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ABA RPTE Conservation Easement Task Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law

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**ABA RPTE CONSERVATION EASEMENT TASK
FORCE REPORT: RECOMMENDATIONS
REGARDING CONSERVATION EASEMENTS AND
FEDERAL TAX LAW***

Authors' Synopsis: In October 2015, the American Bar Association's Real Property, Trust and Estate Law (RPTE) section convened a Conservation Easement Task Force. The objective of the Task Force was to provide recommendations regarding federal tax law as it relates to conservation easements. This Report is the culmination of the Task Force's work. Part I of the Report is an Executive Summary of the Task Force's recommendations. Part II provides the background necessary to understand the Task Force's recommendations. Part III briefly sets forth the Task Force's comments on the Tax Cuts and Jobs Act of 2017 as it relates to charitable contributions in general and conservation easement donations in particular. In Part IV, the Task Force recommends that the Treasury publish safe harbor provisions that would be common to most conservation easements. Part V sets forth the Task Force's recommendations regarding amendments and discretionary consents, the inconsistent use regulations, and furthering transparency in conservation easement administration. Part VI discusses issues surrounding valuation of conservation easements. Part VII contains a brief comment on syndicated conservation easement transactions. Part VIII is the Task Force response to certain proposals the Treasury Department made (most recently in 2016) to change conservation easement law.

Appendix A sets forth the "perpetuity" requirements of § 170(h) and the Treasury Regulations. Appendix B offers specific language to facilitate the preparation of key safe harbor provisions.

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* This Report was prepared by the ABA Conservation Easement Task Force: W. William Weeks (Chair), Turney Berry, Jonathan Blattmachr, Jason Havens, Nancy A. McLaughlin, James Slaton, Steve Swartz, and Philip Tabas.

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In October 2015, the American Bar Association's Real Property, Trust and Estate Law (RPTE) section convened a Conservation Easement Task Force. The objective of the Task Force was to provide recommendations regarding federal tax law as it relates to conservation easements.

The Task Force was chaired by W. William Weeks. Task Force members were Jonathan Blattmachr, Turney Berry, David Dietrich, Jason Havens, Nancy A. McLaughlin, James Slaton, Steve Swartz, and Philip Tabas. This Report is the culmination of the Task's Force's work. This Report has not been presented to the House of Delegates nor to the Board of Governors of the American Bar Association. Thus, this Report is not the ABA's official position.

Although some members of the Task Force have clients who would be affected by the federal income tax principles addressed by this Report, or have advised clients on the application of such rules, neither a Task Force member nor the firm or organization to which any member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of this Report. The Report reflects the collective judgment of the Task Force and not the positions of the organizations, law firms, businesses, non-profit organizations, or government entities with which the Task Force members are affiliated.

I. EXECUTIVE SUMMARY OF RECOMMENDATIONS

Conservation easements have contributed vitally to the nation's interest in land, water, wildlife, ecosystem, agricultural, and historical conservation. Some improvements in law and policy can make conservation easements even more effective.

1. The ABA RPTE Section Conservation Easement Task Force recommends that policy makers monitor the effect of the Tax Cuts and Jobs Act of 2017 on charitable contributions in general and on conservation easement donations in particular, and make adjustments to restore the broad attractiveness of charitable donations if the new law significantly depresses contributions (pp. 256–257).
2. The Task Force recommends that Treasury publish certain safe harbor provisions for conservation easements intended to qualify for deduction under Internal Revenue Code (Code) section 170(h) (pp. 257–261). Upon final publication of safe harbor provisions, easement donors whose contributions are still subject to challenge by the Internal Revenue Service (Service) should be given an opportunity to bring their easements into conformity with the safe harbor provisions. As with other safe harbor provisions, easement deeds that do not include the safe harbor language should not necessarily be disqualified under section 170(h), but neither would the easement donors be assured that the provisions they have drafted qualify for the deduction. The Task Force has recommended certain safe harbor provisions in Appendix B (pp. 348–371).
3. The Task Force recommends that Treasury provide guidance and rules to facilitate appropriate amendments, discourage improper amendments, and address discretionary consents (pp. 252–256, 261–269). The Task Force recommendation is based on its conclusion that conservation easements intended to be perpetual will better serve the conservation purposes of section 170(h) if they can be administered under such guidance. Specifically, we recommend that Treasury:
 - a. publish a safe harbor “limited power of amendment” provision to be included in conservation easement deeds that grants the property owners and easement holders the power to agree to amendments but imposes appropriate limits on that power to prevent abuses (Appendix B, pp. 364–365);

- b. publish “Principles and Procedures” for permissible amendments and discretionary consents (pp. 269–277);
 - c. publish examples of both permissible and impermissible amendments that illustrate that certain minor amendments to conservation easements are permissible without independent external review, certain moderate risk amendments are permissible with independent external review, and certain high risk amendments are permissible with enhanced independent external review (pp. 277–295);
 - d. publish a safe harbor “de minimis release” provision to be included in conservation easement deeds that grants the property owners and easement holders the power to agree to de minimis extinguishments without judicial review but imposes appropriate limits on that power to prevent abuses (Appendix B, pp. 363–364), and publish examples of both permissible and impermissible extinguishments (pp. 295–304); and
 - e. approve an independent external review and approval process for amendments that meets stated objectivity, reliability, consistency, and independence criteria (pp. 304–311) or alternatively, develop procedures that require and encourage easement holders to provide advance notice of proposed amendments, discretionary consents, and extinguishments to appropriate charity regulators (pp. 311–312).
4. The Task Force recommends that Treasury increase transparency and accountability in conservation easement acquisition and administration (pp. 312–313) by:
- a. establishing rules on loss of eligible donee status for easement administration abuses (pp. 314–315);
 - b. promulgating rules or publishing guidance that will discourage improper conservation easement amendments (pp. 315–317);
 - c. requiring more straightforward, accurate, and complete Form 990 reporting on conservation easement amendments (pp. 317–318);
 - d. modifying Form 8282 to include easement holder amendment reporting (p. 318–319);
 - e. enhancing collaboration between the Service and state charity regulators (pp. 319–320); and

- f. applying rules and guidance relating to conservation easement amendments to government holders to the extent possible (p. 320).
5. The Task Force recommends that Treasury provide guidance that would improve compliance by clarifying the inconsistent use provisions in Treasury Regulation section 1.170A-14(e)(2)-(3) (pp. 321–322).
6. The Task Force recommends that Treasury improve Form 990 reporting to increase transparency and bolster public confidence in conservation easement administration (pp. 322–331).
7. The Task Force recommends that Treasury address issues associated with conservation easement valuation (pp. 331–334) by:
 - a. providing for increased penalties on donors and appraisers for serious overvaluation of conservation easements (pp. 334–335);
 - b. improving Form 8283 to increase its transparency (pp. 336–337);
 - c. developing a Qualified Easement Qualified Appraisal Form to facilitate more consistent and easily reviewed appraisals (use of the form need not be mandatory, but failure to use it could trigger a likelihood of enhanced valuation review) (pp. 337–338); and
 - d. providing opportunities for fee-for-service review of conservation easement appraisals to enhance valuation certainty for taxpayers; sponsoring valuation panels; or establishing a list of approved appraisers (pp. 338–339).
8. The Task Force recommends that certain syndicated conservation easement transactions continue to be listed transactions as specified in Notice 2017-10 as revised, and that Treasury further clarify the Notice to avoid burdening certain ancillary parties, donees, and donee staff and advisors with obligations as “material advisors” (pp. 339–340).
9. The Task Force offers its responses to Treasury’s 2016 proposals for changes in conservation easement policy (p. 340):
 - a. Retain without expanding the now existing requirements for conservation easements protecting relatively natural habitat, outdoor recreation areas, and historic buildings and sites. Clarify whether qualifying outdoor recreation includes outdoor sports facilities (pp. 340–341).
 - b. Consider tax credits for conservation easements, but make them an elective alternative to the existing section 170(h) deduction,

and do not create new committees, interagency panels, or other entities to be charged with administering a top-down process for allocating credits (pp. 341–342).

- c. Establish rules specific to golf course easements to ensure public benefits sufficient to justify the deduction. The rules should address, inter alia, public access, off-season use, water and chemical management, and the balance between groomed land and natural or open space land (p. 342).
- d. Do not establish new restrictions that would automatically preclude qualified organizations from accepting conservation easements from insiders. Conflict of interest concerns can be addressed by requiring qualified organizations to adopt appropriate policies for disclosing, avoiding, and managing such conflicts (pp. 342–343).

II. BACKGROUND

Conservation easements protect magnificent forests, teeming wetlands, rich farmlands, open rangelands, and essential wildlife habitat that simply would not otherwise have been conserved. Indeed, it is estimated that more than forty million acres in the United States are subject to various restrictions on development and use in the form of conservation easements.¹ These easements were conveyed by land owners to government and non-profit organizations to be held and enforced as a critical public benefit, interest, and service. Billions of dollars of public funds are being invested in easements through federal, state, and local tax-incentive and easement-purchase programs.²

The law of conservation easements is relatively young. Forty years ago, many states had not yet adopted conservation easement “enabling” statutes.³ These statutes sweep away the common law impediments to the creation and enforcement of conservation easements, which are land use restrictions typically held “in gross.”⁴ In 1981, the Uniform Law Commission adopted the Uniform Conservation Easement Act (UCEA).⁵ More than half the states have now adopted the UCEA in some form, and the remainder of the states have enacted their own versions of enabling statutes.⁶

Though deductions for conservation easement donations had been allowed for some time,⁷ Code sections authorizing charitable deductions

¹ See Nat'l Conservation Easement Database, *Conservation easements and the National Conservation Easement Database: What is NLED?*, <https://www.conservationeasement.us/storymap/index.html> (last visited Jan. 25, 2019).

² See, e.g., Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 3 UTAH L. REV. 755, 756 (2013); Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS INSTITUTION (Dec. 20, 2017), <https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/>.

³ See NANCY A. McLAUGHLIN, UNIFORM CONSERVATION EASEMENT ACT STUDY COMMITTEE BACKGROUND REPORT (June 11, 2017), prepared for the Uniform Law Commission and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101137.

⁴ See *id.* at 1-3.

⁵ See *id.* at 1.

⁶ See *id.*

⁷ The Internal Revenue Service (Service) officially sanctioned a charitable income tax deduction for the donation of a conservation easement in a 1964 Revenue Ruling. See Rev. Rul. 64-205, 1964-2 C.B. 62.

for qualifying conservation easement donations were first enacted in the 1970s. In 1980, section 170(h),⁸ which authorizes a property owner to claim a federal charitable income tax deduction for the donation of a qualifying conservation easement or façade easement, was made a permanent part of the Code.⁹ In 1986, final regulations interpreting section 170(h), which contained many unprecedented terms, were published.¹⁰

The law of conservation easements has actively developed because, over time, a conservation easement is more likely than many other real estate interests to become the subject of a dispute. A conservation easement binds together three parties with potentially conflicting interests: (1) the owner of the encumbered land (who may or may not be the original easement donor), (2) the non-profit or governmental holder of the easement, and (3) the public, which invested in and is beneficiary of the easement's conservation protections.

Both state and federal law govern aspects of the creation, administration, and enforcement of conservation easements intended to qualify as charitable contributions. State enabling statutes authorize the creation of conservation easements, but generally mandate that they be created for specified conservation purposes and conveyed to governmental or charitable entities to be held and enforced for the benefit of the public.¹¹ Section 170(h) and the Treasury Regulations address the income tax deductibility of donated easements. Like the state enabling statutes, section 170(h) mandates that tax-deductible easements be created for specified conservation purposes and conveyed to governmental or charitable entities to be held and enforced for the benefit of the public.¹²

Most state enabling statutes authorize the creation of conservation easements with a variety of durations (that is, term easements, which

⁸ Throughout this Report, “§” or “section” references are to the Internal Revenue Code, Title 26, United State Code, unless otherwise indicated.

⁹ Unless otherwise indicated, this Report will refer to both conservation easements encumbering land and façade easements encumbering historic structures as “conservation easements.”

¹⁰ See generally Treas. Reg. § 1.170A-14. Throughout this Report, references to the “Code” or “I.R.C.” refer to the Internal Revenue Code, Title 26, United State Code, and references to the regulations refer to the Treasury Regulations promulgated thereunder. All Internal Revenue Code and state statutory citations in this Report refer to the current statute unless otherwise indicated. The same applies to regulations.

¹¹ See UNIFORM CONSERVATION EASEMENT ACT BACKGROUND REPORT, *supra* note 3, at 2.

¹² See I.R.C. § 170(h)(1).

expire after a specified term, such as twenty or thirty years; terminable easements, which terminate upon satisfaction of one or more stated conditions, such as approval of a public official or a finding that profitable farming on the property is no longer feasible; and perpetual easements, which are intended to protect the conservation values of the subject properties in perpetuity, or for as long as it remains possible or practicable to do so). To be eligible for a deduction under section 170(h), a conservation easement must be “granted in perpetuity” and its conservation purpose must be “protected in perpetuity.”¹³ Many conservation easements, even those not intended to qualify for section 170(h) deduction, are drafted to be perpetual, in part because many property owners wish to ensure permanent protection of land that has special significance to them, their families, and their communities.

The recommendations of this Report are limited to conservation easements intended to be eligible for a federal charitable income, gift, or estate tax deduction or the section 2031(c) estate tax exclusion. That said, the section 170(h) and Treasury Regulation requirements have been incorporated into many easement-purchase and state tax-incentive programs. Accordingly, it is anticipated that the Task Force’s recommendations, if adopted, could similarly be useful for easements created in other contexts.

The Treasury Regulations contain numerous requirements intended to ensure that tax-deductible easements will protect the conservation and historic values of the properties they encumber in perpetuity and, in the rare event of a judicial extinguishment upon impossibility or impracticality, the public’s investment in the conservation benefit achieved with the easement will be protected. At the state level, in addition to state real property and contract law, state laws governing the operations of charitable organizations and the assets they hold for the benefit of the public also apply.

The closest thing to a set of common standards for conservation easement deeds exists in the efforts of many lawyers to draft such deeds to comply with the section 170(h) and Treasury Regulation requirements. Lack of specific guidance, however, has led to wide disparities in the manner in which easement deeds are drafted. This, in turn, leads to problematic differences in the administration, interpretation, and enforcement of easements over the long term.

¹³ See I.R.C. § 170(h)(2)(C), (h)(5)(A).

In 2015, Congress expressed implicit support for the conservation objectives of section 170(h) by eliminating the sunset provisions associated with certain “enhancements” to the section 170(h) deduction. Litigation over deductions claimed for easement donations has, however, revealed various forms of noncompliance and abuse, including overvaluation of easements, failure to satisfy section 170(h)’s “conservation purposes” and “perpetuity” requirements, and failure to satisfy the qualified appraisal and other substantiation requirements.

There also are concerns regarding the long-term enforcement of these perpetual instruments. Nonprofit and government holders are supposed to enforce the easements on behalf of the public in perpetuity. However, these holders are also motivated to maintain good relations with the owners of the encumbered properties, some of whom may lack the conservation ethic of previous owners who donated the easement. Landowners may press for the modification or release of easement restrictions. In addition, no clear rules exist regarding the enforcement and amendment of easements. The prospect of significant financial gain from unlocking previously restricted development and use rights puts easement protections at risk of erosion over time.

Perpetual conservation is an inherently challenging standard. Easement drafters are fallible, and it has long been recognized that it is impossible at the time of conveyance to specify every conceivable variation of use, activity, or practice that in the future might have an impact on the conservation values protected by an easement. It also is impossible to anticipate all of the forces and changes that may affect the continued viability of an easement’s protection objectives. A mechanism must be created permitting perpetual conservation easements to be adapted to changing conditions over time in a manner consistent with their conservation objectives, while at the same time prohibiting changes that would result in the degradation or destruction of the protected properties’ conservation values.

In this Report, the Task Force makes a number of recommendations for reforms or guidance that are designed to (1) facilitate taxpayer compliance with the section 170(h) and Treasury Regulation requirements, (2) clarify the rights and responsibilities of conservation easement holders and landowners, (3) streamline Service review of easement donation transactions, (4) reduce audits and litigation, and (5) help ensure that tax-deductible easements will protect the conservation and historic values of the properties they encumber in perpetuity, as Congress intended. These reforms and guidance, if adopted, would reduce

the burden on taxpayers and the Service and improve conservation outcomes.

The Task Force's proposals for reform and guidance are designed to result in meaningful but balanced oversight of the section 170(h) deduction program. The Task Force also recommends that both Congress and the Treasury recognize the need for appropriate resources for the Service to fulfill its responsibilities with respect to conservation easements both for donors and for the public. Charitable deductions claimed under section 170(h) represent an important public investment. Both significant public expectations and important government incentives for conservation are at stake.¹⁴

III. THE CHARITABLE CONTRIBUTION DEDUCTION AND SECTION 170(H)

The Task Force began its work in 2015. Significant changes in tax law and policy have taken place since that time. Among these changes was the passage of the Tax Cuts and Jobs Act of 2017 (TCJA). The TCJA made wide-ranging changes to the Code. Under the TCJA, the charitable deduction was retained while the percentage limit on cash donations for those who itemize deductions was raised slightly from 50% to 60% of adjusted gross income (as specially defined).¹⁵ More importantly, the TCJA increased the standard deduction, repealed or limited many itemized deductions, and reduced the marginal tax rates for individuals, corporations, and certain pass-through business entities.¹⁶

These changes have given rise to speculation as to the impact of the TCJA on the charitable sector. Some studies have indicated that 95% fewer taxpayers will itemize and therefore charitable giving will decline by between \$12 and \$20 billion in 2018.¹⁷ At the very least, the tax benefits to donors of charitable contributions will be reduced.

¹⁴ See, e.g., Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS INSTITUTION (Dec. 20, 2017), <https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/>.

¹⁵ See TCJA § 11023.

¹⁶ See generally TCJA, Pub. L. No. 115-97.

¹⁷ These estimates are based on estimates from the Brookings Tax Policy Center and are consistent with a study released by the Indiana University Lilly Family School of Philanthropy. See, e.g., LILLY FAMILY SCH. OF PHILANTHROPY, IND. UNIV., TAX POLICY

The TCJA also doubles the credit against the estate, gift, and generation-skipping transfer tax in 2018 through 2025.¹⁸ Consequently, the TCJA is also likely to weaken the tax incentive to include charitable provisions, including conservation easements, in wills and trusts for the period that this provision is in effect.

While the TCJA did not make any explicit changes to section 170(h) or to the provisions that enhance the ability of conservation easement donors to claim the section 170(h) deduction, it is certainly possible that the TCJA will have an adverse impact on conservation easement donations. It is likely that higher income taxpayers will continue to have financial incentives to donate easements while taxpayers of more modest means will have the tax benefits of their easement gifts reduced.

The Task Force recommends that the Administration and Congress take steps to monitor the sources and extent of charitable contributions and particularly conservation easement donations over the next several years. If the TCJA depresses charitable giving, some amendments to enhance tax incentives for charitable contributions may be appropriate. The Task Force also specifically recommends that the Administration and Congress maintain the existing enhanced deduction for conservation easement donations, with appropriate reforms and guidance as recommended herein.

IV. SAFE HARBOR PROVISIONS FOR CONSERVATION EASEMENT DEEDS

A. The Need for and Benefits of Safe Harbor Provisions¹⁹

The section 170(h) deduction has motivated thousands of taxpayers to make charitable gifts of conservation easements that protect important open space, wildlife habitat, recreational, and historic values on behalf of the public. However, the tax incentive could be made more efficient and effective, and compliance with section 170(h) and the associated Treasury Regulations could be significantly facilitated with the adoption of drafting guidance for key conservation easement deed provisions.

AND CHARITABLE GIVING RESULTS 20 (May 2017), <https://scholarworks.iupui.edu/bitstream/handle/1805/12599/tax-policy170518.pdf>.

¹⁸ See TCJA § 11061(a).

¹⁹ In other contexts, the Service refers to safe harbor provisions as “sample” provisions. See *infra* Part IV.B for safe harbor or sample forms and provisions in other contexts.

Some of the section 170(h) and Treasury Regulations requirements are difficult to interpret, resulting in confusion, noncompliance, and unnecessary expenditure of judicial and administrative resources. Since 2005, courts have issued over one hundred opinions in cases involving Service challenges to deductions claimed under section 170(h), and many of these cases involved interpretation of one or more of the section 170(h) or Treasury Regulations requirements.²⁰ There also are additional cases in the litigation pipeline.

Lack of guidance has also led to wide disparities in the way conservation easement instruments are drafted. Such drafting disparities, in turn, lead to differences in the administration, interpretation, and enforcement of easements on behalf of the public over the long term, jeopardizing the security of the public's investment in these perpetual gifts. Lack of standardized language in easement deeds also makes it difficult to establish meaningful precedents in cases interpreting easement provisions, thereby increasing litigation costs in interpretation and enforcement disputes.

The Task Force recommends that the Treasury publish certain safe harbor conservation easement provisions that meet the section 170(h) and Treasury Regulations requirements and generally need not vary from easement to easement. Use of the safe harbor provisions would, of course, not be mandatory, but publication of the safe harbor provisions would help to minimize legal uncertainties, improve compliance and enforcement, reduce audits and litigation, promote uniformity, and foster better and more lasting conservation outcomes.

The Task Force also recommends that, upon final publication of the safe harbor provisions, all easement donors whose donations are still subject to challenge by the Service, including those then involved in litigation or audit, be given a specified period to work with easement holders to bring their easements into conformity with the safe harbor provisions without penalty, and that modifications made to bring the easements into conformity with the safe harbor provisions apply retroactively to the date of donation. Once the "amnesty period" has run,

²⁰ See, e.g., *PBBM-Rose Hill, Ltd. v. Comm'r*, 900 F.3d 193 (5th Cir. 2018); *Palmolive Bldg. Inv'rs, Minnick v. Comm'r*, 149 T.C. No. 18 (2017); *Mitchell v. Comm'r*, 775 F.3d 1243 (10th Cir. 2015); *Minnick v. Comm'r*, 796 F.3d 1156 (9th Cir. 2015); *Belk v. Comm'r*, 774 F.3d 221 (4th Cir. 2014); *Wachter v. Comm'r*, 142 T.C. 140 (2014); *Scheidelman v. Comm'r*, 682 F.3d 189 (2d Cir. 2012); *Carpenter v. Comm'r*, T.C. Memo. 2013-172; *Turner v. Comm'r*, 126 T.C. 299 (2006).

the ability to bring donations into conformity without penalty and with retroactive effect should end. Providing such an amnesty period would help with the litigation backlog.

