets these requirements.[100]

It seems likely, then, that as transaction costs increase, the number of future donors will decrease because the value of the Conservation Easement Deduction will be less significant. A decrease in the number of Section 170(h) donors, however, may not be wholly disadvantageous from a policy standpoint. Increased substantiation should deter landowners from making Section 170(h) donations who do so for land that lacks such significant conservation merit. From this perspective, increased substantiation for all Conservation Easement Deduction donors will deter fraudulent or less meritorious uses of the Conservation Easement Deduction. However, if the Service and the Treasury are predominantly

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99 Rev. Proc. 2016-1 I.R.B. App'x A. Private letter rulings costs range between $250 and $50,000. *Id.*

100 Joint Comm. on Tax'n, *supra* note 24.

concerned with landowners claiming conservation easements for land used as a golf course, then an outright ban, as Section V of this Article explains, would be a more efficient way to reduce taxpayer fraud without increasing transaction costs that deter meritorious conservation easements contributions.

VI. THE PROPOSAL'S EXCLUSION OF GOLF COURSES IS CONSISTENT WITH SECTION 170(H)'S LEGISLATIVE PURPOSE

There are currently no regulations that specifically address golf courses for Conservation Easement Deduction purposes. In contrast, the proposal seeks banning "any contribution of a partial interest in property that is, or is intended to be, used as a golf course."[101] The Treasury's proposal is consistent with its position as expressed in the Treasury's revenue proposals for fiscal years 2013, 2014, and 2016.[102] It is

[101] 2017 Treasury Proposal, *supra* note 19, at 216.
[102] 2014 Treasury Proposal, *supra* note 31; 2013 Treasury Proposal, *supra* note 31; 2016 Treasury Proposal, *supra* note 31. All three proposals state verbatim "The proposal would amend the charitable contribution deduction provision to prohibit a deduction for any contribution of property that is, or is intended to be, used as a golf course." The Treasury's revenue proposal for fiscal year 2015 leaves out a proposal recommending that golf courses no longer qualify under Section 170(h), but instead focuses on increasing the amount of deductions farmers and ranchers can deduct for issuing a conservation easement over their lands. 2015 Treasury Proposal, *supra* note 31, at 195. Therefore, despite the omission of golf courses from the Treasury's revenue proposals in 2015, it is reasonable to infer that the Treasury has consistently maintained that golf courses should no longer qualify under Section 170(h) since its revenue proposal for fiscal year 2013. *Id.*

noteworthy that it was in 2013 that the Service lost *Kiva Dunes* and began auditing more taxpayers who made Conservation Easement Deductions for golf courses.[103]

The Treasury's proposal to prohibit land used or intended for use as a golf course from Section 170(h) qualifications is reasonable because golf courses and their coinciding use are not consistent under regulatory definition for "recreation purposes." Indeed, the Treasury explained that golf courses, especially those that are located in high-income private housing, present a unique class of conservation easements the Service has difficulty effectively auditing.[104] The Treasury explains that significant Conservation Easement Deductions taken for preserving "recreational amenities, including golf courses, surrounded by upscale private home sites . . . may accrue to a limited number of users such as members of the course club or the owners of the surrounding homes, not the general public."[105] In contrast, Section 170(h)'s regulations list no example of Section 170(h) qualifying property that is similar to a golf course. Examples of farmland preserved for flood prevention, natural land

[103] Dezember, supra note 13.
[104] 2013 Treasury Proposal, *supra* note 31; 2017 Treasury Proposal, *supra* note 19.
[105] 2017 Treasury Proposal, *supra* note 19, at 224.

formations to be enjoyed by the public, and woodlands along public highways are clearly what the Treasury intended the Section 170(h) deduction be taken for.[106] Section 170(h)'s examples also describe undeveloped lands, especially in highly developed and populated metropolitan areas.[107] All of the examples Section 170(h)'s regulations contemplate do not include land used as a golf course. The exclusion of golf courses from Section 170(h) seems reasonable given that it has no regulatory example that supports their inclusion.

Additionally, golf course construction and management may contradict conservation purposes. The Treasury notes in its proposal that golf courses "may even result in environmental degradation."[108] This idea does not seem so farfetched with reports of the chemicals used on golf courses and the relatively insignificant size of ecological habitats that can be reasonably claimed to be preserved by the golf course management.[109]

A recent case illustrates this. In *Atkinson v. Commissioner*, the tax court held that a golf course's use of pesticides and other chemical

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[106] Treas. Reg. § 1.170A-14(d)(4)(iv)(B) (2009).
[107] *Id.*
[108] 2017 Treasury Proposal, *supra* note 19, at 224.
[109] Rubin, *supra* note 15.

treatments damaged the land's ecosystem which is inapposite with Treasury Regulation § 1.170A-14(e)(2) [110] that states "the preservation of … [land] would not [satisfy the conservation purpose test] if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides."[111] As a result, the taxpayer was denied $7.88 million deduction.[112] The *Atkinson* case illustrates how golf courses do not generally conform to the "recreational purposes" the Treasury and Congress anticipated would be eligible for the Conservation Easement Deduction.[113]

