

## **Important Advisory (UPDATED 4-11-23 after release of safe harbor language from IRS): Charitable Conservation Easement Program Integrity Act Advisory**

The U.S. Congress passed the Charitable Conservation Easement Program Integrity Act as part of the year-end “omnibus” spending bill, and it was signed into law on December 29, 2022. This legislation effectively shuts down a tax avoidance scheme that took advantage of the federal conservation easement tax incentive. (For more details on abusive syndicated conservation easement transactions and the legislative efforts to curtail them, see the [Alliance’s blog](#)).

*The Act provides taxpayers the opportunity to correct certain “defects” in an easement deed within 90 days of the publication by the IRS of safe harbor language. On April 10, 2023, the IRS notified the public that it will publish safe harbor language effective as of April 24, 2023 for purposes of calculating the 90 day window.*

### **1. Notice 2023-30**

***IRS [Notice 2023-30](#) sets forth the safe harbor deed language for extinguishment and boundary line adjustment clauses required by § 605(d)(1) of the SECURE 2.0 Act of 2022 (the Integrity Act). The window to amend and record will start on April 24 and close on July 24. The Notice reiterates the provisions of the Integrity Act described above and gives limited additional details.***

The IRS safe harbor deed language for extinguishment clauses is:

*Pursuant to Notice 2023-30, Donor and Donee agree that, if a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation of the perpetual conservation restriction renders impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if (1) the restrictions are extinguished by judicial proceeding and (2) all of Donee’s portion of the proceeds (as determined below) from a subsequent sale or exchange of the property are used by the Donee in a manner consistent with the conservation purposes of the original contribution.*

*Determination of Proceeds.* *Donor and Donee agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in Donee, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction, at the time of the gift, bears to the fair market value of the property as a whole at that time. The proportionate value of Donee’s property rights remains constant such that if a subsequent sale, exchange, or involuntary conversion of the subject property occurs, Donee is entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.*

The IRS safe harbor deed language for boundary line adjustment clauses is:

*Pursuant to Notice 2023-30, Donor and Donee agree that boundary line adjustments to the real property subject to the restrictions may be made only pursuant to a judicial proceeding to resolve a bona fide dispute regarding a boundary line's location.*

Considerations and comments regarding evaluating safe harbor language:

- Donors are not required to make the amendments described in the Notice but the intention of the substitute language is to safeguard the deduction from audit due to “faulty” extinguishment and/or boundary line adjustment language.
- In substituting deed language, the donor may use the precise terms or may use terms that have the same meaning as the terms such as “Grantor” and “Grantee” instead of “Donor” and “Donee.” No other allowable deviations are indicated.
- The safe harbor language for the extinguishment clause closely tracks Treas. Reg. section 1.170A-14(g)(6)(ii) and has been supported by Tax Court and some federal appellate courts.
- The safe harbor language for the boundary line adjustments clause is very limiting and restrictive. This narrow position could be an open question in court.
- Now that the language and instructions have been released, review:
  - State law to determine the treatment of amendments and deed reformation and what is required.
    - Please note the bolded language: “if a donor substitutes the safe harbor deed language for the corresponding language in the original eligible easement deed, and the amended deed is signed by the donor and donee and recorded on or before July 24, 2023, the amended eligible easement deed will be treated as effective for purposes of § 170, § 605(d)(2) of the SECURE 2.0 Act and Notice 2023-30 as of the date the eligible easement deed was originally recorded, **regardless of whether the amended eligible easement deed is effective retroactively under relevant state law.**”
  - Your land trust’s amendment policy.
  - [Practice 11H1](#) on amendments.
  - The Alliance’s “[Amending Conservation Easements: Evolving Practices and Legal Principles 2017](#)” publication.

Related to the safe harbors, there are two key components of the Charitable Conservation Easement Program Integrity Act found in Section 605 (page 935) of the [pending bill](#).

- 1. The Act disallows a charitable deduction for a qualified conservation contribution if the deduction claimed exceeds 2.5 times the sum of each partner’s relevant basis in the contributing partnership, unless one of the following two exceptions is met:**
  - a. The contribution meets a three-year holding period test.**
  - b. Substantially all of the contributing partnership is owned by members of a family.**

Notes on provision 1:



- This provision does not implicitly approve donations of easements valued up to 2.5 times basis; as such, claims below the 2.5 times threshold can continue to be audited and challenged by the IRS.
  - If the 2.5 times threshold is exceeded, the entire deduction is disallowed.
  - This provision is prospective, so it is effective for contributions made after the date of enactment of this Act, which is Dec. 29, 2022.
  - This provision does not apply to any qualified conservation contribution whose conservation purpose is the preservation of any building that is a certified historic structure.
  - The validity of a conservation easement continues to be determined under state law; the Act only addresses the donor's charitable donation.
  - All Land Trust Alliance member land trusts adopt and commit to implement "[Land Trust Standards and Practices](#)," the ethical and technical guidelines for the responsible operation of a land trust. Those guidelines require that all Alliance member land trusts refuse to knowingly participate in tax shelter transactions. (See the Alliance's "[Advisory: Tax Shelter Abuse of Conservation Donations](#)")
- 2. The Act provides taxpayers the opportunity to correct certain "defects" in an easement deed:**
- a. Within 120 days after the date of the enactment of the Act, the Secretary of the Treasury is to publish safe harbor deed language for extinguishment clauses and boundary line adjustments.**
  - b. During the 90-day period beginning on the date of publication of the safe harbor deed language, a donor may amend an easement deed to substitute the safe harbor language for the corresponding language in the original deed if the following two conditions are met:**
    - i. The amended deed is signed by the donor and donee and recorded within such 90-day period.**
    - ii. Such amendment is treated as effective as of the date of the recording of the original easement deed.**

Considerations regarding the Act's safe harbor provisions:

- The ability to cure does not apply to an easement donation in the following instances:
  - It is part of a reportable transaction.
  - It meets the description of IRS Notice 2017-10.
  - It is not treated as a qualified conservation contribution pursuant to the new IRC section 170(h)(7) detailed in Provision 1 above.
  - It is being contested in a federal court before the date the amended deed is recorded.
  - Penalties have been finally determined administratively for an underpayment, or the penalty is challenged in court, the judicial proceeding with respect to such penalty has been concluded by a decision or judgment which has become final.
- The ability to cure only applies to extinguishment and boundary line adjustments provisions; no other deed language flagged by the IRS is able to be corrected under the Act.



- The ability to cure is intended to “reform the deed” making the amendment effective as of the date of the recording of the original easement deed.
  
- Be prepared to:
  - Discuss the Act’s cure provisions internally with your board and staff.
  - Consult with your land trust legal counsel.
  - Determine if and how your land trust will communicate this development to its easement donors (and which ones). Though it may not be a legal duty to notify your easement donors, consider the donor relations at issue.
  - Manage requests for amendment by your donors.
  - Respond to the quick turnaround to meet the July 24 deadline.

This is a complex topic. If you have questions or concerns about this Advisory, contact [Leslie Ratley-Beach](#), 802-262-6051, or [Diana Norris](#), 202-800-2219.

Date: 4/11/2023

**DISCLAIMER:** The Land Trust Alliance designed this material to provide accurate, authoritative information about the subject matter covered with the understanding that the Alliance is not engaged in rendering legal, accounting or other professional counsel. If a land trust or individual requires legal advice or other expert assistance, they should seek the services of competent professionals. The Alliance is solely responsible for the content of this series.