The Task Force further recommends that the amnesty period be no shorter than 180 days, ideally 365 days, and begin on the date of publication of the final safe harbor provisions. This period is recommended because it will take some time to inform taxpayers and nonprofit and governmental holders of easements of the safe harbor provisions and the amnesty period. It also will take some time for taxpayers and holders to engage legal counsel to assist with making changes to their easements.

B. Safe Harbor or Sample Forms and Provisions in Other Contexts

The Service and the Uniform Law Commission have developed sample or safe harbor forms and provisions in other contexts. The following examples are helpful in considering how best to develop and present safe harbor provisions in the conservation easement context.

1. Revenue Procedures 2005–52 through 2005–59 (sample declarations of trust that meet the requirements of section 664, annotations to the sample trusts, and alternative provisions).²¹

²¹ See generally Rev. Proc. 2005-52 to -59, 2005-2 C.B. Section 3 of Revenue Procedure 2005-57, which states the Revenue Procedure's "[s]cope and [o]bjective," provides, in part:

The Service will recognize a trust as a qualified CRUT meeting all of the requirements of § 664(d)(2) and, if applicable, § 664(d)(3), if the trust operates in a manner consistent with the terms of the trust instrument, if the trust is a valid trust under applicable local law, and if the trust instrument: (i) is substantially similar to the sample in section 4 . . . ; or (ii) properly integrates one or more alternate provisions from section 6 . . . into a document substantially similar to the sample in section 4 A trust that contains substantive provisions in addition to those provided in section 4 . . . (other than properly integrated alternate provisions from section 6 . . . or provisions necessary to establish a valid trust under applicable local law that are not inconsistent with the applicable federal tax requirements), or that omits any of the provisions of section 4 . . . (unless an alternate provision from section 6 . . . is properly integrated), will not necessarily be disqualified, but neither will that trust be assured of qualification under the provisions of this revenue procedure. The Service generally will not issue a letter ruling on whether an inter vivos trust . . . qualifies as a CRUT. The Service, however, generally will issue letter rulings on the effect of substantive trust

2. Section 403(b) Pre-Approved Plans: Sample Plan Provisions and Information Package and Revenue Procedure 2007-71 (sample plan language for public school 403(b) plans).²²
3. Uniform Real Property Transfer on Death Act, Section 16 (optional form of transfer on death deed).²³
4. Uniform Power of Attorney Act, Section 301 (statutory form power of attorney).²⁴

C. List of Safe Harbor Provisions

The following is a list of conservation easement provisions for which safe harbor provisions could be provided, along with annotations. These provisions generally need not vary from easement to easement. As in the charitable remainder trust context, conservation easements that do not contain the safe harbor provisions should not necessarily be disqualified, but neither would they be assured of qualifying for the section 170(h) deduction.

Not all provisions in conservation easement deeds could be standardized. Project-specific provisions, such as those that address the unique characteristics of the subject property and the particular permitted and prohibited uses agreed to by the parties, will vary from easement to easement. Project-specific provisions are both necessary and acceptable, provided they do not weaken or negate the safe harbor provisions.

Draft language for each of the proposed safe harbor provisions listed below is provided in Appendix B.

1. Introductory Clause
2. Nonexclusive Recitals
3. Now, Therefore Provision
4. Charitable Gift for Qualified Conservation Purpose(s)
5. Eligible Donee
6. Baseline Documentation
7. Mining Restrictions
8. Inspection and Enforcement

provisions, other than those contained in sections 4 and 6 . . . , on the qualification of a trust as a CRUT.

²² See *403(b) Pre-Approved Plans*, I.R.S., <https://www.irs.gov/retirement-plans/403b-pre-approved-plans> (last updated Aug. 10, 2018).

²³ See UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16, 8B U.L.A. 308 (2009).

²⁴ See UNIF. POWER OF ATTORNEY ACT § 301, 8B U.L.A. 250 (2006).

9. Overarching Prohibition
10. Prohibition on Inconsistent Uses
11. Approvals and Notification of Exercise of Other Reserved Rights
 - a. Approvals
 - b. Notification of Exercise of Other Reserved Rights
12. Restrictions on Transfer, Extinguishment, De Minimis Release, Limited Power of Amendment, and Limited Power of Discretionary Consent
 - a. Restrictions on Transfer
 - b. Extinguishment
 - c. De Minimis Release for a Bona Fide Boundary Line Adjustment or Settlement In Lieu of Condemnation
 - d. Limited Power of Amendment
 - e. Limited Power of Discretionary Consent
13. Interaction With State Law
14. Section 2031(c) Federal Estate Tax Exclusion
15. No Merger
16. Public Access
17. Good Title, Owner Warranty Provision
18. Holder's Obligation to Maintain Enforceability
19. Successors in Interest
20. Holder's Acceptance of Gift
- *** Mortgage Subordination Agreement

V. RECOMMENDED ADDITIONS TO AND CLARIFICATIONS OF CONSERVATION EASEMENT LAW

Through the Task Force's work on additions to and clarifications of conservation easement law, several important themes emerged. First among these is the need to enhance easement prospects for perpetuity by affirming the legality of well-governed amendments. We call for providing rules and standards that will allow easement holders and land owners limited flexibility for addressing certain issues with appropriate amendments adopted with appropriate processes. In addition, we recommend enhanced disclosure of standards for conservation easement acquisition and increased transparency in conservation easement administration.

A. Amendments and Discretionary Consents

Section 170(h) requires that a tax-deductible conservation easement be "a restriction (granted in perpetuity) on the use which may be made of

the real property,”²⁵ and that the conservation purpose of the contribution be “protected in perpetuity.”²⁶ The Treasury Regulations elaborate on these statutory requirements and require, among other things, that a tax-deductible conservation easement be extinguishable only in a judicial proceeding, upon a finding that continued use of the property for conservation purposes has become impossible or impractical, and with a payment of at least a minimum share of proceeds to the holder to be used in a manner consistent with the conservation purposes of the original contribution.²⁷ For a summary of the various “perpetuity” requirements in section 170(h) and the Treasury Regulations, see Appendix A.

A modification of a tax-deductible perpetual conservation easement, whether in the form of an amendment, a discretionary consent, or otherwise, must be considered in light of the perpetuity requirements of section 170(h) and the Treasury Regulations.

1. Government Concerns and Proposals

a. Senate Finance Committee Concerns

In 2005, in response to reports of abuse, the Senate Finance Committee held a hearing on the tax code and land conservation, including the federal tax incentives available with respect to conservation easement donations.²⁸ In connection with that hearing, the Committee issued a report that, among other things, expressed significant concerns regarding conservation easement amendments.²⁹

The report explains that “[m]odifications to an easement held by a conservation organization may diminish or negate the intended conservation benefits, and violate the present law requirements that a conservation restriction remain in perpetuity.”³⁰ The report notes that modifications made to correct ministerial or administrative errors are

²⁵ I.R.C. § 170(h)(2)(C) (emphasis added).

²⁶ I.R.C. § 170(h)(5)(A).

²⁷ See Treas. Reg. § 1.170A-14(g)(6).

²⁸ See generally *The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Hearing Before the S. Comm. on Fin.*, 109th Cong. (2005).

²⁹ See STAFF OF S. COMM. ON FIN., 109TH CONG., REP. OF STAFF INVESTIGATION OF THE NATURE CONSERVANCY, Part Two 4–5 (Comm. Print 2005) [hereinafter *Report of Staff Investigation*].

³⁰ *Id.* at Exec. Summary 9.

permitted under federal tax law.³¹ But the report expresses concern with regard to “trade off” amendments, which can both negatively impact and arguably further the conservation purpose of an easement.³² The report provides, as an example, an amendment that would permit the owner of the encumbered land to construct a larger home in exchange for restrictions further limiting the use of the land for agricultural purposes.³³ The report explains that trade-off amendments may be difficult to measure from a conservation perspective, the weighing of increases and decreases in conservation benefits is difficult to perform by the holder and to assess by the Service, and the private benefit aspects involve subject inquiries with no bright lines to make determinations.³⁴

b. Joint Committee on Taxation Proposal to Impose Penalties on Holders

The Joint Committee on Taxation (JCT) also addressed the issue of improper modification of conservation easements. It published a Description of Revenue Provisions Contained in the President’s Fiscal Year 2006 Budget Proposal, one of which was to impose “significant” penalties on a charity that inappropriately “remov[es]” conservation restrictions in whole or in part,³⁵ or transfers a conservation easement without ensuring that the conservation purposes will be protected in perpetuity.³⁶ The amount of the penalty was to be determined based on the value of the conservation easement shown on the appraisal summary that the donor provided to the charity. Under the proposal, the Secretary of the Treasury was to be authorized to waive the penalty in certain cases, and to require such additional reporting as necessary or appropriate to ensure that the conservation purposes of tax-deductible easements are protected in

³¹ See *id.* at Exec. Summary 9 n.20.

³² See *id.* at Part Two 5.

³³ See *id.*

³⁴ See *id.*

³⁵ STAFF OF J. COMM. ON TAXATION, 109TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2006 BUDGET PROPOSAL 119 (J. Comm. Print 2005). The concept of “removal of conservation restriction[s]” is ambiguous. This Report clearly distinguishes between an “extinguishment,” which involves the release or removal of some or all of the originally-protected land from a conservation easement, and an “amendment,” which involves a change in a conservation easement’s terms as applied to the originally-protected land but does not involve the release or removal of any land from the easement.

³⁶ See *id.* at 239–41.

perpetuity. In its analysis of this proposal, the JCT made a number of observations.

It seems clear that the proposal calls for penalties in cases where conservation restrictions were significantly modified (even if not “removed”).³⁷ On the other hand, the JCT noted that certain non-significant modifications, such as for mistake or clarity, or de minimis modifications, should arguably not be penalized.³⁸

c. Service Concerns

In October 2016, at the Land Trust Alliance national conference, Karin Gross, Special Counsel in the Internal Revenue Service Office of Chief Counsel in Washington, D.C., noted that guidance under section 170(h) was listed in the Treasury’s 2016–2017 Priority Guidance Plan,³⁹ and she announced that the Treasury was working on a proposed rulemaking project regarding conservation easement amendments. She invited attendees to submit suggestions to the Service regarding the project, including providing examples of amendments that are, and are not, consistent with section 170(h)’s “granted in perpetuity,” “protected in perpetuity,” and “enforceable in perpetuity” requirements.

Ms. Gross stated that not all amendments are bad; rather, she said the question is what amendments are appropriate and under what circumstances. In her oral remarks, she noted the following:

- (i) Section 170(h) requires conservation easements to be granted in perpetuity and enforceable in perpetuity; if the rules governing amendments are too lenient, it could negate the perpetual protection of the property.
- (ii) Amendment authority cannot be so broad that holders and landowners could avoid the judicial extinguishment requirements.
- (iii) Landowners must not be permitted to buy their way out of restrictions.

³⁷ See *id.* at 240.

³⁸ See *id.*

³⁹ See OFFICE OF TAX POLICY AND INTERNAL REVENUE SERVICE, U.S. DEP’T OF THE TREASURY, 2016–2017 PRIORITY GUIDANCE PLAN 14 (2016).

- (iv) The rules must be structured to minimize abuses.
- (v) If amendment decision-making is by the landowner and holder alone, there arguably would be no checks and balances. See *Carpenter v. Commissioner*, T.C. Memo 2012-1 (the “restrictions [in a conservation easement] are supposed to be perpetual in the first place, and the decision to terminate them should not be [made] solely by interested parties”).
- (vi) Without some third-party role in amendment decision-making, landowners, who stand to benefit personally and financially from amendments, could potentially place undue pressure on holders to agree to inappropriate amendments.
- (vii) There must be mechanisms in place to ensure, for example, that an amendment does not involve private benefit or private inurement, an amendment does not have a negative impact on the conservation values of the property the easement is intended to protect, an amendment does not permit “inconsistent uses,” the baseline documentation report is updated as appropriate, mortgage subordinations are obtained or updated as appropriate, appraisals are obtained as appropriate, and amendments are properly recorded.
- (viii) There must be a mechanism to prevent holders from agreeing to discretionary approvals or consents in lieu of amendments, whereby holders approve new uses on protected lands that may be prohibited or contrary to the purposes of the easement without formally amending the easements in order to avoid the limitations on and reporting requirements with respect to amendments.

2. *The Need for Clear Rules*

Some amendments are inevitable in the perpetual conservation easement context. “Forever” is very long time, human drafters are fallible, and it has long been recognized that it is impossible at the time of conveyance to specify every conceivable variation of use, activity, or practice that in the future might have a positive or adverse impact on the conservation values protected by an easement. It is also impossible to anticipate all of the forces and changes that may affect the continued viability of the protection objectives of a conservation easement. There must, therefore, be a process for amendment that will permit perpetual conservation easements to adapt to changing conditions over time in a manner consistent with their conservation objectives, and at the same time prohibit changes that would result in the degradation or destruction of the subject property’s conservation values.

The solid ground upon which a conservation easement is constructed is the easement’s stated conservation purpose. Changes to an easement should be allowed over time to permit unanticipated uses only if the new uses are consistent with or further the easement’s conservation purpose and the continued protection of the conservation values of the subject property. Viewing future changes to an easement through the lens of its conservation purpose and the conservation values it is intended to protect in perpetuity will ensure that conservation easements are fundamentally stable, yet adaptable instruments.

Even the most presciently drafted conservation easement may need to be amended at some point, whether to correct scribes’ errors, add land, add restrictions, eliminate reserved rights, improve enforceability, or address unanticipated environmental challenges or land uses. An amendment can make it possible to protect the conservation values of the subject property for the benefit of the public over the long term, and at the same time permit unanticipated land management practices or uses that are consistent with and further the conservation purpose of the easement.

Amendments may also be required by results of easement-related litigation, including often mandatory pre-trial alternative dispute resolution procedures. Regulatory changes can also impact conservation practices and the rules under which state and federal agencies administer easements.

A carefully limited willingness to consider amendments to conservation easements does not represent backsliding from the goal of perpetual protection of the subject property’s conservation values. Rather,

it represents an affirmation of that goal, and a recognition that some adaptation may be necessary or desirable to achieve it.

The holder of a conservation easement possesses a partial interest in real estate, and that creates unique challenges. Holders must enforce easements on behalf of the public, yet they are highly motivated to maintain good relations with new owners of the encumbered lands, some of whom may lack the conservation ethic of the easement donors and would profit from modification or release of easement restrictions. A strong and generally appropriate desire by holders to maintain good relations with landowners and avoid unpleasant, expensive disputes can cause holders not to enforce easements, to agree to improperly modify or release easement restrictions, and to otherwise act in ways contrary to the public interest.⁴⁰

⁴⁰ For example, at the request of a new landowner—a prominent Washington, D.C. developer—the National Trust for Historic Preservation agreed to amend a tax-subsidized easement that prohibited development of a historic tobacco plantation on Maryland’s Eastern Shore to allow a seven-lot upscale residential subdivision on the property. *See* Letter from Richard Moe, President, Nat’l Tr. for Historic Pres. in the U.S., to Mr. and Mrs. Herbert S. Miller (Feb. 7, 1994) (on file with Nancy A. McLaughlin, Univ. of Utah College of Law). After the Maryland Attorney General filed suit to defend the easement, the matter was settled with the easement remaining intact. For a detailed discussion of the controversy, see Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006). *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), similarly involved a land trust’s agreement to improperly amend a tax-subsidized easement at the request of a new owner of the encumbered land.

The stated purpose of the easement was to retain the lawn and landscaped grounds of a historic home “forever predominantly in its scenic and open space condition.” [At the new owner’s request,] the land trust [] agreed to “amend” the easement to (i) remove part of the protected grounds from the easement in exchange for protecting other land so that the new owner could construct a prohibited driveway (a partial extinguishment), . . . and (ii) approve plantings that materially interfered with the easement’s scenic purpose. While the court held that the easement could be amended, and cited an amendment to add land as acceptable, the court invalidated the amendments [at issue] because they were contrary to the terms and conservation purpose of the easement.

UNIFORM CONSERVATION EASEMENT ACT BACKGROUND REPORT, *supra* note 3, at 42; *see also* Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 DUKE J. LAW & CONTEMP. PROBS. 1, 13 (2011) (noting that a recent national survey indicated that land trusts are frequently deterred from enforcing easements by the cost, capacity limitations, and the desire to maintain positive landowner relations).

Lack of clear rules regarding amendments jeopardizes the public investment in conservation easements because easement restrictions may be eroded over time as new owners of the burdened properties press for modifications to or release of easement restrictions. Without clear rules, the prospect of significant financial gain also invites abuse. Oversight by federal and state regulators alone is unlikely to be a sufficient deterrent.⁴¹

While some data on conservation easement amendments is available through a review of nonprofit Form 990 filings and other sources, this data does not provide a reliable or complete picture due to a number of factors, including (1) uncertainty regarding the modifications that must be reported on the Form 990, (2) failure by some nonprofits to report modifications on the Form 990, and failure by some to provide descriptions or provision of descriptions that are ambiguous or unclear, (3) the fact that not all land trusts or other charities holding tax-deductible easements are required to file Form 990, and (4) the fact that federal, state, and local government entities, which hold many tax-deductible easements, do not file Form 990. Moreover, regardless of the current state of amendment activity, the pace of amendments being considered by holders is likely to only increase over time. Conservation easement portfolios are aging, ownership of protected properties will repeatedly change hands, development pressures are likely to increase, climate change will create new impacts, and holders' boards and staff will turn over. Amendments to conservation easements will thus continue to be an issue, and a more frequent and extensive one in the future.

Holders of conservation easements generally understand the permanent protection task they have assumed. Many holders would welcome clear rules regarding amendments and would appreciate assurance that their good faith administration of easements is consistent with the law. Clear rules would enable holders to adapt easements to changing conditions over time consistent with their conservation purposes and, at the same time, more easily say "no" to new owners seeking to unlock development potential in easement-encumbered lands. As it stands now (without guidance from the Service), some holders are finding

⁴¹ See CINDY M. LOTT ET AL., URBAN INST., STATE REGULATION AND ENFORCEMENT IN THE CHARITABLE SECTOR 33 (2016) (indicating that resources devoted to state-level charity oversight are minuscule compared with oversight attorneys general are expected to provide); Chuck Marr & Cecile Murray, *IRS Funding Cuts Compromise Taxpayer Service and Weaken Enforcement* (updated Apr. 4, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/6-25-14tax.pdf> (discussing how funding cuts have severely weakened the IRS's ability to enforce the nation's tax laws).

themselves having to devote considerable time and resources responding to amendment requests rather than engaging in land conservation. Clear rules would also give the public confidence that conservation easements deserve the significant legal advantages they have been afforded.

Given the inevitability of amendments and the desirability of clear rules, the Task Force recommends that the Treasury develop rules that will facilitate appropriate amendments, discourage improper amendments, and address the use of discretionary consents, as they are similarly subject to misuse and abuse.

3. *Section 170(h) Amendment Principles and Procedures*

Any amendment should be required to comply with the following principles and procedures (Section 170(h) Amendment Principles and Procedures) if federal tax benefits were claimed with regard to the donation of the easement or in the context of a bargain-sale. The Section 170(h) Amendment Principles and Procedures are intended to ensure that a conservation easement will qualify as “a restriction (granted in perpetuity) on the use which may be made of *the* real property,”⁴² and the conservation purpose of the contribution will be “protected in perpetuity.”⁴³ The Section 170(h) Amendment Principles and Procedures also address the concerns that Congress and the Service have expressed about amendments⁴⁴ and are based in part on amendment principles formulated by the land trust community.⁴⁵

Section 170(h) Amendment Principles

- (1) No amendment is permitted to the provisions of an easement that are based on the safe harbor provisions published by Treasury, including the Treasury’s safe harbor Limited Power of Amendment provision, unless the change further promotes the perpetual protection of the conservation values of the originally-protected property and the conservation purpose(s) of the easement.

⁴² I.R.C. § 170(h)(2)(C) (emphasis added).

⁴³ I.R.C. § 170(h)(5)(A). The perpetuity requirements of section 170(h) and the Treasury Regulations are summarized in Appendix A.

⁴⁴ See *supra* Part V.A.1.

⁴⁵ See LAND TRUST ALL., AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 17 (2d ed. 2007).

- (2) No amendment is permitted that would involve the release or other removal of any of the originally-protected property from the easement, whether or not in exchange for some form of compensation, such as protection of other land or cash. Such a removal, however labeled or configured, constitutes an extinguishment and must comply with the rules governing extinguishment in Treasury Regulation section 1.170A-14(g)(6) (judicial extinguishment) [or the De Minimis Release provision in Appendix B—Recommended Safe Harbor Provisions].
- (3) No amendment is permitted unless it (a) would be consistent with or enhance the perpetual protection of the conservation values of the originally-protected property and the conservation purpose(s) of the easement and (b) would be consistent with the documented intent of the easement donor and any direct funding source, as well as the fiduciary obligation of the holder to protect the conservation values of the originally-protected property and the conservation purpose(s) of the easement for the benefit of the public in perpetuity.
- (4) No amendment is permitted that would violate any applicable laws or affect the qualification of the easement or the status of the holder at the time of the donation or thereafter under any applicable laws, including section 170(h) and the corresponding Treasury Regulations. Thus, for example, an amendment must not jeopardize the holder's "eligible donee" or tax-exempt status,⁴⁶ or the status of the easement as a "qualified conservation contribution."⁴⁷
- (5) No amendment is permitted that would limit or otherwise alter the perpetual duration of the easement.
- (6) No amendment is permitted that would result in private inurement or confer impermissible private benefit.
- (7) An amendment must serve the public interest and, in the case of a charitable conservation organization serving as holder, be consistent with the organization's conservation mission.

⁴⁶ See Treas. Reg. § 1.170A-14(c).

⁴⁷ See I.R.C. § 170(h)(1); Treas. Reg. § 1.170A-14(a).

- (8) The easement must provide that any amendment that does not comply with all provisions of the safe harbor “Limited Power of Amendment” paragraph (see Appendix B) and the Section 170(h) Amendment Principles and Procedures shall be invalid.⁴⁸
- (9) If an independent external review process is mandated for certain amendments, then advance review and approval of such amendments must be obtained before their execution.