Moreover, by definition, granting a conservation easement prohibits the donor from developing the property to protect the easement's conservation purpose. While that conservation purpose may vary, any donor action that compromises that conservation purpose should cause the donor to forfeit his or her Conservation Easement Deduction because he or she resumes enjoying unrestricted use of the property. This is a problem

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[110] Treas. Reg. § 1.170A-14(e)(2) (2009).
[111] *See generally* Atkinson v. C.I.R., 110 T.C.M. 1 (CCH) 550 (T.C. 2015).
[112] *Id.* at 2.
[113] However, it is important to note that the 2013 act did not pass with the golf course ban, as drafted by the Treasury, but eventually passed in 2015 without such a prohibition. This could mean that Congress does not agree that a categorical ban on golf courses is consistent with Section 170(h)'s history. Land Trust Alliance, *supra* note 48.

that has arisen with golf courses specifically, unlike other conservation easements. Reports of donors claiming paved pathways, tees, fairways, and the entire greens represent the most controversial conservation easements claimed.[114]

The three above reasons demonstrate how golf courses vary considerably from the types of land and conservation purposes intended by Section 170(h) and its regulations. These reasons support the Treasury's suggestion that golf courses should be denied Section 170(h) eligibility. The Treasury should promulgate regulations to make such a ban because doing so is the most efficient way to deal with the majority of taxpayer Section 170(h) abuse. It is the most efficient regulatory approach for three reasons.

First, a ban would eliminate all future litigation against taxpayers claiming Conservation Easement Deductions for golf courses. Golf course conservation easement audits and tax court cases have been the most contentious and difficult for the Service to determine if a conservation easement in question was properly valued and for valid conservation

[114] Rubin, *supra* note 15.

purposes.[115] Banning golf courses from Conservation Easement Deduction eligibility would prevent the Service from having to continue its current crackdown on golf courses in litigation as it has done for the past ten years.[116] Therefore, a golf course ban from Conservation Easement Deduction eligibility would reduce the amount of time the Service spends auditing and litigating golf course lawsuits and allows "qualified organizations" and donors to make conservation easement contributions with only its current statutory and regulatory obligations.

Second, a Section 170(h) ban of golf courses allows meritorious conservation easement contributions to occur between donors and "qualified organizations" under only the current statutory and regulatory requirements. Sections III and IV of this Article discussed the increased obligations and liabilities that "qualified organizations" and conservation easement donors would take on if those regulations were promulgated and the decrease in conservation easements made they would likely cause. To avoid these adverse effects, the Treasury should merely ban golf courses from Section 170(h) eligibility.

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[115] *Id.*
[116] *Id.*; McLaughlin, *supra* note 22.

Third, a categorical ban on golf courses from Section 170(h) eligibility provides the most efficient regulatory scheme the Treasury could pursue to achieve its policy goals of promoting greater taxpayer certainty, reducing taxpayer abuse, and furthering valid conservation purposes.[117]

Denying golf courses from Section 170(h) eligibility will mean that worthwhile conservation efforts will be frustrated because a significant number of golf courses promote valid conservation efforts;[118] however, given that golf course use runs primarily counter to the valid conservation efforts for which its owner claims a conservation easement, if the Treasury is prepared to ban golf courses outright from Section 170(h) eligibility, the Treasury should not also increase requirements on non-golf course Conservation Easement Deduction donors. As Sections III and IV of this article demonstrate, promulgating regulations to add requirements on "qualified organizations" and conservation easement donors will likely discourage donors from making such donations because

[117] 2017 Treasury Proposal, *supra* note 19.
[118] *See* Glass v. C.I.R., 124 T.C. 258 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006).

of high transaction costs[119] and decrease the number of "qualified organizations"[120] who can accept Section 170(h) conservation easements. Overall, a ban on golf courses is the most efficient way for the Service to avoid costly litigation and to promote the donation of conservation easements.

VII. The Suggested Tax Credit Program Offers Taxpayer choice in Tax Incentives for Conservation Easement Contributions

The Treasury proposed creating a non-refundable tax credit for conservation easement contributions.[121] The Treasury would create a federal interagency board that distributed the amount of conservation easement contribution tax credits permitted by the Treasury annually to "qualified charitable organizations and governmental entities that hold and enforce conservation easements."[122] In its first year, the Treasury would permit $100 million and would increase that amount to $475 million annually and adjusted for inflation, if the pilot program is successful.[123] Conservation easement donors could receive up to a 50% of the fair

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[119] McLaughlin, *supra* note 37, at 42-47.
[120] *See generally* § III(C).
[121] 2017 Treasury Proposal, *supra* note 19.
[122] *Id.*
[123] *Id.*

market value of their easement in credits that could be used to offset their income tax liability.[124] Any residual credit could be carried forward 15 years.[125] The proposal also requests that a Congressional report be made by the Secretaries of the Treasury, Agriculture, and the Interior on the merits of the conservation easement credit to compare it to Section 170(h)'s deduction.[126]

On its face, the aggregate amount the Treasury proposes to set aside for the Tax Credit seems small compared to the $1.1 billion claimed in deductions by 1,112 taxpayers in 2012 claiming Section 170(h) deductions. However, this disparity is conflated because the $1.1 billion figure reflects the amount of income that goes untaxed and not the total amount of tax liability of individual taxpayers forgone.