Section 170(h) Amendment Procedures

- (1) If the facts and circumstances or other evidence indicate that the amendment would or may result in private inurement or confer impermissible private benefit, a “qualified appraisal” as defined in the Code and Treasury Regulations must be obtained before the execution of an amendment to assess whether the amendment would result in private inurement or confer impermissible private benefit.⁴⁹ Alternatively, if it is clear from the facts and circumstances or other evidence that the amendment would not result in private inurement or confer impermissible private benefit, no appraisal is required.
- (2) The easement’s baseline documentation must be supplemented before or as of the date of execution of an amendment, as appropriate, to reflect the amendment.
- (3) If the landowner seeks to obtain a deduction with regard to the amendment, any lender holding an outstanding mortgage on the property must subordinate its rights to the rights of the holder of the conservation easement as amended (in the manner set forth

⁴⁸ This provision is intended to ensure that, even though state law might provide, for example, that a conservation easement can be released, in whole or in part, after the holding of a public hearing and approval of a public official, the provisions included in the easement, including those addressing transfer, amendment, extinguishment, and post-extinguishment proceeds, must be complied with in addition to those state law provisions. Similarly, if state law provides that a conservation easement can be modified, released, or terminated by the holder, the provisions included in the easement, including those addressing transfer, amendment, extinguishment, and post-extinguishment proceeds, must nonetheless be complied with. In other words, the terms of the easement must be complied with even if they are more restrictive than state law, and the easement does not excuse the owner and holder from also complying with any additional requirements that may be imposed by state law. The perpetuity requirements of section 170(h) and the Treasury Regulations are summarized in Appendix A.

⁴⁹ I.R.C. § 170(f)(11)(E)(i).

in the safe harbor mortgage subordination agreement). If the landowner will not seek to obtain a deduction with regard to the amendment but the facts and circumstances or other evidence indicate that failure of a lender to subordinate an outstanding mortgage to the amendment will jeopardize the rights of the holder with regard to the easement as amended, the lender must subordinate its rights to the rights of the holder of the conservation easement as amended (in the manner set forth in the safe harbor mortgage subordination agreement). If the landowner will not seek to obtain a deduction with regard to the amendment and the facts and circumstances or other evidence indicate that failure of a lender to subordinate an outstanding mortgage to the amendment may jeopardize the rights of the holder with regard to the easement as amended, the lender should subordinate its rights to the rights of the holder of the conservation easement as amended (in the manner set forth in the safe harbor mortgage subordination agreement).

- (4) The amendment must be in writing and promptly recorded in the land records in the county or counties where the easement is recorded.
- (5) A title search and report should be obtained.
- (6) The holder must maintain documentation of compliance with the Section 170(h) Amendment Principles and Procedures.

4. *Section 170(h) Discretionary Consent Principles and Procedures*

There may be limited circumstances in which the holder of a conservation easement wishes to grant the current owner of the subject property the right to temporarily engage in an activity or use that is not expressly permitted or is restricted or prohibited by the easement, but clearly would not negatively impact the protection of the subject property's conservation values or the conservation purpose(s) of the easement. For example, assume a conservation easement encumbers a sizable tract of largely forested land, there is one single-family residence on the land, and a number of trails run through the forest. At the time of the donation of the easement, the owner was in his forties, healthy, and consistently hiked the trails on foot, in part to inspect the property for trespassers or other problems. The easement expressly prohibits the use of all-terrain or other motorized vehicles on the trails. Time passed, and the owner aged and became unable to hike the trails on foot due to a heart

condition. The holder wishes to grant the owner's request to allow the owner, for the remainder of his ownership of the property, to use an all-terrain vehicle on the trails so he can continue his inspections, subject to conditions and limitations that will ensure the continued protection of the property's conservation values and the conservation purposes of the easement.

"Discretionary consents" can be useful to address these minor or short-term issues, provided the consents are temporary and subject to appropriate conditions and limitations. However, discretionary consents can also be misused or abused to, for example, authorize activities or uses that negatively impact the protection of the conservation values of the subject property or the conservation purpose of the easement, or avoid the limitations on and reporting requirements relating to amendments.

The Task Force believes that while efficient administration of conservation easements can be enhanced with well governed use of discretionary consents, such consents can also be misused. The expectation that a holder may grant such consents invites landowners to make requests to engage in activities and uses that may be contrary to the protection of a property's conservation values and the conservation purposes of an easement. Refusing to grant discretionary consents can cause resentment and impair landowner relations, and responding to and justifying responses to requests for discretionary consents can involve the expenditure of considerable charitable resources that would be better spent on land conservation. The Task Force concluded that guidance on this issue is needed given the use of discretionary consents and similar techniques, and that detailed and clear guidance will help holders use discretionary consents properly.

The Task Force recommends that discretionary consents should be permissible only if they comply with the discretionary consent principles and procedures set forth below (Section 170(h) Discretionary Consent Principles and Procedures). Other similar techniques short of recorded amendments that are used to authorize activities or uses that are not expressly permitted or are restricted or prohibited by an easement, such as, but not limited to, temporary use or license agreements, discretionary waivers, or informal letters of agreement or interpretation generally ought to be treated just as discretionary consents are treated. That is, all forms of discretionary permissions to engage in activities or uses that are not

expressly permitted should be required to comply with the Section 170(h) Discretionary Consent Principles and Procedures.⁵⁰

Section 170(h) Discretionary Consent Principles

- (1) No consent is permitted that would involve the release or other removal of any of the originally-protected property from the easement, whether or not in exchange for some form of compensation, such as protection of other land or cash. Such a removal, however labeled or configured, constitutes an extinguishment and must comply with the rules governing extinguishment in Treasury Regulation section 1.170A-14(g)(6) (judicial extinguishment) [or the De Minimis Release provision in Appendix B—Recommended Safe Harbor Provisions].
- (2) A consent is permitted only if the proposed activity or use will not materially impact the protection of the subject property's conservation values.
- (3) A consent is permitted only if the proposed activity or use will be consistent with or enhance the conservation purpose(s) of the easement.
- (4) A consent is permitted only if the activity or use will be consistent with the documented intent of the easement donor and any direct funding source, as well as the fiduciary obligation of the holder to protect the conservation values of the originally-protected property and the conservation purpose(s) of the easement for the benefit of the public in perpetuity.
- (5) The consent must be limited in duration to no more than five (5) years, provided, however, that (a) if the property is directly owned by one or more natural persons who are legal adults,⁵¹ the consent may, in the holder's discretion, be granted for the term of ownership of the property or an interest therein by one

⁵⁰ No attempt was made to consider every fact pattern that might prompt a holder's consideration of providing a discretionary consent, and the example used is intended to be only illustrative. The line between the appropriateness of a discretionary consent and the appropriateness, if not the requirement, of a formal amendment is neither fixed nor sharp. Individual holders will likely disagree about where it should be drawn with some opting for more and some for less formality.

⁵¹ Direct ownership means ownership in the natural person's individual name and excludes ownership through a trust, corporation, partnership, limited liability company, or otherwise.

such adult natural person who must be identified by name in the consent or (b) if the property is owned by an entity such as a corporation, partnership, or limited liability company, the consent may, in the holder's discretion, be granted for the life of an adult natural person who must have a demonstrated active interest in the property and be identified by name in the consent. A "demonstrated active interest in the property" includes living or working on the property or visiting the property at least annually.

- (6) No consent is permitted that would violate any applicable laws or affect the qualification of the easement or the status of the holder at the time of the donation or thereafter under any applicable laws, including section 170(h) and the corresponding Treasury Regulations. Thus, for example, a consent must not jeopardize the holder's "eligible donee" or tax-exempt status,⁵² or the status of the easement as a "qualified conservation contribution."⁵³
- (7) No consent is permitted that would limit or otherwise alter the perpetual duration of the easement.
- (8) No consent is permitted that would involve impermissible private benefit or private inurement.
- (9) A consent must serve the public interest and, in the case of a charitable conservation organization serving as holder, be consistent with the organization's conservation mission.
- (10) The holder may further condition, qualify, or otherwise circumscribe the consent in any manner, including by:
 - (a) making the consent revocable either in the holder's discretion or upon the occurrence or termination of specified conditions;
 - (b) further limiting the duration of the consent, including providing for its automatic termination upon the resolution of the issue that stimulated the request for the consent, and providing for termination of the consent upon abandonment or suspension of the activity;
 - (c) limiting the time of the day or year in which the activity or use may be conducted;
 - (d) specifying the individuals or entities who may engage in

⁵² See Treas. Reg. § 1.170A-14(c)(1).

⁵³ See I.R.C. § 170(h)(1); Treas. Reg. § 1.170A-14(a).

the activity or use, including specifying professional qualifications of individuals or entities conducting the activity or use.

- (11) The easement must provide that any consent that does not comply with all provisions of the safe harbor “Limited Power of Discretionary Consent” paragraph (see Appendix B) and the Section 170(h) Discretionary Consent Principles and Procedures shall be invalid.⁵⁴

Section 170(h) Discretionary Consent Procedures

- (1) If the facts and circumstances or other evidence indicate that the discretionary consent would or may result in private inurement or confer impermissible private benefit, a “qualified appraisal” as defined in the Code and Treasury Regulations must be obtained before the granting of the consent to assess whether the consent would result in private inurement or confer impermissible private benefit. Alternatively, if it is clear from the facts and circumstances or other evidence that the discretionary consent would not result in private inurement or confer impermissible private benefit, no appraisal is required.
- (2) The easement’s baseline documentation must be supplemented before or as of the date of the granting of the consent, as appropriate, to reflect the consent.
- (3) The consent must be in writing and delivered by the holder to the owner before the proposed activity or use begins.

⁵⁴ This provision is intended to ensure that, even though state law might provide, for example, that a conservation easement can be released, in whole or in part, after the holding of a public hearing and approval of a public official, the provisions included in the easement, including those addressing transfer, amendment, extinguishment, and post-extinguishment proceeds, must be complied with in addition to those state law provisions. Similarly, if state law provides that a conservation easement can be modified, released, or terminated by the holder, the provisions included in the easement, including those addressing transfer, amendment, extinguishment, and post-extinguishment proceeds, must nonetheless be complied with. In other words, the terms of the easement must be complied with even if they are more restrictive than state law, and the easement does not excuse the owner and holder from also complying with any additional requirements that may be imposed by state law. The perpetuity requirements of section 170(h) and the Treasury Regulations are summarized in Appendix A.

- (4) The activity or use must be described or defined in sufficient detail in the consent to allow the holder to monitor the owner's compliance with the consent.
- (5) The holder must maintain documentation of compliance with the Section 170(h) Discretionary Consent Principles and Procedures.

5. *Amendment and Extinguishment Examples*

Parties seeking to amend a tax-deductible easement must comply with both (1) federal tax law requirements and (2) any additional conditions or limitations that may be imposed by state law. Each of the following examples assumes a conservation easement for which a section 170(h) deduction or other federal tax incentive was claimed, and the analysis that follows the examples represents the best thinking, opinions, and recommendations of the Task Force with respect to the requirements of federal law. In this section, the Task Force does not address questions about whether state law would impose additional conditions or limitations on the proposed amendments.

The examples are grouped by degree of risk. When external review is indicated, readers of the Report should envision not only the currently available judicial review, but also the other proposed forms of authorized review presented in Part V.A.6. of the Report.

a. Amendments That Should Not Require External Review ("Low-Risk Amendments")

The Task Force recommends that the Treasury issue guidance specifying that the holder of a tax-deductible conservation easement and the owner of the encumbered land can agree to certain corrective amendments, protection-enhancing amendments, *de minimis* amendments, and specific amendments authorized in an easement without external review, subject to the Section 170(h) Amendment Principles and Procedures set forth above. Properly defined and limited, these amendments present little potential for abuse and, thus, constitute "Low-Risk Amendments."

(1) Corrective Amendments

Corrective amendments are those that correct mutually recognized mistakes that can be proved by pre-recording written notes, correspondence, or communications, or other extrinsic evidence that is intended to document the final terms of the easement. Such errors may

include scrivener's errors, mistakes in legal descriptions, incorrect or missing internal references, mislabeled exhibits, or accidentally omitted exhibits or pages.

Example 1. The conservation easement deed states that the subject property consists of "3.00 acres." The legal description attached as an exhibit to the conservation easement provides that the subject property consists of "three hundred (300) acres" (the "Legal Description"). The baseline documentation provided to the eligible donee organization (hereinafter in all examples called "Holder") at the time of the donation, the mortgage subordination agreement obtained at the time of the donation from the lender holding an outstanding mortgage on the property, the qualified appraisal used to substantiate the donor's deduction, and the Form 8283 the donor filed with the return on which the donor first claimed the deduction were all based on the assumption that the easement encumbers the 300 acres described in the Legal Description. Holder has been monitoring and enforcing the easement with regard to the 300 acres described in the Legal Description since the easement's donation.

An amendment to the easement to change "3.00 acres" to "three hundred (300) acres" would comply with the Section 170(h) Amendment Principles and should be permissible without external review, provided it also complies with the Amendment Procedures.

Example 2. The conservation easement deed states that the subject property consists of "150 (one hundred and fifty) acres" and includes a legal description describing 150 acres (the "Legal Description"). The baseline documentation provided to the Holder at the time of the donation, the qualified appraisal used to substantiate the donor's deduction, and the Form 8283 that the donor filed with the return on which the donor first claimed the deduction were all based on the assumption that the easement encumbers the 150 acres described in the Legal Description. Some years following the donation of the easement, it is discovered that the Legal Description mistakenly included a quarter of an acre that was not owned by the donor and, thus, under the law of the relevant state, is not legally subject to the conservation easement. If it had been known that the quarter of an acre was not encumbered by the easement at the time of the donation, it would not have altered the appraised value of the easement or affected satisfaction of the conservation purposes test or other requirements of section 170(h) and the Treasury Regulations.

An amendment to the easement to reflect the property actually encumbered by the easement would comply with the Section 170(h)

Amendment Principles and should be permissible without external review, provided it also complies with the Amendment Procedures.⁵⁵

(2) *Protection-Enhancing Amendments*

Protection-enhancing amendments are those that clearly enhance the perpetual protection of the subject parcel's conservation values and the conservation purpose of the easement. Examples include amendments that (1) eliminate reserved rights to develop or otherwise use the parcel; (2) modify retained rights in protection-enhancing ways, such as reducing the size of building envelopes or permitted structures; (3) add additional restrictions on the development or use of the parcel; or (4) add additional acreage to the easement.

Example 3. Parcel *A* consists of 150 acres and the only improvement on the parcel is one single-family residence. The owner of Parcel *A* donates a conservation easement to the Holder for the purpose of permanently protecting Parcel *A*'s open space and habitat values but reserves the right to build two additional single-family residences on the property in five-acre building envelopes that are identified in the easement and located to minimize negative impacts on those values. Some years later, the owner of Parcel *A* asks Holder to amend the easement to eliminate the right to build one of the additional single-family residences. The amendment clearly would enhance the perpetual protection of Parcel *A*'s conservation values and the conservation purpose of the easement.

Provided the amendment complies with the other Section 170(h) Amendment Principles and the Amendment Procedures, the Holder should be permitted to execute the amendment without external review.⁵⁶

Example 4. Parcel *B* consists of 200 acres and the only improvements on the parcel are a 10,000-square foot single-family residence and ancillary structures. The owner of Parcel *B* donates a conservation easement to the Holder for the purpose of permanently protecting Parcel *B*'s open space, scenic, and habitat values but reserves the right to build

⁵⁵ If not including the quarter of an acre in the easement would have altered the appraised value of the easement or affected satisfaction of the conservation purposes test or other requirements of section 170(h) and the Treasury Regulations, other issues would be raised.

⁵⁶ The owner of Parcel *A* should be entitled to a deduction for the donation of the amendment if the amendment reduces the fair market value of Parcel *A* and the donation complies with the substantiation requirements. See *Strasburg v. Comm'r*, 79 T.C.M. (CCH) 1697 (2000).

an additional 10,000-square foot single-family residence and ancillary structures on the property in a twenty-acre building envelope that is identified in the easement and located to minimize negative impacts on the parcel's conservation values. Some years later, the owner of Parcel *B* asks Holder to amend the easement to reduce the permitted size of the additional single-family residence to 5,000 square feet and reduce the permitted size of the building envelope to five acres. The amendment clearly would enhance the perpetual protection of Parcel *B*'s conservation values and the conservation purpose of the easement.

Provided the amendment complies with the other Section 170(h) Amendment Principles and the Amendment Procedures, the Holder should be permitted to execute the amendment without external review.⁵⁷

Example 5. Parcel *C* consists of 150 acres and the only improvement on the parcel is one single-family residence. The owner of Parcel *C* donates a conservation easement to the Holder for the purpose of permanently protecting Parcel *C*'s open space and habitat values. Several years later, the owner of Parcel *C* acquires adjacent Parcel *D*, which consists of twenty-five undeveloped acres that have open space and habitat values similar to those of Parcel *C*. The owner of Parcel *C* asks Holder to amend the easement to add Parcel *D* to the easement. The amendment clearly would enhance the perpetual protection of Parcel *C*'s conservation values and the conservation purpose of the easement by enlarging the permanently protected area.

Provided the amendment complies with the other Section 170(h) Amendment Principles and the Amendment Procedures, the Holder should be permitted to execute the amendment without external review.⁵⁸

(3) *De Minimis Amendments*

De minimis amendments are those that involve trivial or minor changes to an easement that clearly are consistent with or enhance the perpetual protection of the subject parcel's conservation values and the conservation purpose of the easement. Such amendments may, in

⁵⁷ The owner of Parcel *B* should be entitled to a deduction for the donation of the amendment if the amendment reduces the fair market value of Parcel *B* and the donation complies with the substantiation requirements. *See id.*

⁵⁸ The Owner of Parcel *C* should be entitled to a deduction for the donation of the amendment if the donation of a separate easement with identical terms with regard to the twenty-five acres would qualify for the deduction (i.e., the donation would satisfy the requirements of section 170(h) and the Treasury Regulations, as well as the substantiation requirements).

appropriate circumstances, clarify ambiguous or potentially conflicting terms in an easement.

Example 6. The purpose of the conservation easement is to permanently protect 100-acre Parcel *E* as forestland, as wildlife habitat, and for the outdoor passive recreational use by the public of a trail that runs along the southern border of the parcel. The easement restricts the cutting of vegetation except as required for the health of the forest and the habitat, but also requires maintenance of the trail to allow its passive recreational use by the public. Vegetation intruding on parts of the trail has become an impediment to public use and a public safety issue. The Holder and the owner of Parcel *E* wish to amend the easement to clarify that Holder has the limited right to selectively move, prune, trim, or cut trees, shrubs, or other vegetation solely for the purpose of preserving the public's passive recreational use of the trail and for public safety purposes. The amendment would make only a minor change to the easement. The amendment would be consistent with the perpetual protection of the forest and habitat values of Parcel *E* and the forestland and habitat protection conservation purposes of the easement because it would have only a negligible adverse impact on such values and purposes (that is, an impact so small or unimportant as to not be worth considering). The amendment would enhance the perpetual protection of the trail's public recreational value and, thus, the outdoor recreational purpose of the easement.

Provided the amendment complies with the other Section 170(h) Amendment Principles and the Amendment Procedures, the Holder should be permitted to execute the amendment without external review.

(4) Specific Amendments Authorized in the Easement

In some cases, a conservation easement may provide that specific amendments may or will be made to the easement in certain circumstances. For example, the easement may give the owner the right to exercise a reserved residential development right in one of several building envelopes identified in the easement, each located to minimize the impact of the development on the conservation values of the subject property and the conservation purposes of the easement. The easement may also provide that the easement and accompanying exhibits will be amended to reflect the owner's exercise of such right in one of the authorized locations. Amending the easement and accompanying exhibits to reflect the owner's exercise of such right should satisfy the Section 170(h) Amendment Principles and be permitted without external review, provided it also

satisfies the Amendment Procedures. Key elements of this example, however, are that the building envelopes are identified in the easement at the time of its donation, the reserved right must be exercised within one of the identified building envelopes, and, regardless of which building envelope is chosen, the easement would comply with the requirements of section 170(h) and the Treasury Regulations.

Nevertheless, it is important to note that, if reserved rights, including a reserved right to amend, are not appropriately limited, they may render an easement nondeductible. Thus, a deduction may be denied if the reserved rights could, for example, permit uses or an amendment that would be inconsistent with the conservation purposes of the donation,⁵⁹ permit the destruction of other significant conservation interests,⁶⁰ or, in the case of an open space easement, “permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation.”⁶¹ Accordingly, care must be taken to limit reserved rights to those that could not be exercised in such a way as to violate the section 170(h) and Treasury Regulation requirements.

b. Amendments That Should Require Independent External Review and Approval (“Moderate-Risk Amendments”)

Amendments that address advancements in conservation science or conservation land management knowledge and expertise, and amendments that adjust boundary lines between two adjacent parcels, each encumbered by a virtually identical easement, can involve complex questions regarding conservation purposes, conservation impacts, and economic impacts. Nonetheless, properly defined and limited, these amendments present only a modest risk of abuse. Accordingly, the Task Force recommends that the Treasury issue guidance specifying that the holder of a conservation easement and the owner of the encumbered land can agree to these Moderate-Risk Amendments with independent external review and

⁵⁹ See Treas. Reg. § 1.170A-14(g)(1) (“any interest in the property retained by the donor . . . must be subject to legally enforceable restrictions . . . that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation”).

⁶⁰ See Treas. Reg. § 1.170A-14(e)(2)-(3) (“a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests,” and “[a] use that is destructive of conservation interests will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution.”).

⁶¹ Treas. Reg. § 1.170A-14(d)(4)(v).

approval of the amendments. Options for independent external review are discussed in Part V.A.6 below.

*(1) Amendments Addressing Advancements in
Conservation Science or Conservation Land
Management Knowledge and Expertise*

It generally will be in the best interest of easement holders, property owners, and the public to modify conservation easements to address advancements in conservation science or conservation land management knowledge and expertise. However, like all amendments, these amendments must, among other things, be consistent with or enhance the perpetual protection of the subject parcel's conservation values and the conservation purpose of the easement. External review and approval of these amendments is recommended because assessment of the conservation purposes and conservation impacts can be complex, as can the assessment of private benefit. However, given that these amendments will generally enhance the perpetual protection of the parcel's conservation values and the conservation purposes of the easement, the external reviewer should apply a permissive standard when reviewing these amendments.

Example 7. Several decades ago, the owner of Parcel *F* donated a conservation easement for the purpose of permanently protecting Parcel *F* as a grassland prairie and as habitat for the accompanying animal species, and to keep Parcel *F* "pristine." The grassland prairie on Parcel *F* is now being threatened by invasive plant species. The easement prohibits the use of insecticides, pesticides, fungicides, herbicides, or similar chemicals on Parcel *F*. Removal methods consistent with the easement terms have been ineffective in removing the threat that the invasive plant species pose to the native grasses. Contemporary conservation science indicates that the only way to practically and effectively eliminate the invasive plant species is through spot application of herbicides, and such spot application, if done in an appropriate manner, would have only a negligible adverse impact on native plant and animal species (that is, an impact so small or unimportant as to not be worth considering). The Holder and the new owner of Parcel *F* propose to amend the easement to permit limited use of herbicides to combat the invasive plant species. Because herbicide products and scientific understanding of their effects change over time, the amendment would include appropriate restrictions on the type of products that can be used, the extent of the use, the manner of application, and the qualification

of the applicators, and would permit such use only to the extent that it has a negligible adverse impact on native plant and animal species.

Holder is permitted to execute the amendment if it is approved in an independent external review and approval process in which the reviewer determines, applying a permissive standard, that the amendment will comply with Section 170(h) Amendment Principles and Procedures.

Example 8. Same facts as Example 7, except the donor of the easement specified in the conservation easement deed that a primary or co-primary purpose of his gift was to prohibit the use of chemicals on Parcel *F* so that Parcel *F* could serve as a control or reference parcel for the purpose of studying the impacts of chemical use on plant and animal species, water quality, and other natural resources, because most lands are subject to chemical use. The proposed amendment would not be consistent with the perpetual protection of Parcel *F*'s conservation values as part of a control parcel, or the conservation purpose of the easement, which, in part, is to preserve the parcel in perpetuity as a control parcel. The proposed amendment also would not be consistent with the documented intent of the easement donor or the fiduciary obligation of the Holder to protect the conservation values of the parcel and the conservation purpose(s) of the easement for the benefit of the public in perpetuity.

Holder is not permitted to execute the amendment.

Example 9. A conservation easement was donated in 1980 to the Holder for the conservation purposes of protecting and maintaining tidal marshes and wetlands and preventing habitat fragmentation on Parcel *G*. The approximately 500-acre Parcel *G* consists of a mosaic of coastal wetlands, tidal marshes, and maritime forests. A series of impoundments behind dikes and a large pond of about thirty acres are also located on Parcel *G*. The dikes were placed on Parcel *G* early in the 20th century to manage water levels for flood control. As the climate has changed, the landscape features on Parcel *G* have changed. Well documented sea-level rise and the increasing frequency of coastal storms have caused the wetlands and maritime forests on Parcel *G* to diminish in area and the marsh habitats to shift in location. Saltwater intrusion into what was once a freshwater system has altered wetland functions and forced some key species to relocate or die, thus removing predators or prey that were critical in maintaining the original wetland food chain. Sea-level rise has resulted in a band of wetlands migrating landward on some parts of Parcel *G* and open water on other parts. Many areas of Parcel *G* have become so inundated that it has become physically impossible to maintain the tidal

marshes and historic impoundments. The conservation easement does not allow the landowner to undertake land management activities that would address the rising sea-levels, excavate the degrading dikes, or create freshwater wetlands in a planned approach. Consequently, it has become difficult and very expensive to fulfill the conservation easement's stated purposes of protecting and maintaining the tidal marshes and wetlands and preventing habitat fragmentation. The landowner and the Holder wish to amend the easement to allow appropriate habitat management activities to be undertaken on Parcel *G* to restore the mosaic tidal marsh and wetland configuration and rebuild the dikes.

Holder is permitted to execute the amendment if it is approved in an independent external review and approval process in which the reviewer determines, applying a permissive standard, that the amendment will comply with Section 170(h) Amendment Principles and Procedures.

*(2) Amendments Adjusting Boundary Lines Between
Adjacent Parcels Encumbered by Virtually
Identical Easements*

In some jurisdictions, numerous properties are encumbered by virtually identical easements held by the same eligible donee. In these jurisdictions, some flexibility to adjust boundary lines between two adjacent parcels, each encumbered by a virtually identical easement, is desirable, provided the amendment would be consistent with or enhance the perpetual protection of the parcels' conservation values and the conservation purposes of the easements, would not involve private inurement or impermissible private benefit, and would otherwise comply with the Section 170(h) Amendment Principles and Procedures. External review and approval of these amendments is recommended because assessment of the conservation and economic impacts can be complex.

Example 10. *A* owns two contiguous undeveloped parcels of land: Parcel *H*, consisting of 450 acres, and Parcel *I*, consisting of 200 acres. Each Parcel is encumbered by a separate open space conservation easement that met the requirements of section 170(h) at the time of its donation. Each easement was donated to and is held by the same holder. Each easement contains virtually identical terms, including prohibiting division of the parcel it encumbers but allowing construction of two single family residences on the parcel in building envelopes identified in the easement deed and located to minimize negative impacts on the parcel's conservation values. *A* has decided to sell Parcel *H* but wants to adjust the boundaries before he does so. *A* asks Holder to amend the legal

descriptions of the parcels encumbered by the easements such that Parcel *H* will be reduced from 450 to 400 acres and Parcel *I* will be increased from 200 to 250 acres. The fifty acres to be added to Parcel *I* is an open field that *A* would like to continue to use for agricultural purposes and it is not the site of a building envelope. The 650 acres would remain encumbered in perpetuity by the two easements—there would be no changes made to the language of the easements other than the amendment of the legal description of each encumbered parcel. The amendment would not affect the ability to exercise development rights on either parcel, the building envelopes, construction of the permitted structures or related access roads or utility lines, or other permitted or prohibited uses. Holder believes that the amendment would be consistent with the perpetual protection of the conservation values of Parcels *H* and *I* and the conservation purpose(s) of the easements. Holder obtained a qualified appraisal, the cost of which was reimbursed by *A*, which established that the amendment would not confer impermissible private benefit on *A*. *A* agreed to compensate Holder for all costs associated with the amendment so Holder does not have to expend its charitable resources on the amendment, which has no discernable public benefit and is of benefit only to *A*, a private party.

Holder is permitted to execute the amendment if it is approved in an independent external review and approval process in which the reviewer determines that the amendment would not affect any of the permitted or prohibited uses in either easement and will otherwise comply with Section 170(h) Amendment Principles and Procedures. The amendment should not be deemed to involve the release or other removal of any of the originally-protected property from the easement because all of the originally-protected 650 acres would remain encumbered in perpetuity by the two easements, which are held by the same eligible donee and contain virtually identical terms.

c. Amendments That Should Require Enhanced Independent External Review and Approval (“High-Risk Amendments”)

Amendments to conservation easements that are potentially protection-diluting or protection-negating raise special concerns, even if they also provide conservation benefits. These amendments could take a variety of forms, such as those that eliminate restrictions, modify restrictions in protection-diluting or negating ways (such as to increase the level of residential development allowed on the property), interpret restrictions to allow activities or uses that may not have been contemplated

at the easement's donation, modify conservation purposes, or involve "trade offs" within the four corners of an easement (for example, allowing the owner to construct a larger home on the encumbered property in exchange for further limiting agricultural uses) or "trade offs" outside the four corners of an easement (that is, reducing or eliminating easement restrictions on some or all of the originally-protected property without removing the property from the easement in exchange for the landowner protecting some other property).⁶²

These amendments may violate the section 170(h) and Treasury Regulation perpetuity requirements. They also may involve difficult questions regarding potential increases and decreases in conservation benefits, as well as complex private benefit considerations. The difficulties associated with making the assessments required in these cases, coupled with the pressures often placed on holders to agree to modify and release easement restrictions, make assessing the propriety and desirability of these amendments particularly difficult (High-Risk Amendments). Accordingly, the Task Force recommends that these amendments be permissible only if they are approved in an enhanced independent external review and approval process in which the reviewer determines that the amendment will comply with Section 170(h) Amendment Principles and Procedures. Options for independent external review are discussed in Part V.A.6 below.

The following are examples of High-Risk Amendments.

(1) Protection Negating or Diluting Amendments

Example 11. Parcel *J* consists of 100 acres and the only improvements on the parcel are a 3,000-square foot historic manor house and ancillary structures. The owner of Parcel *J* donates a conservation easement to the Holder for the purpose of protecting Parcel *J*'s open space character and wildlife habitat. The easement prohibits industrial, commercial, and any additional residential development of Parcel *J*. The easement also prohibits any subdivision of Parcel *J* to prevent fragmentation of the Parcel. Some years later, the owner of Parcel *J* asks Holder to agree to amend the easement to authorize the owner (and his successors) to subdivide the property and sell four 20-acre lots on which single-family residences can be built. The owner offers to make a generous cash payment to Holder in exchange for the amendment.

⁶² As previously noted, in its 2005 report, the Senate Finance Committee expressed significant concerns regarding trade-off amendments. See *Report of Staff Investigation*, *supra* note 29, at Part Two 5.

Holder is not permitted to execute the amendment. The amendment would not be consistent with the continued perpetual protection of the open space and habitat conservation values of Parcel *J* or the conservation purposes of the easement. Holders are not permitted to amend an easement to authorize prohibited uses or uses that are inconsistent with the perpetual protection of the originally-protected parcel's conservation values or the conservation purpose of the easement, whether or not in exchange for compensation.

Example 12. The purpose of the conservation easement encumbering Parcel *K*, a 100-acre undeveloped and largely forested parcel surrounded on three sides by state- and federally-protected forestland, is to preserve and protect Parcel *K* in perpetuity in its natural and wild state as a sanctuary for wildlife. The easement prohibits all development and structures other than the maintenance and replacement of one small cabin fronting on the road that runs along Parcel *K*'s southern border. The easement also prohibits (1) the use of motorized vehicles except to access the cabin from the road; (2) the cutting of trees, shrubs, and other vegetation except for the health of the forest; and (3) any alterations of Parcel *K*'s surface. An unanticipated catastrophic wildfire has significantly degraded, damaged, and destroyed large portions of the forest on Parcel *K*. The owner of Parcel *K* and the Holder propose to amend the easement to allow active management of the parcel to prevent erosion, avoid the establishment of opportunistic invasive species, and otherwise restore and rehabilitate the forest. The active management would involve the construction of a few temporary structures on the property, limited use of motorized vehicles, and limited alterations to Parcel *K*'s topography. The amendment would carefully limit the duration and extent of the active management activities to those necessary for the restoration and rehabilitation of the forest and specify the qualifications of those permitted to engage in the activities. Holder believes that the amendment, appropriately limited, would be consistent with and enhance the perpetual protection of Parcel *K*'s conservation values and the conservation purpose of the easement. Holder also obtained a qualified appraisal, the cost of which was reimbursed by the owner of Parcel *K*, which established that there would be no change in the value of the parcel as a result of the amendment.

Holder is permitted to execute the amendment if it is approved in an enhanced independent external review and approval process in which the reviewer determines that the amendment will comply with Section 170(h) Amendment Principles and Procedures.

(2) *Modification of Land Uses Under a Multi-Purpose Easement*

Example 13. The owner of Parcel *L* donated a conservation easement in the early 1970s for the dual and co-equal stated purposes of protecting Parcel *L*'s (1) wildlife, ecology, and natural habitat and (2) open space, specifically to ensure continued agriculture and ranching uses. At the time of the donation, Parcel *L* was a viable ranch, also provided relatively natural habitat, and wetlands existed in the southeast corner. Over the years, the wetlands significantly diminished in size and viability due to a drier climate in the region, natural changes in the hydrology of the surrounding area, and overland erosion of soil. During this period, the value of the land for agricultural use significantly increased because of the strong local farm economy. Much of the southeast corner is now being used as a hay field to support the ranch operations. A new owner of Parcel *L* would like to restore the southeast corner to wetlands, despite the loss of substantial economic value of that land for agricultural use. The new owner asks the Holder to agree to amend the easement to specifically authorize such wetland restoration. Restoring the wetlands would advance the wildlife, habitat, and ecological purposes of the easement but would adversely impact the open space purposes because of the removal of the acreage from agricultural use. The Holder wrestles with the conflict between the dual purposes of the easement and tries to balance the wildlife, ecological, and natural habitat benefits of the wetland restoration against the removal of the southeast corner from the ranching uses, which would decrease the economic value of Parcel *L*.

Holder is permitted to execute the amendment if it is approved in an enhanced independent external review and approval process in which the reviewer determines that the amendment will comply with Section 170(h) Amendment Principles and Procedures. Because the wetlands existed in the southeast corner of Parcel *L* at the time of the easement's donation, and protection of farmland is only one example of "open space" protection, restoring the wetlands in that area should be deemed consistent with the perpetual protection of the conservation values of Parcel *L* and the conservation purposes of the easement. It also should be deemed consistent with the documented intent of the easement donor and the fiduciary obligation of the holder to protect the conservation values of Parcel *L* and the conservation purposes of the easement for the benefit of the public in perpetuity.

(3) *Modification of Purpose Amendments*

Example 14. The stated purpose of the conservation easement encumbering Parcel *M* is to preserve and protect in perpetuity the specialized habitat of the blue hawk in order to support perpetuation of the blue hawk species. The undisputable death of the last blue hawk makes continued use of Parcel *M* for that purpose impossible or impractical. Parcel *M* continues, however, to serve as habitat for a wide variety of plant and animal species. The owner of Parcel *M* and the Holder propose to amend the easement to provide that the purpose of the easement is to preserve and protect Parcel *M* in its undeveloped state in perpetuity to serve as habitat for a variety of plant and wildlife species, the precise nature of which may change over time as climate and other forces impact Parcel *M* (that is, to broaden the easement's habitat protection conservation purpose). No changes would be made to the restrictions in the easement, and Holder believes that the amendment would have no effect on the economic value of Parcel *M*.

Holder is permitted to execute the amendment if it is approved in an enhanced independent external review and approval process in which the reviewer determines that the amendment will comply with Section 170(h) Amendment Principles and Procedures. The Treasury Regulations provide that extinguishment of a conservation easement is permissible only when no other conservation purpose can be served by continuing to protect the subject property with the easement.⁶³ Accordingly, broadening the habitat protection conservation purpose of the easement as proposed may be consistent with or enhance the perpetual protection of Parcel *M*'s conservation values and the statutory qualifying purpose of the easement.

(4) *Trade-offs Within the Four Corners*

Example 15. Parcel *N* consists of 400 acres and the only improvements on the parcel are one 3,500 square foot single-family residence and ancillary structures. The owner of Parcel *N* donates a conservation easement to the Holder but reserves the right to build three additional 1,500 square foot single-family residences plus ancillary

⁶³ See Treas. Reg. § 1.170A-14(g)(6)(i) (providing for extinguishment by a judicial proceeding only “[i]f a subsequent unexpected change in the conditions surrounding the property . . . make impossible or impractical the continued use of the property for conservation purposes”) (emphasis added). Given scientific advances, it is possible that the blue hawk species could be resurrected through genetic engineering (a process sometimes referred to as “de-extinction”), and preservation of the specialized habitat on Parcel *M* may be of critical importance to the survival of the species in such event.

structures in two-acre building envelopes that are identified in the easement and located to minimize negative impacts on the parcel's conservation values. Some years later, the owner of Parcel *N* asks Holder to agree to amend the easement to (1) eliminate the right to build one of the additional single-family residences and (2) increase the permitted size of each of the two remaining additional residences to 3,000 square feet. Holder believes that the increase in the size of the two additional residences would have only a negligible adverse impact on the perpetual protection of Parcel *N*'s conservation values and the conservation purpose of the easement. Holder believes that elimination of the right to build one of the additional residences would enhance the perpetual protection of Parcel *N*'s conservation values and the conservation purpose of the easement. Holder also obtained an appraisal, the cost of which was reimbursed by the owner of Parcel *N*, which established that there would be no change in the value of Parcel *N* as a result of the amendment.

Holder is permitted to execute the amendment if it is approved in an enhanced independent external review and approval process in which the reviewer determines that (1) the increase in the size of the two additional residences would have only a negligible adverse impact on the perpetual protection of Parcel *N*'s conservation values and the conservation purpose of the easement (that is, an impact so small or unimportant as to not be worth considering), (2) the amendment would not involve private inurement or impermissible private benefit, and (3) the amendment would otherwise comply with the Section 170(h) Amendment Principles and Procedures.

Example 16. Parcel *O* consists of fifty acres. The owner of Parcel *O* donated a conservation easement to the Holder and reserved the right to build one 5,000 square foot single-family residence plus ancillary structures on Parcel *O* within a five-acre building envelope identified in the easement. A new owner purchased Parcel *O* (New Owner). New Owner requests that Holder agree to amend the easement to (1) move the building envelope to a location closer to the road that fronts the property and (2) reduce the permitted size of the residence to 3,000 square feet and the permitted size of the building envelope to one acre. Holder believes that relocation of the building envelope would have no negative impact on and would enhance the perpetual protection of the scenic, open space, and habitat conservation values of Parcel *O* and conservation purposes of the easement because the new location is less environmentally sensitive and the amendment would significantly reduce the length of the driveway and utility lines required to service the residence, as well as the size of the

residence and the building envelope. Holder also obtained an appraisal, the cost of which was reimbursed by New Owner, which established that there would be no change in the value of Parcel *O* as a result of the amendment.

Holder is permitted to execute the amendment if it is approved in an enhanced independent external review and approval process in which the reviewer determines that (1) relocation of the building envelope would have at most a negligible adverse impact on the perpetual protection of Parcel *O*'s conservation values and the conservation purpose of the easement (that is, an impact so small or unimportant as to not be worth considering), (2) the amendment would not involve private inurement or impermissible private benefit, and (3) the amendment would otherwise comply with the Section 170(h) Amendment Principles and Procedures.

Example 17. Same facts as Example 16, except (1) the location of the building envelope identified in the conservation easement is close to the road and was chosen to minimize the impact of the development on the protection of Parcel *O*'s scenic, open space, and habitat conservation values, (2) New Owner requested that the easement be amended to move the building envelope to a location on Parcel *O* that is farther from the road and on a ridgeline, where the residence will command a better view, and (3) relocation of the building envelope would negatively impact the protection of the Parcel *O*'s conservation values despite the reduction in the size of the residence and building envelope because the new location is more environmentally sensitive, the longer driveway and utility lines to the residence will harm conservation values, and building on the ridgeline will harm the scenic view of Parcel *O* from the road and surrounding properties, and (4) there would be an economic benefit conferred upon New Owner as a result of the amendment. New Owner offers to make a cash payment to Holder in an amount equal to that economic benefit.

Holder is not permitted to execute the amendment. The amendment would not be consistent with the perpetual protection of Parcel *O*'s conservation values or the conservation purposes of the easement. Holders are not permitted to amend an easement to authorize prohibited uses or uses that are inconsistent with the perpetual protection of the originally-protected parcel's conservation values or the conservation purpose of the easement, whether or not in exchange for compensation.

(5) *Trade-offs Outside of the Four Corners*

Example 18. Parcel *P* consists of one acre on which a historic home is located. The owner of Parcel *P* donated a conservation easement to the Holder for the purpose of assuring that Parcel *P* will be retained forever predominantly in its scenic and open space condition as lawn and landscaped grounds. The owner of Parcel *P* later sold the parcel, subject to the easement, to a new owner (New Owner). New Owner asks Holder to agree to amend the easement to (1) release a portion of the one acre from the easement to permit New Owner to construct a driveway turn-around, which is prohibited by the easement, and (2) approve plantings and other landscaping changes made by New Owner that materially interfere with the easement's scenic purpose. In exchange, the New Owner offers to add some adjacent land to the easement. Continued use for conservation purposes of the portion of Parcel *P* to be released from the easement has not become impossible or impractical. Approving the landscaping changes would have a negative impact on the perpetual protection of the scenic and open space values of Parcel *P* and the conservation purposes of the easement. The increase in the economic value of Parcel *P* as a result of the amendment is equivalent to the value of easement interest that New Owner is offering in exchange.

Holder is not permitted to agree to execute the amendment. Releasing a portion of the one acre from the easement would constitute a partial extinguishment rather than an amendment, and would not comply with Treasury Regulation section 1.170A-14(g)(6)'s extinguishment requirements [or the De Minimis Release provision in Appendix B—Recommended Safe Harbor Provisions]. Approving the landscaping changes would not be consistent with the perpetual protection of Parcel *P*'s conservation values or the conservation purpose of the easement.⁶⁴

Example 19. The only improvements on Parcel *Q* are a single-family residence and ancillary structures, as well as a few nonresidential buildings related to the agricultural use of portions of Parcel *Q*. Owner of Parcel *Q* donates a conservation easement to the Holder for the purpose of protecting the open space, scenic, agricultural, and wildlife habitat values of Parcel *Q* in perpetuity, and agricultural uses are confined to locations (zones) identified in the easement. The easement also provides that the existing structures on Parcel *Q* may be maintained and replaced but not

⁶⁴ This example is based on *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), in which an Illinois Appellate Court invalidated the amendments.

enlarged, and all other residential, commercial, or industrial development is prohibited. Owner has since died, and the new owner of Parcel *Q* (New Owner) asks Holder to agree to amend the easement to allow the construction of two additional single-family residences plus ancillary structures within a building envelope that includes the existing residence. In exchange, New Owner offers to add Parcel *R*, which is adjacent to Parcel *Q* and serves as critical habitat for certain species, to the easement and to restrict Parcel *R* to use as a natural area for wildlife and ecological purposes in perpetuity. A rigorous conservation science assessment conducted by an independent expert commissioned by Holder indicates that adding the two additional residences to Parcel *Q* would have more than a negligible adverse impact on the perpetual protection of Parcel *Q*'s conservation values and the conservation purposes of the easement.

Holder is not permitted to execute the amendment. Adding the two additional residences would not be consistent with or enhance the perpetual protection of Parcel *Q*'s conservation values or the conservation purpose of the easement. Holders are not permitted to amend an easement to authorize prohibited uses or uses that are inconsistent with the perpetual protection of the originally-protected parcel's conservation values or the conservation purpose of the easement, whether or not in exchange for cash or some other form of compensation, such as adding land to the easement.

Example 20. Same facts as Example 18, except a rigorous conservation science assessment conducted by an independent expert commissioned by Holder indicates that adding the two additional residences to Parcel *Q* would have only a negligible adverse impact on the perpetual protection of Parcel *Q*'s conservation values and the conservation purposes of the easement (that is, an impact so small or unimportant as to not be worth considering).

Holder is permitted to execute the amendment if it is approved in an enhanced independent external review and approval process in which the reviewer both: (1) confirms that adding the two additional residences to Parcel *Q* would have only a negligible adverse impact on the perpetual protection of Parcel *Q*'s conservation values and the conservation purposes of the easement because of, for example, the large size of Parcel *Q*, the siting of the residences to avoid negative impacts on Parcel *Q*'s conservation values, and a prohibition in the amendment on any new access roads, utilities, or other amenities or improvements; and (2) determines that the amendment would also comply with the other Section 170(h) Amendment Principles and Procedures, including the requirements that the amendment must serve the public interest, must be

consistent with Holder's conservation mission, and must not result in private inurement or confer impermissible private benefit.