Unlike a tax deduction that reduces a taxpayer's taxable income, a tax credit offsets dollar-for-dollar a taxpayer's income tax liability.[127] This

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Key Elements of U.S. Tax System* (2016) TAX POLICY CENTER, http://www.taxpolicycenter.org/briefing-book/whats-difference-between-tax-deductions-and-tax-credits. "Deductions reduce taxable income and their value thus depends on the taxpayer's marginal tax rate, which rises with income. Credits reduce taxes directly and do not depend on tax rates. However, the value of credits may depend on the taxpayer's basic tax liability. Nonrefundable credits can reduce tax to zero but any credit beyond

means that, if the tax deduction were structured as a tax credit, the current amount claimed would equate to $363 million.[128] Given that scholars have determined that the Service has forgone $112 million because of fraudulent or overvalued Section 170(h),[129] this makes the real amount of current deduction translated into tax credit less fraud about $250 million. If the pilot tax credit is electable, the Treasury's pilot tax credit amount of $100 million seems patently reasonable. Indeed, the significant increase in the amount of credit to be available in the aggregate indicates that the Treasury may wish to phase out the Conservation Easement Deduction. While beyond the scope of the proposals, a movement towards a tax credit for Section 170(h) would benefit "land rich income poor" landowners who grant conservation easements because those landowners have less taxable income, on average, than landowners with higher incomes.[130] Additionally, vesting in decentralized organizations the power to grant tax credits may be an effective way of ensuring the Treasury's Section 170(h)

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that is lost." *Id.*

[128] Dana Joel Gattuso, *Conservation Easements: The Good, the Bad, and the Ugly*, NATIONALCENTER.ORG (May 2008), http://www.nationalcenter.org/NPA569.html.

[129] Joint Committee on Taxation, *supra* note 24.

[130] Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (And Care) about Land Trusts and Their Private Land Conservation Transactions*, ENVTL. L. REP. NEWS & ANALYSIS, ENVTL. L.INST. 10223, 10229 (Mar. 2004).

policy goals of transparency and accuracy of conservation easement valuation and conservation purpose substantiation.

For individual taxpayers, this proposed conservation easement tax credit is good for donors who do not generate enough taxable income over the 15-year carry forward period for the current deduction. [131] In contrast, a tax credit offsets a taxpayer's tax liability and can be carried forward to offset tax liability for 15 years. Overall, if the Treasury wishes to give "land rich income poor" landowners greater tax incentive to make conservation easements, then it should pilot the tax credit.

VIII. CONCLUSION

This article examined the United States Treasury Department's current proposals for amending Section 170(h) of the Internal Revenue Code in light of ongoing litigation that the Internal Revenue Service is pursuing against taxpayers who are claiming substantial amounts of deductions for the conservation easements they contribute.[132] Until now, litigation has been the only way that the Internal Revenue Service has been able to test the validity of a taxpayer's Conservation Easement

[131] Gattuso, *supra* note 128.
[132] 2017 Treasury Proposal, *supra* note 19; *see also* I.R.C. § 170(h) (2015), Treas. Reg. § 1.170A-14 (2009).

Deduction,[133] this Article suggests that the most efficient regulatory approach the Treasury could take to curb taxpayer abuse of Section 170(h) is to categorically ban golf courses from deduction eligibility. Doing so, as opposed to adding additional obligations and potential penalties to "qualified organizations"[134] – most of which pay nothing to receive the conservation easement – and to donors that are foregoing land they could profitably develop, would prevent "qualified organizations" from losing their qualified status, and prevent donors from being discouraged to make conservation easement contributions. By banning golf courses from Section 170(h) eligibility, the Service will likely not have to audit and litigate against taxpayers because the majority of future fraudulent Section 170(h) claims will be prevented from making any deduction at all.

An outright ban of golf courses also avoids the need for the Service to modify the "conservation purpose" requirement under Section 170(h)[135] that would increase transaction costs on potential conservation easement donors. To further Section 170(h)'s legislative purpose to decrease the development of land in the United States, the Treasury could consider

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[133] Rubin, *supra* note 15.
[134] 2017 Treasury Proposal, *supra* note 19, at 224.
[135] *Id.*

implementing a tax credit in lieu of the Conservation Easement Deduction to encourage conservation easement donations by "land rich, income poor" landowners.[136] In any scenario, a Section 170(h) ban on golf courses creates the most efficient regulatory scheme for preventing taxpayer abuse and avoiding costly litigation.

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[136] Cheever & McLaughlin, *supra* note 130, at 10229.