Example 21. Parcel *S* consists of five acres of oceanfront property and the only improvement on the parcel is a historic 1,500 square foot shingle-style cottage. Parcel *S* contains some of the only remaining critical habitat in the area for a number of rare species of plants and animals and provides an increasingly rare unobstructed view of the ocean from the highway that parallels the coastline. The owner of Parcel *S* donates a conservation easement to Holder for the purpose of protecting the scenic and habitat values of Parcel *S* for the benefit of the public in perpetuity. The easement provides that the existing residence on the property may be maintained and replaced but not enlarged, and all other residential, commercial, or industrial development on the property is prohibited. The owner has since died, and the new owner of Parcel *S* (New Owner) proposes that Holder agree to amend the easement on Parcel *S* to allow the subdivision and sale of nine half-acre residential lots and the construction of a 4,000-square foot single-family residence on each lot in exchange for New Owner protecting twenty-five acres of nearby inland property that is not particularly scenic and does not contain the same high-quality habitat.

Holder is not permitted to execute the amendment. The amendment would have more than a negligible adverse impact on the perpetual protection of Parcel *S*'s conservation values and the conservation purpose of the easement and, thus, would not be consistent with or enhance the perpetual protection of Parcel *S*'s conservation values or the conservation purpose of the easement. Holders are not permitted to amend an easement to authorize prohibited uses or uses that are inconsistent with the perpetual protection of the originally-protected parcel's conservation values or the conservation purpose of the easement, whether or not in exchange for cash or some other form of compensation, such as adding land to the easement.

d. Extinguishment

Tax-deductible conservation easements are intended to protect the conservation values of the properties they encumber in perpetuity or forever.⁶⁵ However, forever is a long time, and the Treasury recognized that, in rare circumstances, changed conditions might make continuing to use an encumbered property for conservation purposes impossible or impractical. To ensure that the easements subsidized through the

⁶⁵ See S. REP. NO. 96-1007, at 9 (1980) (providing that the deduction is directed at the permanent preservation of "unique or otherwise significant land areas or structures").

deduction program will be permanent and, at the same time, protect the federal investment in the rare event of an extinguishment, extinguishment of a conservation easement in whole or in part requires

- (1) judicial approval in a proceeding in which it is demonstrated to the satisfaction of the court that continued use of the encumbered property for conservation purposes has become impossible or impractical, and
- (2) payment of at least the minimum proportionate share of proceeds as defined in the Treasury Regulations to the holder of the easement to be used in a manner consistent with the conservation purposes of the original contribution.⁶⁶

The judicial proceeding and impossibility or impracticality requirements provide crucial protection of tax-deductible perpetual conservation easements, the importance of which will only increase over time as population growth exerts ever-greater pressures on undeveloped land, ecosystems, and wildlife.⁶⁷ They are intended to ensure that tax-deductible easements will actually protect the subject properties' conservation values for the benefit of the public in perpetuity, or for as long as it remains possible or practicable to continue to do so. The payment to the holder and use of proceeds requirements ensure that, in the rare event of extinguishment, the public's investment in the easement and in conservation will not be lost.

(1) De Minimis Extinguishments

Although the judicial proceeding and impossibility or impracticality requirements provide crucial protection of tax-deductible perpetual conservation easements, in the case of certain de minimis extinguishments, the cost of a judicial proceeding would be out of proportion to such a proceeding's protective purpose. Accordingly, the Task Force recommends that a Holder be permitted to agree to certain de minimis extinguishments without judicial approval, subject to the principles provided in the safe harbor De Minimis Release provision set forth in

⁶⁶ See Treas. Reg. § 1.170A-14(g)(6).

⁶⁷ See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. a (AM. LAW INST. 2000) (similarly requiring judicial approval to extinguish perpetual conservation easements).

Appendix B, which are designed to protect the public interest and investment in the easement and prevent abuse.

The de minimis extinguishments authorized by the De Minimis Release provision are those that involve the release of a de minimis portion of the originally-protected parcel from a conservation easement in connection with (1) a bona fide boundary line dispute, the resolution of which also involves the protection of a similar and similarly-sized parcel of adjacent land, or (2) a condemnation or settlement in lieu of condemnation. Conservation easements are generally subject to the power of eminent domain and can be taken (and thereby extinguished) when the encumbered land is taken for a purpose that is inconsistent with the continued protection of the land for conservation purposes.

(a) Bona Fide Boundary Line Dispute

Example 22. The conservation easement encumbers 200-acre Parcel *T* for the purpose of protecting the open space, plant habitat, and wildlife habitat values of Parcel *T* in perpetuity. A dispute has arisen between the owner of Parcel *T* (Owner) and an abutter regarding the boundary line between Parcel *T* and the abutter's property. The legal description attached as an exhibit to the conservation easement (the "Legal Description") accurately describes the correct boundary line. However, Owner and the abutter incorrectly believed the boundary line was marked by a fence. The correct boundary line runs north and south and separates Parcel *T* from the abutter's property, which lies to the east of the boundary line. The fence runs almost parallel to the correct boundary line but intersects the boundary line at a slight angle. As a result, at the northern end of the boundary line, the fence cuts off a two-acre triangle ("Triangle *X*"), which is encumbered by the easement but lies to the east of the fence. The abutter has continually treated Triangle *X* as if it were owned by him, believing the fence was the actual boundary. Correspondingly, at the southern end of the boundary line, a two-acre triangle ("Triangle *Y*") that lies to the east of the correct boundary line and to the west of the fence is not encumbered by the easement, although Owner has continually treated Triangle *Y* as if it were owned by him and encumbered by the easement in the belief that the fence was the actual boundary. The Holder has monitored the easement assuming the fence was the correct boundary line. Owner, Holder, and the abutter have proposed the following: (1) Owner will convey ownership of Triangle *X* to the abutter in exchange for the abutter conveying ownership of Triangle *Y* to Owner, (2) Holder will release Triangle *X* from the easement, (3) Owner will add Triangle *Y* to the easement, and (4) the Legal

Description of Parcel *T* will be amended to reflect the new agreed upon boundary line, which will run along the fence line.

Holder's legal counsel has determined, in accordance with the De Minimis Release provision included in the easement, that (1) Triangle *X*, which would be released from the easement, represents no more than 1% of the total acreage of Parcel *T* and there have been no other releases of land from the easement; (2) a bona fide boundary line dispute exists between Owner and the abutter, the resolution of which would entail the addition of an identically-sized parcel of adjacent land (Triangle *Y*) to the easement, and Triangle *Y* has substantially the same conservation values as Triangle *X*; (3) [as established by an independent conservation review,] release of Triangle *X* from the easement in exchange for the addition of Triangle *Y* would have only a negligible adverse impact on the perpetual protection of the open space and habitat values of Parcel *T* and the conservation purposes of the easement (that is, an impact so small or unimportant as to not be worth considering) because both triangles are undeveloped and contain virtually identical general open space and habitat values, and Triangle *X* does not contain critical habitat or other singular conservation values; (4) the addition of Triangle *Y* to the easement would satisfy the proceeds and use of proceeds requirements of Treasury Regulation section 1.170A-14(g)(6) because the fair market value of the easement on Triangle *Y* is equal to or greater than the mandated minimum proportionate share of proceeds that Holder is required to receive upon extinguishment of the easement on Triangle *X*, and protection of Triangle *Y* would be consistent with the conservation purposes of the easement; and (5) release of Triangle *X* from the easement would not involve impermissible private benefit or private inurement.

Holder is permitted to release Triangle *X* from the easement (a partial extinguishment) in accordance with the De Minimis Release provision as described above and without judicial approval.

Example 23. Parcel *U*, consisting of 150 acres, is encumbered by a conservation easement, the purpose of which is to preserve and protect the open space, scenic, and habitat values of Parcel *U* in perpetuity. The owner of adjacent Parcel *V* wishes to purchase fifteen of the 150 acres, free of the easement, to add to Parcel *V*. The owner of Parcel *V* plans to subdivide and develop Parcel *V* into multiple single-family residential lots. The owner of Parcel *U* requests that the Holder execute a series of five "de minimis amendments" over a five-year period, releasing three of the desired fifteen acres from the easement each year, in exchange for a share of the proceeds from the sale of the unencumbered fifteen acres to the owner of Parcel *V*.

It has not become impossible or impractical to continue to use Parcel *U*, including the fifteen acres, for conservation purposes.

Holder is not permitted to execute the proposed releases, which would constitute partial extinguishments rather than amendments. The proposed partial extinguishments would not comply with either Treasury Regulation section 1.170A-14(g)(6)'s extinguishment requirements or the De Minimis Release provision.

*(b) Condemnation or Settlement in Lieu of
Condemnation*

Example 24. The conservation easement encumbers Parcel *W*, which consists of 10,000 acres of mountainous, open ranch land in State *X*. Parcel *W* sits within a patchwork of approximately 50,000 acres of other publicly and privately protected land, creating a large protected landscape conservation area for a number of federally- and state-listed species and natural communities. The purpose of the easement is to preserve and protect the open space and wildlife habitat values of Parcel *W* in perpetuity. State Road *X* runs along the southern border of Parcel *W* and has been the site of numerous traffic accidents because of its winding and curving route. The State Department of Transportation has proposed to acquire, by settlement in lieu of condemnation or, if necessary, condemnation, a ten-acre strip of land running along the southern border of Parcel *W* to enable it to straighten the road for public health, welfare, and safety purposes.

The Holder of the easement proposes to release the ten-acre strip from the easement as part of a settlement in lieu of condemnation. Holder's legal counsel has determined, in accordance with the De Minimis Release provision included in the easement, that (1) the ten-acre strip to be removed from the easement would constitute no more than 0.1% of the total acreage of Parcel *W* and there have been no other releases of land from the easement; (2) the State Department of Transportation has complied with all of the provisions of the law necessary to vest it with the legal authority and power to condemn the strip for public health, welfare, or safety purposes, and there is no defense to the condemnation on the merits; (3) [as established by an independent conservation review,] removal of the strip from the easement would have only a negligible adverse impact on the perpetual protection of the open space and habitat values of Parcel *W* or the conservation purposes of the easement (that is, an impact so small or unimportant as not to be worth considering); (4) Holder would receive at least the minimum proportionate share of

proceeds required by Treasury Regulation section 1.170A-14(g)(6)(ii) as part of the settlement and would be required to use such proceeds in a manner consistent with the conservation purposes of the easement; and (5) the release would not involve impermissible private benefit or private inurement.

Holder is permitted to release the strip from the easement (a partial extinguishment) in accordance with the De Minimis Release provision as described above and without judicial approval.

*(2) Complete or Partial Non-De Minimis
Extinguishments Due to Condemnation*

Cases involving complete or non-de minimis extinguishments due to condemnation raise special concerns. On the one hand, if condemnation is imminent (that is, the condemning authority has complied with all provisions of the law necessary to vest it with the legal authority and power to condemn the subject property or a portion thereof for public health, welfare, or safety purposes, and there is no defense to the condemnation on the merits), it would not be appropriate for the holder of the easement to expend its charitable resources to contest the acquisition. Rather, the holder should be able to agree to the condemnation or a settlement in lieu of condemnation without contesting the condemnation, provided the holder will receive at least its mandated minimum proportionate share of the condemnation award and will use such share “in a manner consistent with the conservation purposes of the original contribution,” as required by Treasury Regulation section 1.170A-14(g)(6).

On the other hand, holders of conservation easements have a fiduciary obligation to enforce easements on behalf of the public and to contest inappropriate threatened condemnations. Such threats may not be uncommon given that easement-encumbered lands, which generally are largely undeveloped, are attractive targets for condemnation. A holder may also be subject to pressures to agree to a condemnation to make way for a project that could as easily, if not as profitably, be pursued on other land. The value inherent in an easement may be considerable (in the multiple millions of dollars), making the prospect of receipt of a share of the condemnation award attractive to a holder. Also, an owner who stands to profit from the difference between the appreciated value of the easement and the amount of the condemnation award payable to the holder as

provided in the easement,⁶⁸ or who would be entitled to the entire condemnation award under state law,⁶⁹ may be particularly motivated to pressure the holder to agree to an inappropriate condemnation.

The Task Force did not reach consensus on whether the extinguishment of an easement in whole or non-de minimis part in response to a threat of condemnation should require court approval. On one hand, a sufficient level of protection of easements might be provided by allowing a holder to agree to a settlement in lieu of condemnation, provided (1) the holder provides advance notice of the proposed settlement to the Attorney General or other public official charged with enforcement responsibilities regarding charitable gifts in the state in which the subject property is located (“State Charity Regulator”) and (2) the holder’s legal counsel is required to document that an authorized government representative has made a declaration of threat to condemn, and that it is reasonable to expect the threat will be carried out if a voluntary sale is not made.⁷⁰

On the other hand, requiring that the holder obtain court approval of a settlement in lieu of condemnation in a proceeding in which the condemning authority must demonstrate that the threat to condemn would be carried out if a voluntary sale is not made has a number of benefits. Court approval would provide an added layer of protection of easements and the public investment therein, which may be appropriate in the case of complete and non-de minimis extinguishments, and it would assist holders

⁶⁸ See *infra* notes 208, 212 (discussing the perverse incentive that may be created if the holder’s share of post-extinguishment proceeds is limited to the Minimum Percentage).

⁶⁹ See Treas. Reg. § 1.170A-14(g)(6)(ii).

⁷⁰ To satisfy this requirement, the holder’s legal counsel should be required to document that all of the following factors are present:

- (1) the condemning authority has the legal authority and power to condemn property for the public purpose at issue;
- (2) the condemning authority has satisfied all statutory prerequisites to condemn the property at issue, including, inter alia,
 - (a) finalization of planning for the project prompting the acquisition, including its location, routing, or both, as applicable, and
 - (b) obtaining any required legislative, administrative, or regulatory approval for the project, such as authorizing legislation or a certificate of public necessity; and
- (3) the condemning authority has the funding to pay the fair market value of the property interests being acquired and any severance damages.

in resisting pressures to agree to inappropriate threatened condemnations, which are likely to only increase over time. Court approval also may motivate condemning authorities to explore possible alternatives, and it would involve court oversight of the holder's receipt of an appropriate share of proceeds upon extinguishment and use of those proceeds in a manner consistent with the conservation purposes of the easement, as provided in Treasury Regulation section 1.170A-14(g)(6).

(3) Other Extinguishments

Example 25. Parcel *X* consists of a 150-acre peninsula that extends into a tributary of a large bay. Parcel *X* contains important habitat for a variety of bird, plant, and animal species and is viewable by the public from the tributary, the opposite shore, and the road that runs along the inland boundary of the parcel. The only improvements on Parcel *X* are a 5,000-square foot historic manor house and ancillary structures. The owner of Parcel *X* donated a conservation easement to the Holder for the purpose of preserving and protecting Parcel *X*'s open space, scenic, and habitat values in perpetuity. Parcel *X* had been in the owner's family for seven generations, and she wished to ensure that the property would be permanently protected from subdivision and development. The owner has since died, and a new owner purchased the property subject to the perpetual easement. The new owner wishes to subdivide Parcel *M* into seven residential estate lots, consistent with zoning rules for the area. The new owner asks Holder to extinguish the easement to allow for the development in exchange for receiving a percentage of the proceeds from the sale of each lot. It has not become impossible or impractical to continue to use Parcel *X* for conservation purposes. To the contrary, continued protection of the conservation values of Parcel *X* has become more important since the easement's donation as a result of the development of nearby properties.

Holder is not permitted to extinguish the easement. Extinguishment of the easement would require a judicial proceeding and a showing to the satisfaction of the court that, due to an unexpected change in conditions surrounding Parcel *X*, continued use of Parcel *X* for conservation purposes has become impossible or impractical.⁷¹

Example 26. Same facts as Example 25, but to avoid the judicial proceeding and impossibility or impracticality requirements of Treasury Regulation section 1.170A-14(g)(6), the new owner asks the Holder to

⁷¹ See Treas. Reg. § 1.170A-14(g)(6)(i).

agree to amend (rather than extinguish) the easement to allow the development.

Holder is not permitted to execute the amendment. The amendment would not be consistent with the perpetual protection of Parcel *X*'s conservation values or the conservation purpose of the easement. Holders are not permitted to amend an easement to authorize uses that are inconsistent with the perpetual protection of the originally-protected parcel's conservation values or the conservation purpose of the easement, whether or not in exchange for compensation.⁷²

Example 27. *B* purchased Parcel *Y*, which consists of 500 acres and is encumbered by a conservation easement that was donated to the Holder some years before. A portion of an age-old migration route for a wild ungulate species is protected by the easement, which prohibits residential, commercial, and industrial development of Parcel *Y*. The migration route is a federally-designated wildlife corridor, and its protection entailed a collaborative effort of the federal government, state and local governments, scientists, and charitable organizations, as well as the expenditure of significant public funds. *B* poured the foundation for a residence on a portion of the migration route protected by the conservation easement. Holder discovered the easement violation, but rather than enforcing the easement by requiring *B* to restore the damaged property to its condition before the violation, Holder, at *B*'s request, proposes to release fifteen acres from the easement to permit construction of the residence and other development in exchange for *B*'s conveyance to Holder of a new easement on a much larger parcel of land to the north, which also contains a portion of the migration route. *B* and Holder represent that the exchange would result in a "net" conservation gain. Scientists who helped map the migration route disagree, explaining that the wild ungulate species is very sensitive to human intrusions, incremental intrusions such as this into the migration route could end the migration and cause the species to be extirpated from the area, and this type of "death by a thousand cuts" has already eliminated the migration routes of other species in the area. Continued use of the fifteen acres for conservation purposes, and, specifically, as part of the migration route, has not become impossible or impractical.

Holder is not permitted to release the fifteen acres from the easement (a partial extinguishment). Extinguishment of the easement with regard to

⁷² See *supra* note 40 (discussing the Myrtle Grove controversy on which this example is based).

the fifteen acres would require a judicial proceeding and a showing to the satisfaction of the court that, due to an unexpected change in conditions surrounding Parcel Y, continued use of the fifteen acres for conservation purposes has become impossible or impractical.⁷³ Holder has a fiduciary obligation to enforce the easement on behalf of the public by requiring restoration of the areas or features of Parcel Y that were damaged by the violation to the extent possible.⁷⁴

Example 28. Same facts as Example 25, but to avoid the judicial proceeding and impossibility or impracticality requirements of Treasury Regulation section 1.170A-14(g)(6), B and Holder propose to amend (rather than partially extinguish) the easement to allow the development of the fifteen acres.

Holder is not permitted to execute the amendment. The amendment would not be consistent with or enhance the perpetual protection of Parcel Y's conservation values or the conservation purpose of the easement. Holders are not permitted to amend an easement to authorize uses that are inconsistent with the perpetual protection of the originally-protected parcel's conservation values or the conservation purpose of the easement, whether or not in exchange for cash or some other form of compensation, such as adding land to the easement. Holder has a fiduciary obligation to enforce the easement on behalf of the public by requiring restoration of the areas or features of Parcel Y that were damaged by the violation to the extent possible.⁷⁵

6. *Options for Independent External Review and Approval of Moderate- and High-Risk Amendments and an Advance Notice and Penalties Option*

The Task Force recommends that the Treasury consider developing or approving a process for independent external review and approval of the Moderate- and High-Risk Amendments described in Part V.A.5 above. The Task Force recommends that the review and approval process be practical, efficient, and cost-effective; that it be structured to give easement donors, landowners, holders, and the public confidence that the decision-making will be independent, fair, and objective, and consistent across similar amendment cases nationwide (that is, the federal standards should apply equally to all easements regardless of jurisdiction); and that

⁷³ See Treas. Reg. § 1.170A-14(g)(6).

⁷⁴ See Treas. Reg. § 1.170A-14(g)(5)(ii).

⁷⁵ See *id.*

it respect the status of tax-deductible easements as donor-restricted charitable gifts, the terms of which are binding upon both the property owner and holder.

The Task Force offers the following options for consideration.

a. Service-Administered Review and Approval Process

(1) Advance Ruling Process

A process could be developed that would allow property owners and holders to jointly seek Service review and approval of proposed Moderate- and High-Risk Amendments, perhaps through Office of Chief Counsel review or an expedited, reduced-fee private letter ruling or similar process. The owner and holder could be required to submit a specified set of materials, under penalty of perjury, addressing each of the Section 170(h) Amendment Principles and Procedures.⁷⁶ The New Hampshire Attorney General's Office implemented a review process for conservation easement amendments that has been in operation since 2010 and could serve as a model.⁷⁷ Consideration also should be given to providing the State Charity Regulator with notice of the review process and an opportunity to provide comments.

An advantage to this option would be consistency in decision-making across similar amendment cases nationwide. A disadvantage may be that current funding and staffing of the Service might not allow for such a procedure without a substantial user fee. Efforts to raise revenues from other sources to help offset the expense of the reviews could be explored (for example, federal appropriations, conservation easement donation filing fees based on the amount of the claimed deduction, or monetary penalties imposed on property owners and holders for improper amendments and extinguishments).

⁷⁶ See Rev. Proc. 18-1 § 7.01(16), 2018-1 I.R.B. 1, 31 (private letter ruling requests must include the following penalties of perjury statement: "Under penalties of perjury, I declare that I have examined [. . . this request . . .], including accompanying documents, and, to the best of my knowledge and belief, [[. . .this request . . .] contains all the relevant facts relating to the request, and such facts are true, correct, and complete.").

⁷⁷ See CENTER FOR LAND CONSERVATION ASSISTANCE, AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS (2010), <https://www.doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf>; see also Terry M. Knowles, *Amending or Terminating Conservation Easements: The New Hampshire Experience*, 33 UTAH L. REV. 871 (2013).

(2) *Easement Amendment Advisory Panel*

The Service could establish a panel to which proposed Moderate- and High-Risk Amendments could be submitted for review for a fee. The panel could be modeled on the Service's existing Art Advisory Panel, which helps the Service review and evaluate appraisals of works of art submitted by taxpayers in support of the value claimed in federal income, estate and gift tax cases.⁷⁸ In the easement context, the panel (or perhaps regional panels) could be established and commissioned by the Service to review proposed easement amendments for compliance with the Section 170(h) Amendment Principles and Procedures. Such a panel could include individuals knowledgeable regarding conservation science, law, and appraisals, but care would need to be taken to ensure that the panelists are sufficiently independent of easement donors and holders. In addition, the State Charity Regulator should be provided with notice of the review process and an opportunity to provide comments. Establishing regional panels would have the advantage of spreading the workload and potentially including panelists that are familiar with local land and conservation issues in different parts of the country. Disadvantages of regional panels could include lack of consistency in decision-making across panels and a possible bias in favor of regional, state, or local interests, as opposed to the national interest in conservation that section 170(h) is designed to promote.

A variation on this proposal would establish the panel under the auspices of the Service but in collaboration with federal agencies that fund or acquire conservation easements and, thus, have relevant expertise (such as the U.S. Department of Agriculture, Forest Service, and Natural Resources Conservation Service). These agencies often fund the acquisition of easements through bargain-sale transactions, where a portion of the easement is donated and the landowner claims a federal deduction for the donation component. Accordingly, these agencies and the Service have an interest in ensuring that only appropriate amendments are made to easements, and collaboration could create efficiencies and otherwise be beneficial.

⁷⁸ See Art Appraisal Services, I.R.S., <https://www.irs.gov/appeals/art-appraisal-services> (last visited March 10, 2019).

b. Federally-Approved State Processes for Review and Approval

States could be authorized to establish state-level statutory or administrative frameworks for reviewing proposed Moderate- and High-Risk Amendments (including, among other things, requiring review by an administrative body with right of judicial appeal and establishing criteria for judicial review). The state-level frameworks would have to comply with federally-mandated requirements to ensure that the decision-making would be independent, fair, and objective, and there would be reasonable consistency in decision-making nationwide. Federally-mandated requirements should include (1) adherence to the Section 170(h) Amendment Principles and Procedures and the principles applicable to donor-restricted charitable gifts; (2) decision-makers independent of owners of encumbered properties and nonprofit and governmental holders of easements; (3) procedural safeguards related to evidence and decision-making; and (4) participation by or notice to the State Charity Regulator. As an alternative, the Treasury could consider recognizing, as permissible, review by a State Charity Regulator (such as is currently in place in New Hampshire).⁷⁹ This process would similarly have to comply with federally-mandated requirements noted above to ensure independent, fair, and objective decision-making, and an acceptable level of consistency in decision-making nationwide. The required features of state-level frameworks could be promulgated through new Treasury Regulations or specified in formal guidance.

An advantage to this approach would be federal sanctioning of limited and defined state-level experimentation in this context. There also would be disadvantages. Not all states will have sufficient interest in or the resources to establish or maintain such a framework, creating potential inequities for property owners and holders depending on the state in which they reside or operate, and requiring the Treasury to establish rules for both types of jurisdictions. Compliance with federal performance standards would need to be reviewed and approved when a framework is established. The frameworks would be subject to change over time as state priorities and resources change, requiring additional reviews and approvals. Despite federally-mandated requirements, variations in the frameworks could lead to differences in decision-making across jurisdictions, resulting in inequities and inconsistent protection of the federal investment in easements and conservation.

⁷⁹ See *supra* note 77.

c. Judicial Review and Approval

Judicial review and approval of amendments that are not consistent with the perpetual protection of the conservation values of the originally-protected property, the specifications of protective terms of the easement, or the conservation purposes of the easement could be required. The safe harbor Limited Power of Amendment provision set forth in Appendix B provides for this. It:

- (1) authorizes the owner and holder to agree to amendments that comply with the proposed Section 170(h) Amendment Principles and Procedures,
- (2) requires that amendments exceeding the scope of that discretion be approved by a court in a proceeding that the State Charity Regulator is given notice of and an opportunity to participate in to represent the interest of the public in ensuring that the easement is administered in accordance with its terms and charitable conservation purpose,
- (3) provides that the owner and holder acknowledge that the easement constitutes a donor-restricted charitable gift, and
- (4) provides that amendments that do not comply with the provision shall be invalid.⁸⁰

Requiring that the parties acknowledge that the easement constitutes a donor-restricted charitable gift would help to ensure that the court applies the laws relating to charitable gifts, which protect the public interest and investment, rather than real property law doctrines, such as the doctrines of changed conditions or relative hardship, which do not take the public interest or investment into account.⁸¹ Providing that amendments that do

⁸⁰ See *infra* Appendix B.

⁸¹ See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.6, 3.1, 4.1, 4.3(4), 4.6(1)(b), 7.11, 7.16(5), 8.5 (AM. LAW INST. 2000) (applying a special set of rules, including the doctrine of cy pres, to conservation easements in recognition of their status as assets invested in by, and held for the benefit of the public). For example, § 7.11, Comment c, of the Restatement explains:

The primary difference between applying the [real property law] changed-conditions doctrine under § 7.10 and terminating a conservation servitude under [§ 7.11] is the entitlement to damages. In other instances where changed conditions lead to termination of servitudes, . . . there is seldom an entitlement to damages. The opposite is true with conservation

not comply with the Limited Power of Amendment provision are invalid would provide a strong incentive to owners and holders to be cautious regarding amendments because the Service, the state attorney general, a lender, a potential purchaser of the property, a title examiner, or other interested party could question the validity of an amendment.⁸² Fear of losing “eligible donee” status for federal deduction purposes for agreeing to improper amendments would further motivate holders to be cautious.⁸³

In some cases, a holder may believe that a proposed amendment falls within the scope of the discretion granted to the parties under the Section 170(h) Amendment Principles and Procedures, but reasonable people might disagree. The Service should consider allowing the holder and the owner of the subject property to execute such an amendment without judicial approval, provided the State Charity Regulator (1) reviews the proposed amendment in his or her role as representative of the interests of the public in ensuring that the easement, which constitutes a charitable gift, is used in accordance with the stated terms and charitable conservation purpose of the gift, and (2) responds in writing that the State Charity Regulator will not object to, or consents to, or approves of the proposed amendment.⁸⁴ This proposal could be implemented by authorizing inclusion of a safe harbor provision in conservation easements relating to State Charity Regulator review.⁸⁵ While not all states have

servitudes. . . [There is] the strong public interest in the continued availability of property devoted to conservation purposes and in avoiding loss of public investments made in such property. These interests should be protected if the servitude is terminated.

⁸² Invalidating amendments that do not comply with stated requirements is a strategy adopted by Maine in its conservation easement enabling statute. As one of the architects of the statute explains, while the statutory standard for amendments requires the exercise of reasonable discretion by the holder, “prudence requires a cautious approach, because an amendment that is later found to violate this standard could well be voided.” Pidot, *supra* note 40, at 17.

⁸³ Treas. Reg. § 1.170A-14(c)(1).

⁸⁴ For example, the Maine and New Hampshire Attorney General offices provide this type of advice to holders. See Pidot, *supra* note 40; see also *supra* note 77.

⁸⁵ The safe harbor provision, which could be added to the safe harbor Limited Power of Amendment provision, could provide as follows:

There may, in some circumstances, be a question regarding whether a proposed amendment exceeds the scope of the discretion granted to Owner and Holder under the Section 170(h) Amendment Principles and Procedures. In such a circumstance, Owner and Holder may execute the amendment without judicial approval, provided:

attorney general offices that are active in supervising charities and charitable assets, the attorney general offices in Maine and New Hampshire provide useful models,⁸⁶ and land trusts and other stakeholders could support working with the attorney general in the state or states in which they operate to develop similar models.

The judicial review and approval option has a number of advantages. For example, it would not require that the Service or each of the fifty states develop a review and approval process, but would rely on existing institutions that already supervise the administration of charitable gifts on behalf of the public (courts and state attorney general offices). It also would be relatively easy for the Treasury to implement, as it would require only the development of Section 170(h) Amendment Principles and Procedures and a safe harbor Limited Power of Amendment provision (and, ideally, issuance of some examples of amendments that fall within and outside of the discretion granted to the parties by that provision). Although the judicial review option might be more costly and time consuming for property owners and holders than some other review processes, those concerns would be mitigated somewhat by the nature of the proceedings, which generally would be non-adversarial. The process could be further streamlined by the option for parties to seek State Charity Regulator review of and response to an amendment the holder believes complies with the Section 170(h) Amendment Principles and Procedures.

The Task Force acknowledges legitimate concerns in the land conservation community about the cost and duration of judicial proceedings

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- (i) *Holder determines that the amendment complies with the Section 170(h) Amendment Principles and Procedures,*
 - (ii) *Holder provides the [State in which Property is located] Attorney General or other public official in the State charged with enforcement responsibilities regarding charitable gifts with a copy of the easement and the proposed amendment, and requests that the public official (a) review the proposed amendment in his or her role as representative of the interests of the public in ensuring that the easement, which constitutes a charitable gift, is used in accordance with its terms and charitable conservation purpose, and (b) respond in writing regarding the proposed amendment, and*
 - (iii) *the public official responds in writing that it will not object to, or it consents to or approves of the proposed amendment.*

If the public official does not respond to such a request, the Holder may either (i) seek court approval of the proposed amendment or (ii) proceed with the proposed amendment, subject to the risk that the Service may determine that the amendment was improper and other stakeholders may question its validity.

⁸⁶ See Pidot, *supra* note 40; see also *supra* note 77.

that may be required to obtain the approvals of some amendments. Procedural requirements related to such matters are the product of state law, whether resting with the legislative branch in the creation of statutory proceedings or the judicial branch in establishing rules of civil procedure. They are therefore outside the scope of this Report. Nevertheless, the Task Force recommends state-level consideration of simplified, expedited, inexpensive, and non-adversarial processes to address cost and duration concerns while still allowing for appropriate judicial consideration of these matters. Such proceedings exist in other state judicial contexts. Examples include the existence in different jurisdictions of simplified “small claims” proceedings, expedited litigation in the child support and mechanics’ lien areas, use of special or standing masters for fact finding, and the often non-adversarial petitions for instructions in the estate administration and the charitable trust or gift administration areas.

d. Advance Notice and Penalties Option

In lieu of required independent external review of amendments, holders and property owners could (1) be required to provide advance notice of proposed discretionary consents and amendments (or perhaps only Moderate- or High-Risk Amendments) to the State Charity Regulator, the public within a defined geographic area, and (if desired by the Service) the Service, and (2) be liable for penalties or excise taxes for failure to comply with the advance notice requirement or for agreeing to improper discretionary consents, amendments, and extinguishments.

Harm to an encumbered property’s conservation values (“one peppercorn” of harm) as a result of an improper discretionary consent, amendment, or extinguishment could trigger the excise tax or penalty, but to avoid discouraging beneficial consents and amendments (for example, herbicide use to combat invasive species), there could be a presumption of compliance if the parties obtained an independent conservation science review and a reasoned opinion of counsel that the negative impact on conservation values would be negligible.⁸⁷ Excise tax and penalty revenues could be applied to develop an expedited, reduced fee, advance-ruling or panel-review process for proposed discretionary consents and amendments. Imposition of penalties might require a statutory change, although it could possibly fit under current intermediate sanctions rules.

⁸⁷ See Treasury Regulation section 25.7520-3(b)(3) for an example of such a presumption.

An advance notice requirement and penalties would only be effective to deter improper discretionary consents, amendments, or extinguishments if there are realistic assessment and enforcement mechanisms. As a start, Schedule D to the Form 990 could be modified to require the holder to make certain declarations, under penalties of perjury, such as:

The [holder] declares that it provided the required advance notice of all discretionary consents, amendments, and extinguishments made during the year to the State Charity Regulator, the public, and the IRS as required by [____], and that all discretionary consents and amendments complied with section 170(h) Discretionary Consent Principles and Procedures or the Section 170(h) Amendment Principles and Procedures, as the case may be.⁸⁸

Advance notice and penalty provisions would have salutary effects similar to those that would flow from the recommended enhancements to the Form 990 reporting requirements discussed below.

7. *Increasing Transparency, Accountability, Compliance, and Enforcement*

Unless effective enforcement mechanisms and deterrents exist, safe harbor provisions, Section 170(h) Amendment and Discretionary Consent Principles and Procedures, required independent external review processes, and other carefully-crafted rules will not have the desired effect of facilitating proper amendments while discouraging improper amendments, consents, and extinguishments.

At present, the legal risks associated with improper discretionary consents, amendments, and extinguishments fall disproportionately on tax-exempt easement holders. While very few such holders have been disciplined, the sanctions that could potentially be imposed solely on tax-exempt holders are daunting: intermediate sanctions or loss of tax-exempt status. A government holder that agrees to improper discretionary consents, amendments, or extinguishments, by contrast, faces little legal risk. Yet the public value of government-held easements is no less important than the public value of easements held by tax-exempt organizations, and the behavior of government holders holds much the

⁸⁸ See generally I.R.S. Form 990 (2018), <https://www.irs.gov/pub/irs-pdf/f990.pdf>.

same level of risk in terms of the public's perception of conservation easements and the federal incentives for their donation.

Even more anomalously, easement donors and subsequent property owners face little legal risk in seeking or obtaining improper discretionary consents, amendments, or extinguishments after the statute of limitations has run on the deductions. Subsequent property owners face effectively no legal risk. In fact, the low risk of audit means that demanding and obtaining improper discretionary consents, amendments, or extinguishments is only faintly discouraged even during the applicable statute of limitations period.⁸⁹ The fifteen-year carry-forward under the now-permanent enhanced section 170(h) deduction does extend the statute of limitations in some instances.⁹⁰ But current reporting requirements for amendments and extinguishments (that is, post hoc non-specific reporting on a nonprofit holder's Form 990), and the lack of any reporting requirements for discretionary consents limits the risk to donors.

Once easement-encumbered property has changed hands, and absent an insider situation, there is no federal legal exposure for the successor landowner from an improper discretionary consent, amendment, or extinguishment, regardless of its impact on the subject property's conservation or economic value. Accordingly, there is no disincentive for property owners to push, sometimes aggressively, for improper discretionary consents, amendments, and extinguishments. Coupled with holders' strong motivation to maintain good relations with current landowners, this exposes easements to risk of erosion over time.

The Task Force offers the following options for consideration. They are intended to increase transparency and accountability, facilitate enforcement, distribute risk among all parties (that is, easement holder, original donor, and current landowner), and increase compliance by creating disincentives for property owners to push for, and easement holders to agree to, improper discretionary consents, amendments, or extinguishments. Because the parties sometimes use labels other than "discretionary consent," "amendment," or "extinguishment" to describe these activities, those terms would need to be broadly defined to capture improper activities, regardless of the label used.⁹¹

⁸⁹ See generally Marr & Murray, *supra* note 41 (discussing low rate of Service audits).

⁹⁰ See I.R.C. § 170(b)(1)(E)(ii).

⁹¹ Discretionary consents could be accomplished by using, for example, temporary use or license agreements, discretionary waivers, or letters of agreement or interpretation. Amendments could be labeled as, for example, modifications, alterations, transfers,

a. Loss of Eligible Donee Status

To be deductible, a conservation easement must be donated to an “eligible donee.”⁹² Pursuant to the Treasury Regulations, to be an eligible donee, “an organization must be a qualified organization, have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.”⁹³ The regulations further provide that a “conservation group”⁹⁴ organized or operated primarily or substantially for one of the conservation purposes specified in section 170(h)(4)(A) will be considered to have the commitment required by the preceding sentence,⁹⁵ and a “qualified organization need not set aside funds to enforce the restrictions that are the subject of the contribution.”⁹⁶

Guidance could be issued, perhaps in the form of a Notice, stating the actions or omissions of an organization that can cause loss of “eligible donee” status and, thus, loss of eligibility to accept tax-deductible conservation easement donations. For example, an organization could lose eligible donee status for (1) a material failure to report or material misstatement regarding its conservation easement-related activities on Schedule D of the Form 990 (and the Form 8282, if the recommendation below is adopted), (2) failure to comply with the Section 170(h) Amendment or Discretionary Consent Principles and Procedures, (3) failure to comply with the restriction on transfer requirement of Treasury Regulation section 1.170A-14(c), (4) failure to comply with the extinguishment requirements of Treasury Regulation section 1.170A-14(g)(6), [as modified by the safe harbor De Minimis Release provision (see Appendix B)] and (5) failure to enforce a conservation easement, provided that the holder, consistent with holder’s fiduciary obligation to the public, may (a) decline to take corrective action if the holder determines that the violation does not negatively impact the continued perpetual protection of the property’s conservation values or the conservation purposes of the easement, and the taking of corrective action

releases, or trade-offs. Extinguishments could be referred to as, for example, abandonments, terminations, releases, trade-offs, swaps, substitutions, or reconfigurations.

⁹² See Treas. Reg. § 1.170A-14(a), (c)(1).

⁹³ Treas. Reg. § 1.170A-14(c)(1).

⁹⁴ This term is not defined in the Treasury Regulations.

⁹⁵ Treas. Reg. § 1.170A-14(c)(1).

⁹⁶ *Id.*

would not be in the public interest,⁹⁷ and (b) exercise reasonable discretion in not pursuing or in settling claims when enforcement is not in the public interest, including when the costs of enforcement would greatly outweigh the public benefit to be derived or the damage to conservation values.

Eligible donee status could be suspended temporarily (for example, for a period of three or five years from the date of the Service's publication of loss of status).⁹⁸ Notification to the public of the loss of eligible donee status could be provided as a supplement to the Service's current online list of organizations that have had their federal tax-exempt status revoked.⁹⁹ Loss of eligible donee status could be permanent for repeat offenders. It should be made clear that loss of eligible donee status has no effect on an entity's ability to enforce the conservation easements it holds on behalf of the public, although, in the case of a permanent loss of eligible donee status for a repeat offender, mandated transfer of the easements the entity administers to a more responsible holder(s) would be desirable.

The threat of loss of eligible donee status would both deter holders from engaging in the offending actions and assist them in warding off requests from property owners who push, often aggressively, for improper discretionary consents, amendments, and extinguishments.

b. Rescission or Excise Tax

Correction of improper discretionary consents, amendments, or extinguishments by their rescission or, when that is not possible or

⁹⁷ As an example of this, assume a conservation easement allows the construction and maintenance of a one-story residence on the subject property. The landowner constructs a second story on the residence on the property, and the holder does not discover the violation until construction is completed. The holder may decline to require that the owner remove the second story if the second story has no negative impact on the continued perpetual protection of the conservation values of the property or the conservation purposes of the easement. If the holder wishes to permanently permit the second story, the easement could be amended, provided the amendment satisfies the Section 170(h) Amendment Principles and Procedures, including the prohibition on private benefit. Alternatively, the holder might grant the owner a temporary discretionary consent, assuming satisfaction of the Section 170(h) Discretionary Consent Principles and Procedures.

⁹⁸ The process for revoking or suspending eligible donee status could be similar to the process for revoking section 501(c)(3) status. The Task Force recommends that there be no retroactive application of loss of eligible donee status, which would be inequitable to taxpayers who made donations without notice of such loss of status.

⁹⁹ See *Tax Exempt Organization Search Bulk Data Downloads: Automatic Revocation of Exemption List*, I.R.S., <https://www.irs.gov/charities-non-profits/tax-exempt-organization-search-bulk-data-downloads> (last visited March 10).

practicable, the landowners' payment of excise taxes to the Service, could be required. When a discretionary consent, amendment, or extinguishment is found upon later review by the Service to have been improper, the transaction should be unwound or "corrected" to the extent possible. Ideally, the discretionary consent, amendment, or extinguishment should be rescinded to restore pre-transaction protections to the subject property.¹⁰⁰ That may not be possible, practicable, or equitable—for example, because of a transfer in ownership or activities conducted on the property in reliance on the amendment that cannot practically be reversed, particularly without causing additional damage to conservation values. In these situations, the landowner who owned the property at the time of the discretionary consent, amendment, or extinguishment could be required to pay an excise tax to the Service.

The excise tax could be equal to 200% of the increase in the value of the subject property as a result of the improper discretionary consent, amendment, or extinguishment. To increase the deterrent effect and prevent complex evidentiary and valuation disputes, the excise tax should be calculated without deduction or reduction for any consideration that may have been paid to the holder in connection with the discretionary consent, amendment, or extinguishment, whether in cash or in kind. The excise tax should also be calculated without deduction or reduction for any decrease in the subject property's value caused by other provisions of the discretionary consent, amendment, or extinguishment, or a related transaction, whether or not couched in the form of compensation.¹⁰¹ This corrective model is broadly intended to track the excise tax model applied in cases of private inurement. The monies received by the Service could be used to help defray the costs of an expedited, reduced-fee, advanced-ruling or panel-review process for proposed discretionary consents and amendments.

¹⁰⁰ If a holder agreed to a discretionary consent, amendment, or extinguishment that exceeded the discretion granted to the holder in the conservation easement deed, the amendment may be void ab initio under state law, and actions taken by the landowner may constitute violations of the easement enforceable by the holder or the state attorney general on behalf of the public.

¹⁰¹ For example, if an owner and holder improperly agreed to amend a conservation easement to authorize the owner to subdivide and sell two residential lots, which increased the value of the subject property by \$200,000, and in exchange (as a "trade-off"), the owner added an additional fifty acres to the easement, the excise tax would be \$400,000. This example assumes rescission is not possible.

c. New Intermediate Sanctions

New “intermediate sanctions” could be imposed on the parties to an improper discretionary approval or consent, amendment, or extinguishment, similar to the intermediate sanctions imposed on private inurement transactions. While this idea would face resistance in the land trust community, it has the corresponding advantage of providing a useful negotiating tool to a holder faced with a confrontational property owner seeking an improper discretionary approval or consent, amendment, or extinguishment. In addition, the monies received by the Service could be used to help defray the costs of an expedited, reduced-fee, advanced-ruling or panel-review process for proposed discretionary consents and amendments.

d. Enhanced Reporting

(1) Enhanced Form 990 Reporting

A charitable organization filing Service Form 990 is currently required to report on Schedule D the total number of easements held by the organization that were transferred, modified, or extinguished during the tax year, and to provide an explanation of these activities.¹⁰² This reporting requirement in its current form is less than ideal. First, not all entities holding tax-deductible easements are required to file Form 990 (government entities are exempt, as are holders that do not meet the Form 990 thresholds). Second, some organizations leave the easement-related questions on the Form 990 blank, others report transfers, amendments, and extinguishments without providing any explanation, and others include opaque explanations. Third, the Instructions to Schedule D do not currently require that charitable organizations report on the discretionary consents they have granted during a taxable year, and these consents are sometimes used to authorize activities on protected properties without formally amending easements, thus avoiding the amendment reporting requirements. Thus, the Form 990 in its current form does not provide a true or particularly useful picture of the modifications being made to these perpetual gifts over time.

The Task Force recommends that charitable organizations holding conservation easements that do not meet the Form 990 filing thresholds and government holders be required to report on their conservation easement-related activities in the same manner as charitable organizations

¹⁰² See I.R.S. Form 990 Schedule D (2018), <https://www.irs.gov/pub/irs-pdf/f990sd.pdf>.

that file the Form 990. The Task Force recommends that the Form 990 Schedule D instructions be modified to require reporting on discretionary consents or similar techniques, in addition to transfers, amendments, and extinguishments (as those terms are defined herein). The Task Force recommends that the instructions be clarified to ensure more straightforward, accurate, and comprehensive reporting on these activities.¹⁰³ For example, to the extent that the recommended Section 170(h) Amendment and Discretionary Consent Principles and Procedures are adopted, including the requirement that a holder document in writing satisfaction of those Principles and Procedures, that written documentation could be attached to Schedule D. Finally, consideration could be given to requiring holders to make certain declarations or acknowledgments regarding their conservation easement-related activities, similar to those required of appraisers and donors on the Form 8283.

The Task Force believes these changes would help to ensure that the reporting requirements both serve as a more effective deterrent to improper discretionary consents, amendments, and extinguishments, and provide the Service, state regulators, researchers, and the public with a better picture of the manner in which charitable organizations and government entities are administering these perpetual gifts on behalf of the public. The changes also would assist holders in warding off requests from property owners who push for improper discretionary consents, amendments, and extinguishments.

(2) Enhanced Form 8282 Reporting

The requirements for filing a Form 8282 could be modified to extend beyond transfers of conservation easements themselves and include amendments and extinguishments with regard to donated or partly-donated conservation easements.¹⁰⁴ No other form of property donation is as readily susceptible to a change in its terms as a conservation easement. Moreover, because amendments and extinguishments can be tantamount to the sale, exchange, or other disposition of property rights that were donated, Form 8282 reporting is appropriate. To the extent that a Form

¹⁰³ The definition of a conservation easement in the Instructions to Schedule D could be clarified to refer to only conservation easements for which a section 170(h) deduction or other federal tax benefit was claimed (i.e., full donations or bargain sales of easements).

¹⁰⁴ Discretionary consents are not included in this recommendation because, if the Section 170(h) Discretionary Consent Principles and Procedures are adopted, such consents could be granted only in limited circumstances.

8282 filing might prompt a review of the original donor's deduction, this taxpayer- and project-specific reporting would create a disincentive for the original donor to pursue a questionable amendment or extinguishment.¹⁰⁵

The logical extension of other Task Force recommendations might suggest that the Form 8282 filing requirement should apply only to extinguishments and amendments that require independent external review. A lower number of Form 8282 filings could make Service review and action, where appropriate, more likely and feasible. That said, a blanket requirement may be simpler to apply and would be consistent with current Form 990 Schedule D reporting requirements.

Given the perpetual life of a conservation easement and the fact that many amendments are requested and agreed to many years after an easement's donation, this recommendation, which would require the filing of Form 8282 only if amendments or extinguishments are executed within three years of the easement's donation, would have a very limited salutary effect.¹⁰⁶ In addition, while there is value in transparency and advising the Service of the identity of landowners who benefit from amendments and extinguishments, until there is more certainty regarding proper and improper amendments, taxpayer-specific reporting might discourage conservation-enhancing as well as conservation-weakening or -negating amendments.

e. Increased Collaboration Between the Service and State Charity Regulators

Discretionary consents, amendments, and extinguishments present issues for both the Service and state regulatory authorities. While not a sanction per se, enhanced communication would facilitate the Service being able to take appropriate action when warranted by an action taken by a State Charity Regulator, and vice versa. At a minimum, holders could be required to provide a copy of Part II (Conservation Easements) of Schedule D of the Form 990, along with the accompanying explanations in Part XIII, to the State Charity Regulator. This requirement would be

¹⁰⁵ Some inequities are possible if the original donor transfers the subject property, and the current landowner then obtains an improper discretionary consent, amendment, or extinguishment.

¹⁰⁶ See I.R.S. Form 8282, General Instructions (Rev. Apr. 2009), <https://www.irs.gov/pub/irs-pdf/f8282.pdf>. Consideration might be given to extending the time period in which a Form 8282 is required to be filed with respect to conservation easement amendments or extinguishments, particularly given the enhanced carry-forward period for the section 170(h) deduction, or requiring this type of reporting on some other form.

similar to the requirement applicable to private foundations, which must furnish copies of Form 990-PF to state officials.

f. Government Holders

Because the public value of government-held easements is no less important than the public value of easements held by charitable organizations, the Task Force recommends that reforms be applied to all qualified organizations, including government entities, to the extent possible. For example, to retain their status as “eligible donees” of tax-deductible easements, government entities could be required to annually report to the Service on their discretionary consent, transfer, amendment, and extinguishment activities, similar to the reporting that is required by charitable organizations on the Service Form 990. They also could be subject to the other rules regarding loss of eligible donee status recommended above.

8. Conclusion

As the number of conservation easements rises and as natural conditions on the landscape continue to change, the need for guidance regarding proposed changes to easements will become ever more critical. Official guidance that both authorizes and places appropriate limits on discretionary consents and amendments would give the public confidence that legitimate changes can be made to perpetual conservation easements in a way that serves the public interest and protects the conservation values of the encumbered properties and the conservation purposes of the easements. Such guidance would also legally acknowledge the need for flexibility to respond to changing circumstances.

The Task Force recommends that, in considering options for providing such guidance, the Service consult with the various stakeholders in this context, including:

- individuals who have donated conservation easements, often to ensure that specific properties that have special meaning to them, their families, and their communities will be protected from development and other environmentally harmful uses in perpetuity;
- institutional and governmental funders who contribute to specific conservation easement acquisition projects, which are often structured as bargain-sales;

- through a comment period, the public, which is investing billions of dollars in and is the beneficiary of the perpetual easements;
- the land trusts and local, state, and federal government entities that acquire and administer tax-deductible easements on behalf of the public;
- owners of easement-encumbered properties, who must comply with the restrictions on the use of the properties; and
- attorneys general and other public officials who are charged with overseeing charities and protecting the public interest in assets held for the benefit of the public within their jurisdictions.

B. Inconsistent Use Regulations

The inconsistent use provisions in Treasury Regulation section 1.170A-14(e)(2) and (3) are meant to address a real issue. The drafters realized that without an inconsistent use rule, the law might, for example, permit a deduction for a conservation easement that protects farmland but allows the farm to be intentionally or heedlessly operated in a manner that destroys rare plants or a rare fish in an adjacent stream. But as drafted, the scope of landowner and conservation easement holder responsibilities regarding inconsistent uses is unclear.

The problem is especially evident in situations in which (to quote the language of the regulation) one or more “other significant conservation interests” are quite unlike the primary protected interest.¹⁰⁷ The reference to “significant conservation interests” could be interpreted broadly to include outdoor recreation, habitat and ecosystem, open space, and historic values on the land subject to the easement and on nearby land. Thus, the easement donor may be at risk for failing to provide for the protection of significant resources unlike those in which it has expertise or that could have been discovered but were not. At present, few easement drafters read the regulation as requiring that before a qualified easement can be properly prepared, contract research must be conducted in order to identify all possible significant conservation interests on or affected by the land to be subject to a conservation easement. But nothing in the language of the regulation lends definitive support to that practice-oriented reading.

To cite another problem with the existing regulation, consider the implications of the deployment of a preferred, but perhaps not “necessary,” method of managing a target resource that incidentally

¹⁰⁷ Treas. Reg. § 1.170A-14(e)(2).

compromises another significant resource. The regulations excuse inconsistent use activity that is “necessary” to achieve the conservation purposes of the easement.¹⁰⁸ But imagine a prairie remnant of substantial size that might best be managed with periodic, prescribed burning. The remnant might, however, at greater cost and with inferior results, also be managed through periodic mowing and tree-clearing. All other things being equal, an easement might be drafted to specifically permit management by prescribed burning.

However, if such permitted burning could damage a small population of a species of tree (considered rare in the state) that has become established in the prairie, the easement might not be upheld as qualifying if challenged under the inconsistent use regulations. Because burning is arguably not “necessary,” an inconsistent use challenge might prevail even if there was a healthy population of the tree species on a protected tract a mile away, and the trees growing on the easement land, left unmanaged, might proliferate and compromise the prairie by shading prairie plants.

The Task Force recommends that the Treasury clarify the inconsistent use provisions in Treasury Regulation section 1.170A-14(e)(2) and (3). At present, the scope of these provisions is unclear, as are the steps donors need to take to comply with these provisions. The Task Force believes that addressing the uncertainties and ambiguities in these provisions would be best dealt with through the issuance of guidance and additional examples, rather than through the litigation process where ad hoc decisions based on specific facts often do not provide helpful guidance. In developing guidance, the Task Force recommends that the Treasury consult with all stakeholders as noted in Part V.A.8.

C. Further Transparency in Conservation Easement Administration

1. *Improved Form 990 Conservation Easement Reporting*

Nonprofit conservation easement holders are required to include on their annual Form 990 return some basic information about the easements they hold: information about easement purposes, number of easements held, acreage restricted, states in which easements are held, and hours spent and expenses incurred in easement stewardship.¹⁰⁹ Also required is the disclosure of the method these organizations use to account for

¹⁰⁸ Treas. Reg. § 1.170A-14(e)(3).

¹⁰⁹ See I.R.S. Form 990, Part IV (2018), <https://www.irs.gov/pub/irs-pdf/f990.pdf>; I.R.S. Form 990 Schedule D, Part II (2018), <https://www.irs.gov/pub/irs-pdf/f990sd.pdf>.

conservation easements in their financial reports.¹¹⁰ Further, the Service requires that conservation easement holders report whether they have policies for monitoring and enforcing easements (and requires a summary of existing policies).¹¹¹ Finally, a Form 990 must include disclosure of conservation easements “modified, transferred, released, extinguished, or terminated” and an explanation regarding any such changes.¹¹²

The Task Force believes that enhanced reporting on acceptance and administration of conservation easements will increase public confidence in the investment in, and will encourage proper administration of conservation easements. Therefore, the Task Force proposes four broad categories of enhanced Form 990 conservation easement reporting:

- (1) immediate modification of the instructions associated with the definition of “conservation easements”;
- (2) interim modification of the instructions associated with current Schedule B related to conservation easement valuation reporting, and related changes;
- (3) the development of a new form, with the working name “Schedule B-1.” This new form would require reporting of more detailed information about the valuation of donated conservation easements. This information would be taken directly from answers the conservation easement donor provides on the Form 8283 that the easement holder is required to execute for a donated easement;¹¹³ and
- (4) additional reporting regarding the existence and public accessibility of holders’ project selection policies and policies regarding conservation easement amendments and extinguishments.

¹¹⁰ See I.R.S. Form 990 Schedule D, Part II (2018), <https://www.irs.gov/pub/irs-pdf/f990sd.pdf>.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ Accordingly, the paperwork obligations for the holder would be limited and would merely entail copying information already provided by the donor.

2. *Proposal to Clarify the Definition of “Conservation Easement” for Form 990 Reporting Purposes.*

The Form 990 Instructions currently define “conservation easement” as:

A restriction (granted in perpetuity) on the use that may be made of real property granted exclusively for conservation purposes. Conservation purposes include preserving land areas for outdoor recreation by, or for the education of, the general public; protecting a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem; preserving open space, including farmland and forest land, where such preservation will yield a significant public benefit and is either for the scenic enjoyment of the general public or pursuant to a clearly defined federal, state, or local governmental conservation policy; and preserving a historically important land area or a certified historic structure. For more information, see section 170(h) and Notice 2004-41, 2004-2 C.B. 31.¹¹⁴

This definition is very broad and could reasonably be interpreted as requiring reporting of activities related to conservation easements and other restrictions not associated with federal tax benefits. The Task Force proposes a clarifying amendment to the definition of “conservation easement” contained in the Form 990 Instructions:

A restriction (granted in perpetuity) on the use that may be made of real property granted exclusively for conservation purposes and for which the donee executed Part IV, Donee Acknowledgment of a Form 8283 Noncash Charitable Contributions for a “Qualified Conservation Contribution” and which restriction was intended to comply with the requirements of section 170(h). Conservation purposes include preserving land areas for outdoor recreation by, or for the education of, the general public; protecting a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem; preserving open space, including farmland and forest

¹¹⁴ I.R.S. Form 990 (2018), <https://www.irs.gov/pub/irs-pdf/f990.pdf>.

land, where such preservation will yield a significant public benefit and is either for the scenic enjoyment of the general public or pursuant to a clearly defined federal, state, or local governmental conservation policy; and preserving a historically important land area or a certified historic structure. For more information see section 170(h) and Notice 2004-41, 2004-2 C.B. 31.

3. *Proposal to Modify Form 990 Reporting of Conservation Easement Valuation Information to Mirror that Contained on Donor's Form 8283*

The current Form 990 requires minimal information regarding easement valuation. Schedule D, Part II, Line 9 only seeks information about holders' policies for accounting for easement value. In the interest of transparency and increased public confidence in conservation easements, the Task Force recommends some expansion of reporting on valuation.

a. *Immediate Change to 990 Instructions*¹¹⁵

The Service does not mandate that holders employ any particular approach in valuing conservation easements. But conservation easements, once accepted by a nonprofit, present a valuation challenge to which there are several plausible responses. The donation of a conservation easement can legitimately generate a substantial tax deduction (when, for example a donor agrees by conveying a deed to permanently refrain from pursuing what would otherwise be valuable uses of the restricted property). However, the donation itself renders those valuable rights inaccessible to the holder of the easement. Indeed, from the perspective of the holder, the easement poses the immediate challenges and costs of stewardship responsibilities. From an accounting perspective, the property interest represented by the easement may be viewed by the holder as a liability. Further, while an easement donor may readily find a buyer for the subject property despite the easement restrictions, there is no market for the sale of the holder's conservation easement responsibilities. Even so, some easement holders book the full value of the development rights rendered

¹¹⁵ Note that the instructions for Form 990, Schedule B are included in the form itself. While the Task Force understands that modifying instructions may be simpler than modifying forms, it is unclear how that applies to a situation where, as here, the form and instruction are combined.

inaccessible by the conservation easement. The financial statements of other holders, however, reflect the view that the property right represented by the conservation easement has little or no value.¹¹⁶ Greater clarity and transparency could be achieved by requiring consistent Form 990 reporting of conservation easement donations that is independent of, and financial-neutral relative to, the legitimate differences in financial reporting practices among easement holders.

The Task Force proposes the following immediate change in Form 990 instructions:

The organization must report the value of any qualified conservation contributions and contributions of conservation easements listed in Part II as that value was reported on the donor's Form 8283 for the relevant donation as acknowledged by the organization, regardless of ~~eonsistently~~ with how the organization reports such contributions in its books, records, and financial statements and in Form 990, Part VIII, Statement of Revenue.

As an immediate step, this would promote transparency about the claimed donated value of conservation easements in a manner that a holder's financial reporting may not.

This change would necessitate additional modifications related to Form 990, Schedule D, Part XI and, in some cases, also Part XII, to reconcile the new Form 990-mandated reporting of Form 8283-based conservation easement value with the valuation used by the nonprofit holder on its financial statements.¹¹⁷ As an interim step, the instructions

¹¹⁶ Several examples demonstrate the variability here:

- (1) Land Trust No. 1 takes a conservation easement and values it on its financial statement at a placeholder value of, say, \$10. It has \$10 in revenue and no program expense.
- (2) Land Trust No. 2 takes an identical conservation easement and values it at the donor's stated value for deduction purposes, say \$500,000. It has \$500,000 of revenue and an increase in its balance sheet. It books no program expense.
- (3) Land Trust No. 3 takes an identical conservation easement and values it at the donor's stated value, say \$500,000. It has \$500,000 of revenue. It writes the easement's value down by the same amount to reach a placeholder value of \$10 but, by that, generates nearly \$500,000 in program expense.

¹¹⁷ The Task Force proposal is consistent with current treatment of "[D]onated services and use of facilities," where there is a significant difference between Generally

for Schedule D could be modified to specify that if the holder simply uses a placeholder or other nominal value for conservation easements on its financial statements,¹¹⁸ the easement value shown on Form 8283 and reported on the Form 990 must be reported as “Other” revenue in Line 4b of Schedule D, Part XI for reconciliation purposes. For nonprofit holders that initially take the full value of a conservation easement as revenue on their financial statements but then “write it down” on their books to a net placeholder value, changes may also be required to Schedule D, Part XII, to capture that write down. Accordingly, there should be an instruction related to Part XII, Line 2d specifying that such a write down should be treated as an “Other” expense.

*b. Permanent Change in Form 990 Instructions*¹¹⁹

A new Schedule “B-1” for nonprofit organizations holding conservation easements could be created to expand upon current reporting elements in Schedule B, Schedule of Contributors.¹²⁰ The new Schedule “B-1” could require disclosure of the following information for any donation identified as a “Qualified Conservation Contribution” in Schedule B, Part I of a Form 8283 signed by the donee:¹²¹

- (1) *Easement’s donor’s name.* [Listing easement donors’ names would be consistent with the current disclosure requirements of Schedule B. However, individual easement donor identities and

Accepted Accounting Principles and Form 990 reporting of such items. I.R.S. Form 990 Schedule D, Part XI (2018), <https://www.irs.gov/pub/irs-pdf/f990sd.pdf>.

¹¹⁸ Holders using the donated value of conservation easements for financial reporting purposes obviously would not need to reconcile the valuation reporting on their Form 990.

¹¹⁹ See *supra* note 115.

¹²⁰ Such reporting would be consistent with other disclosures of significant noncash contributions under current Schedule B. A more detailed review of the full Form 990, the various schedules, and the respective instructions would be necessary to address places where other changes might be needed to facilitate this change in reporting requirements.

¹²¹ This reporting would be tied to information reported by the conservation easement donor on the Form 8283 that the easement holder is required to execute for a donated easement. Accordingly, the paperwork obligations for the holder would be limited and would merely entail copying information already provided by the donor. Reporting in this fashion on the Form 990 should be accompanied by the same disclaimer as specified on the Form 8283: that the holder’s reporting of donor-provided information “does not represent agreement with the claimed fair market value” on the proffered Form 8283 or any other financial information. See I.R.S. Form 8283, Part IV (Rev. Dec. 2014), <https://www.irs.gov/pub/irs-prior/f8283--2014.pdf>.

information on the donated conservation easement about property location from which the donor's identity might be learned should be protected from public disclosure by the same mechanism that permits redactions of such information from Schedule B in "public inspection copies" of Form 990s.]

- (2) *State in which the property is located.*¹²²
- (3) *Acreage protected by the conservation easement.*
- (4) *The qualifying purpose(s) identified in the conservation easement if a tax deduction is to be claimed or was claimed by the donor.*¹²³
- (5) *The following information reported on the donor's Form 8283,¹²⁴ if applicable:*
 - *Appraised fair market value [from Schedule B, Part I, Box 5(c)];*
 - *Date acquired by donor (month, year) [from Schedule B, Part I, Box 5(d)];*
 - *How acquired by donor [from Schedule B, Part I, Box 5(e)];*
 - *Donor's cost or adjusted basis [from Schedule B, Part I, Box 5(f)];*
 - *For bargain sales, amount received by the taxpayer [from Schedule B, Part I, Box 5(g)];*
 - *Amount claimed as a deduction [from Schedule B, Part I, Box 5(h)]; and*
 - *Date of contribution [from Schedule B, Part I, Box 5(i)].*

¹²² See I.R.S. Form 990 Schedule D, Part II (2018), <https://www.irs.gov/pub/irs-prior/f990sd.pdf>. Line 4 currently requires disclosure of "[n]umber of states where property subject to conservation easement is located."

¹²³ The Task Force recommends that the donee's acknowledgment on a Form 8283 for a "qualified conservation contribution" be sufficient information for the donee to presume that "a tax deduction is to be claimed or was claimed by the donor" for the conservation easement donation.

¹²⁴ All references are to the I.R.S. Form 8283 (Rev. Dec. 2014), <https://www.irs.gov/pub/irs-prior/f8283--2014.pdf>.

This additional reporting would offer more transparency and facilitate oversight. It would also measure the overall nature of the work by the holder; for example, it would make clear the number, general location, and value of donated easements.

c. Expanded Organizational Reporting on Policy and Standards

A land trust must disclose, on Schedule D to Form 990, the “[n]umber of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year.”¹²⁵ Those actions are defined in the Form 990 instructions.¹²⁶ The Task Force proposes that, consistent with that inquiry, the Form 990 be modified to require a “yes” or “no” answer to a new, related question:

Does the organization have a written policy regarding the modification, transfer, release, or extinguishment of conservation easements it holds?

¹²⁵ I.R.S. Form 990 Schedule D, Part II (2018), <https://www.irs.gov/pub/irs-prior/f990sd.pdf>.

¹²⁶ The Schedule D Instructions provide:

For purposes of this Schedule D reporting requirement, an easement is *modified* when its terms are amended or altered in any manner. For example, if the deed of easement is amended to increase the amount of land subject to the easement or to add, alter, or remove restrictions regarding the use of the property subject to the easement, the easement is modified. An easement is *transferred* if, for example, the organization assigns, sells, releases, quitclaims, or otherwise disposes of the easement whether with or without consideration. An easement is *released*, *extinguished*, or *terminated* when it is condemned, extinguished by court order, transferred to the land owner, or in any way rendered void and unenforceable, in each case whether in whole or in part. An easement is also *released*, *extinguished*, or *terminated* when all or part of the property subject to the easement is removed from the protection of the easement in exchange for the protection of some other property or cash to be used to protect some other property.

The categories described in the preceding paragraph are provided for convenience purposes only and aren't to be considered legally binding or mutually exclusive. For example, a modification may also involve a transfer and an extinguishment, depending on the circumstances. Use of a synonym for any of these terms doesn't avoid the application of the reporting requirement. For example, calling an action a “swap” or a “boundary line adjustment” doesn't mean the action isn't also a modification, transfer, or extinguishment.

I.R.S. Form 990 Schedule D, (2018), <https://www.irs.gov/pub/irs-prior/f990sd.pdf>.

The Task Force further proposes an additional new question that would require a “yes” or “no” answer:

Does the organization have written project selection criteria that guides it in deciding whether to purchase or accept or decline donations of conservation easements?

Lastly, to increase transparency, the Task Force recommends that changes be made to the Form 990 to encourage public disclosure of conservation easement-related policies. Form 990 Part VI, Section C, Line 19, now asks:

Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

We propose expanding this requirement, whether in the principal Form 990 or in Schedule D, Part II, to include an inquiry into whether the organization makes existing or proposed conservation easement-related policies available for public inspection. For example:

Describe in Schedule O whether (and if so, how) the organization made the following documents available to the public during the tax year:

- *its governing documents;*
- *its conflict of interest policy;*
- *its financial statements; and*
- *for organizations holding conservation easements:*¹²⁷
 - *its project selection criteria;*
 - *its policies regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds; and*
 - *its policy regarding making an organizational decision to agree or decline to modify, transfer, release, or extinguish a conservation easement.*

As with other policies referenced in the Form 990, the Service would not mandate public disclosure nor, for an organization inclined to some form of public review, mandate any particular method of disclosure.

¹²⁷ This section assumes that the proposed clarification of the definition of “conservation easement” is made. See *supra* Part V.C.2.

Simply posing the question would likely encourage easement-holding organizations to be more transparent regarding their internal policies and procedures.

VI. MANAGING VALUATION ISSUES

A. Introduction

Among the most persistent of issues identified by the Treasury regarding the tax status of conservation easements is valuation. The most pressing valuation issues in recent years may have emerged from the rise in the marketing of conservation easement deductions through deals often called “syndicated conservation easement transactions.”

In the broadest terms, a syndication involves the marketing of interests in an entity that will acquire a property that will be made subject to a conservation easement. Many such deals have featured appraisals of the subject property that are far greater than a price recently paid for the property. The promotional pitch made in a suspect syndication is that an investment of say, \$50,000, will generate a tax deduction of perhaps \$250,000 when the conservation easement is donated.

In the fall of 2016, the Service issued Notice 2017-10,¹²⁸ which made certain conservation easement donations involving pass-through entities “listed transactions,” and required parties to such transactions to make certain disclosures to the Service. This action was designed to chill the conservation easement syndication market and address legitimate concerns about abuse in tax valuation of syndicated conservation easements. Recommendations with respect to syndications are presented in Part VII of this Report.

Broader valuation issues remain, in part because accurate appraisal of the value of a donated conservation easement is difficult. There is no record of fair market value sales to which an appraiser can look for comparative values. “Before and after” appraisal is highly subjective. The Task Force has considered several ideas for reforms that might improve the credibility of conservation easement appraisals for the Service and their reliability for donors.

B. Discussion

Without making any judgment about the extent to which valuation of conservation easements represents a tax issue that merits priority attention, neither the Service nor the courts have sufficient resources to effectively

¹²⁸ Notice 2017-10, 2017-4 I.R.B. 544.

police valuation abuses. Conservation easements pose special difficulties because the most desirable method of valuation—reference to market conditions—is, for practical purposes, not available. This requires that another less precise method, typically referred to as the “before and after” method, be used. As the name suggests, “before and after” requires that not one but two valuations be performed, and after those appraisals, the amount deductible by the taxpayer must be reduced by other difficult-to-appraise factors: the enhancement in the value of other property owned by the easement donor or a related person and any quid pro quo received as a result of the easement conveyance.¹²⁹

As a general matter, appraisers value real property using three methods: sales comparisons, income capitalization, and reproduction cost. In the “before and after” method, the appraiser applies these methods—or those the appraiser finds applicable—twice. Without delving into the intricacies of each of these methods, the reproduction cost method is so rarely used that it can be fairly and safely disregarded.¹³⁰

In valuing the property before the imposition of restrictions, the comparable sales method is most frequently employed. The courts have repeatedly stated that the comparable sales method is the most reliable indicator of value when sufficient data exists regarding sales of properties similar to the subject property.¹³¹ Sales comparisons are far from foolproof, of course. An appraiser must accomplish the challenging task of identifying properties similar to the property at issue, including most particularly properties with the same highest and best use as the property at issue. In addition, the sales must have been arms-length and within a reasonable time of the valuation date.

Where comparable sales are not available or the method is inadequate, then appraisers turn to an income capitalization approach. The income capitalization approach is complex and generally requires the appraiser to

¹²⁹ See Treas. Reg. § 1.170A-14(h)(3)(i).

¹³⁰ In theory, it could apply to historic structures, in connection with facade easements, but in both *Losch v. Commissioner*, 55 T.C.M. (CCH) 909 (1988), and *Whitehouse Hotel, L.P. v. Commissioner*, 139 T. C. 304 (2012), *aff'd in part, vacated in part, remanded by* 755 F. 3d 236 (5th Cir. 2014), the courts rejected its reliability. Diverse commentators have done likewise, from 4 RICHARD R. POWELL, POWELL ON REAL PROP. § 34A.06 (Michael Allan Wolf ed., 2012) to INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 1615 (2000) (often referred to as the Yellow Book).

¹³¹ See, e.g., *United States v. 320.0 Acres of Land*, 605 F.2d 762, 798 (5th Cir. 1979); *Butler v. Comm'r*, 103 T.C.M. (CCH) 1359, 1368 (Mar. 19, 2012).

assume a myriad of factors and variables, the accuracy of which cannot clearly and easily be demonstrated by direct market data. Even relatively minor changes in only a few of the assumptions can have large bottom-line effects on the value estimate produced.

The more speculative the potential development of the property, the more susceptible the income capitalization appraisal is to criticism. A particular example would be the so-called “subdivision development analysis,” which requires the creation and analysis of a full development plan for the property, including zoning, the design of streets and lots, sewers and other utilities, and the like, with an estimate of financing costs, sales time horizon, and potential developer profit.¹³² Even the most experienced real estate developers often make mistakes engaging in this kind of analysis, and an appraiser has less at stake and even more difficulty determining a correct value. Certain factors are particularly speculative, such as the availability of sewer and other utilities and especially the likelihood that a property could be rezoned if rezoning is required for development to proceed. Zoning is often a political process and as a practical matter may depend as much on the identity of the developer as on the project itself.

As with all charitable gifts, a taxpayer must reduce the value of the taxpayer’s deduction by taking into consideration the value of any benefit the taxpayer received or retained. Typically, in the conservation easement context, those benefits are either an increase in the value of contiguous property as a result of the conservation of the property subject to the easement, or a quid pro quo.

We can easily conclude that the multiple appraisals required to make the conservation easement deduction system work are complicated at best. Those complications also create the potential for abuse. In *Valuation Conundrum*, Professor McLaughlin notes that in the seventeen reported conservation easement valuation cases between 1977 and 2000, the average amount by which courts found value was overstated was a little over \$500,000.¹³³ But in the eleven reported cases from 2009 to 2015, the average overstatement in value was more than \$1.5 million.¹³⁴ Put another way, in the seventeen early cases the courts found that the taxpayers were,

¹³² See Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225, 239–40 (2016) [hereinafter *Valuation Conundrum*].

¹³³ See *id.* at 266.

¹³⁴ See *id.*

on average, claiming about double the real value of the easement, but in the eleven recent cases, the taxpayers had claimed values that were, on average, almost ten times the value determined by the courts.¹³⁵

Possible reforms to the valuation process fall into three categories: increased penalties for donors and appraisers, enhanced reporting, and appraisal-related reforms. Each is discussed below.

1. Increased Penalties for Donors and Appraisers

Arguably one of the most successful penalty deterrents in the Code, certainly in the charitable area, is the private foundation excise tax. The reasons for that are bound up in the primarily strict liability of the penalties, including the need for correction, and the drastic nature of a 200% tax as a consequence of misbehavior.¹³⁶ In addition, penalties may be imposed on everyone involved in a prohibited private foundation transaction: the disqualified person, the foundation, and the foundation managers are all at risk.¹³⁷ Further, in most excise tax cases, the Form 990-PF for the foundation has been completed as if there is no penalty transaction. Thus, as with all tax returns, the potential for criminal penalties associated with filing a false tax return also exists.

By contrast, penalties are rarely assessed against the organizations accepting conservation easements. Organizations could be stripped of their status as “qualified” to hold deductible conservation easements, but this has rarely, if ever, happened in connection with valuation issues. An organization could lose its tax-exempt status, but that drastic result is seldom imposed and is widely recognized as ineffective and inefficient. Appraisers face minimal fines, although the potential of disqualifying an appraiser for conservation easement appraisal deduction purposes ought to have a deterrent effect, and no more than the usual penalties are imposed on taxpayers for overvalued charitable gifts.

On the other hand, donors have every incentive to maximize the real and proposed tax benefits, and appraisers have every incentive to appraise the value of donated conservation easements on the high end of “reasonable” in order to retain and increase appraisal market share. And charities have every reason to hope the incentives for giving are as great as possible. The incentives are aligned at every level for appraisals to

¹³⁵ See *id.* at Appendix C.

¹³⁶ See I.R.C. § 4958(b).

¹³⁷ See generally I.R.C. § 4958.

generate the greatest supportable value, with the result that some appraisals end up over any reasonable line.

a. Taxpayer Penalties

Penalties on taxpayers could be increased. For example, the taxpayer's charitable deduction could be limited to the taxpayer's basis in the property, or disallowed entirely, if the claimed deduction exceeded the deduction finally allowed for federal income tax purposes by, say, 35%. That could be an automatic rule without any reasonable reliance-type exceptions. If desirable, there could be a threshold before that penalty applied; for example, if the claimed deduction were less than \$50,000, this new penalty provision would not apply. While this penalty would surely deter valuation inflation, without some way for donors to have confidence as to a claimed valuation,¹³⁸ this sort of penalty would tend to reduce the granting of easements.

b. Appraiser Penalties

New penalties could be imposed on appraisers, increasing their risks. Imposing more significant penalties on appraisers could alter the current incentive structure. The threat of such penalties might have the effect of making conservation easement appraisal an area of specialization by discouraging appraisers without significant easement valuation expertise from accepting such assignments. An undesirable side-effect, however, might be to increase the cost of donation transactions for easement donors.

A key question if appraiser penalties are increased pertains to what defenses are available to appraisers. For example, if a "reasonableness" standard is a defense, we might expect appraisers to ask other appraisers to review the appraisal for "reasonableness" in an effort to limit liability.

Appraiser penalties could be imposed *either* for "gross valuation misstatements"¹³⁹ *or* for a failure to follow the qualified appraisal rules. The Task Force envisions a "Qualified Easement Qualified Appraisal Form" (QEQA) that could make it more difficult for appraisers to justify inflated values, while making audits easier. The concept is further described in Part VI.B.3 below.

¹³⁸ See *infra* Part VI.B.3.

¹³⁹ I.R.C. § 6662(h).

2. *Enhanced Reporting*

An entirely different mechanism to try to limit valuation abuses without reducing the number of bona fide easement donations would be to increase the ability of the Service to enforce the rules. In the absence of additional Service funding, better reporting may be the only realistic approach. Professor McLaughlin discusses this issue as follows:

In its current iteration, the Form 8283 is not a particularly effective reporting tool for conservation or façade easement donations. Some of the questions on the form are difficult to understand as applied to easement donations, making the form difficult for donors to complete and the information provided on the form difficult for the IRS to understand. For example, in Section B, Part I of the form, subparts 5(c), (d), (e), (f) ask for the “[a]ppraised fair market value,” “[d]ate acquired by donor,” “[h]ow acquired by donor,” and “[d]onor’s cost or adjusted basis,” respectively. Most donors understand that the appraised fair market value should be that of the easement, but it is not clear if the “date acquired,” “how acquired,” and “basis” questions relate to the easement or the subject property. It also is not clear whether or how to address the entire contiguous parcel and enhancement rules.

The Form 8283 could be revised to instruct the donor, in a straightforward and easy to understand manner, to provide specific information relating to the subject property and the easement donation. For example, it should be clear from the face of the form that the donor of a conservation or façade easement (i) purchased the underlying property for \$1 million in early November 2014, (ii) donated the easement with respect to that property fourteen months later, in late December 2015, and (iii) is claiming that the easement (a partial interest in the property) had an appraised fair market value on the date of the donation of \$10 million (that is, that the subject property appreciated in value by more than 900 percent in just fourteen months). It also should be clear from the face of the form or the instructions how the donor should

report values determined using the contiguous parcel or enhancement rules.

In addition, even though overvaluation appears to be a persistent problem in the easement donation context, the existing Form 8283 does little to highlight valuation issues. The IRS's enforcement efforts could be facilitated by requiring that the donor or the donor's appraiser provide additional valuation information in the supplemental statement, such as the per-acre or per-square-foot value of the conservation or façade easement; whether a façade easement encumbers a residential or commercial property; whether the subject property is subject to existing restrictions or limitations on its development and use; whether the appraiser assumed a before-easement HBU [highest and best use] for the subject property that differs from its current use; whether rezoning was assumed in estimating the before-value of the subject property; and whether the income capitalization approach, the subdivision development analysis, the reproduction cost approach, or nonlocal comparables were used to value the subject property.

Requiring that all easement donors attach the full qualified appraisal to the return on which the deduction is first claimed would also facilitate IRS enforcement efforts. Putting appraisers of easements valued at \$500,000 or less on notice that their appraisals will be submitted to the IRS is likely to make at least some more careful in their analyses.¹⁴⁰

3. *Appraisal-Related Reforms*

a. *Qualified Easement Qualified Appraisal*

The Task Force recommends that a special QEQA form be created.¹⁴¹ Such a form would require that an appraisal be structured to answer a series of questions and provide analysis in a prescribed way that would both reduce the potential for abuse and simplify review. Taxpayers would not be required to furnish the QEQA but failure to do so could have ramifications. For example, perhaps all easement deductions of over

¹⁴⁰ *Id.* at 297–98 (footnotes omitted).

¹⁴¹ See *Valuation Conundrum*, *supra* note 132, at 299–300.

\$50,000 claimed without a QEQA would be audited. Statutory changes might include a greater range of penalties if a QEQA were not used, or a longer statute of limitations.

Another benefit of such a form, and the instructions that would accompany it, is that it would guide appraisers through the entire appraisal process, reducing errors and producing a level of consistency unseen today. Further, as noted earlier, appraisers could be subjected to substantial penalties for claiming to present a QEQA if in fact the objective rules were not followed.

b. After-the-Fact Valuation Panel

Ideally, taxpayers should be able to obtain certainty other than through the audit process. The Art Advisory Panel is often pointed to as a potential model. One difficulty with the comparison is that there may be more easement contributions than art gifts that go before the Art Panel. Thus, without a significant source of funding, an easement panel might not be possible. One possible source of funding could be taxpayer fees. For example, for easements over a certain amount, the taxpayer would either face the prospect of significant penalties for overvaluation (for example, no deduction at all if the claimed value was determined after dispute to be more than 35% too high) or could pay a significant amount, perhaps \$25,000, for an opinion from the easement panel that the claimed value is either acceptable or unacceptable. For easements valued at amounts lower than the threshold, donors would be free to proceed in largely that same manner as they are today; perhaps a QEQA regime would be in place, but otherwise, none of the strict liability sorts of penalties discussed earlier would be adopted.

c. Front-End Valuation Panel

It might be useful for a taxpayer to be able to submit an easement with an appraisal to the Service for review in advance. An easement valuation panel would review the appraisal and determine if it is acceptable or deficient. The panel would not “adjust values” but rather would determine whether the asserted values are acceptable or not. Further, if it had the necessary legal expertise, the panel could review the terms of the easement to ensure that the easement is otherwise qualified for a section 170(h) deduction. Naturally, a significant user fee would be required to pay for what would, in effect, be a ruling. The benefits of minimizing future litigation would seem to be significant both in terms of efficiency and direct costs for both the government and the taxpayer. Making the

easement panel optional would limit criticisms about costs and would streamline the process by effectively exempting comparatively low-value, plain-vanilla easements, which would, of course, remain subject to audit.

d. Designation of Approved Appraisers

Finally, the Service could prepare a list of Service-approved conservation easement appraisers. If the taxpayer engaged an appraiser from the approved list, both the taxpayer and the Service would be bound by the appraiser's determination unless either side could demonstrate, perhaps with a high standard and burden of proof, that the appraisal was unreasonable or defective. A taxpayer that did not use the value determined by a listed appraiser when claiming the deduction would have to disclose the failure to do so.

VII. CONSERVATION EASEMENTS AND SYNDICATIONS

In December of 2016, the Service issued Notice 2017-10. The Notice identifies certain conservation easement donation transactions involving "pass-through" entities as "listed" (tax avoidance) transactions and requires parties to such transactions to make disclosures to the Service.¹⁴² The Notice applies to transactions with "a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment."¹⁴³

The Task Force believes that the Notice reflects a reasonable judgment as to the transactions that merit the enhanced reporting associated with being "listed." Service Acting Commissioner Kautter, in a March 13, 2018, letter to U.S. Senator Ron Wyden, estimated that the first set of disclosures provided to the Service revealed transactions that generated about four times the original investment in tax deductions alone.¹⁴⁴ The 10% of transactions claiming the largest deductions featured a seven-and-a-half-to-one ratio of deduction to investment. The Notice should help to ensure the continued integrity of the federal charitable income tax deduction provided to taxpayers who make well-documented and defensible conservation easement donations.

¹⁴² Notice 2017-10, 2017-4 I.R.B. 544, 544-45 (Jan. 23, 2017).

¹⁴³ *Id.* at 545.

¹⁴⁴ See Letter from David J. Kautter, Acting Comm'r, Service, to Senator Ron Wyden, Ranking Member, Comm. on Fin., U.S. Senate (Mar. 13, 2018).

Notice 2017-10 has been revised through the issuance of Notice 2017-29.¹⁴⁵ The revision makes it clear that land trusts and other donees will not be treated as “material advisors” to listed transactions.¹⁴⁶ Presumably, this exemption fully covers donees’ activities in soliciting stewardship contributions and in engaging in customary efforts to facilitate the completion of conservation easement gifts. The Notice as revised may still require some additional revisions. The Task Force believes that it would be helpful to clarify, for purposes of the Notice, that land surveyors and natural resource or other environmental or land planning consultants shall not be required to report to the Service unless they are involved in structuring or promoting a transaction—that even if they receive payment in excess of the threshold limits, they will not be considered to be material advisors.

The success of efforts to serve the public interest by protecting the nation’s natural and historic resources depends on the public’s continuing confidence in the integrity of the tax incentives that encourage private landowners to voluntarily protect their land and historic structures. The Task Force believes that the Notice, improved as specified above, will help maintain the public’s confidence in conservation easements.

VIII. RESPONSE TO RECENT TREASURY RECOMMENDATIONS

In recent years, Treasury has made a number of proposals to modify the section 170(h) deduction.¹⁴⁷ Although Treasury has not reissued the proposals put forth in 2016, the Task Force considered the proposals and offers the following responses.

A. Qualifying Purposes

In its 2016 proposals, Treasury recommended changing the qualifying conservation purpose requirements for the section 170(h) deduction.¹⁴⁸ Specifically, Treasury recommended that conservation easements encumbering relatively natural habitat, outdoor recreation or education areas, and historically important land areas or certified historic

¹⁴⁵ See Notice 2017-29, 2017-20 I.R.B. 1243.

¹⁴⁶ See *id.*

¹⁴⁷ See, e.g., DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2017 REVENUE PROPOSALS, at 215 (2016).

¹⁴⁸ See *id.*

structures¹⁴⁹ would no longer qualify for the deduction unless they also demonstrably (1) furthered a clearly delineated federal, state, or tribal governmental conservation policy and (2) yielded significant public benefit. The Task Force does not support this proposed change in law.

It was sensible for Congress to require that open space (including farmland or forest land) easements satisfy the governmental conservation policy and significant public benefit requirements.¹⁵⁰ It is necessary to demonstrate that conserved open space land is not merely “ordinary land” (the donation of a conservation easement on which, legislative history indicates, Congress did not intend would generate a charitable deduction). However, the absence of those requirements in section 170(h)(4)(A)(i), (ii), and (iv) indicates that Congress identified the accomplishment of each of the purposes defined in those provisions as a national government priority that, by definition, would yield a significant public benefit. The Treasury Regulations regarding relatively natural habitat sufficiently define that purpose, as do the Treasury Regulations regarding historic land or structures.¹⁵¹ An additional requirement that a governmental conservation policy be satisfied, and a significant public benefit be provided, would be ambiguous and redundant. On the other hand, the Task Force recommends that the Treasury issue guidance regarding the outdoor recreation or education conservation purpose; Treasury Regulation section 1.170A-14(d)(2) does not, for example, address whether an outdoor sports facility is a qualifying outdoor recreation purpose.

B. Tax Credits for Conservation Easements

In its 2016 proposals, Treasury recommended development and implementation of a pilot program designed to encourage conservation easement donations by providing tax credits for donations.¹⁵² Among the justifications for the proposal was that doing so could open the federal tax program on conservation easements to donors who do not itemize deductions.¹⁵³ The Treasury recommended a top-down approach to allowing credits, on the theory that giving the power to allocate credits to a federal interagency panel and selected nonprofits would improve the

¹⁴⁹ See I.R.C. § 170(h)(4)(A).

¹⁵⁰ See *id.*

¹⁵¹ See Treas. Reg. § 1.170A-14(d)(3), (5).

¹⁵² See DEP'T OF THE TREASURY, *supra* note 147, at 213–15.

¹⁵³ See *id.*

quality of land conservation subsidized with what would otherwise be tax revenue.¹⁵⁴ The Task Force recommends a modification of the proposal: allow donors to choose between long carry-forward tax credits and tax deductions. The credit should, however, be a uniform percentage of the diminution of property value attributable to the easement restrictions, and the percentage should be consistent across the qualifying conservation purposes. Such a program, if adopted, should also be self-administering rather than administered by an interagency board and a group of nonprofit intermediary organizations selected by such a board. The Task Force believes that the current open system for offering and accepting qualifying conservation easements is as likely as the proposed system for allocating credits to produce high-quality conservation, and is more likely to result in a valuable diversity of conservation accomplishments.

C. Golf Courses

In its 2016 proposals, the Treasury recommended that conservation easements on property used for golf courses be ineligible for the section 170(h) deduction.¹⁵⁵ The Task Force recommends, instead, that a special category of qualification be established for properties used or intended to be used for golf. Many conservation practitioners have commented that in some places, golf course properties represent valuable and quite uncommon green and open space, often available for outdoor recreation in the winter.¹⁵⁶ New protocols for qualifying golf course conservation easements could address the particular issues that these easements present: e.g., water use and management, course maintenance regimes (including use of fertilizers, pesticides, herbicides, and the like), off-season use, an appropriate balance between the natural and open space values of the rough and the grooming of the fairways, and public benefits.

D. Easement Donee Duties

In its 2016 proposals, the Treasury recommended that a number of additional duties be required of conservation easement donees.¹⁵⁷ These include (1) providing a detailed description of easement conservation purposes and benefits, (2) attesting to the accuracy of the fair market value

¹⁵⁴ See *id.* at 216.

¹⁵⁵ See *id.*

¹⁵⁶ See, e.g., *Valuation Conundrum*, *supra* note 132, at 276 n.273.

¹⁵⁷ See DEP'T OF THE TREASURY, *supra* note 147, at 215–16.

of the easement, (3) providing a detailed description of the conserved property and the restrictions, (4) providing a description of rights retained by easement donors or others, and (5) annually disclosing easement modifications and enforcement actions.¹⁵⁸ The Task Force has included recommendations regarding enhanced reporting by easement holders in Parts V.A.7. and V.C. above. The Task Force does not support requiring holders to attest to the fair market value of easements at the time of donation.

E. Qualifying Organizations

In its 2016 proposals, the Treasury also recommended new minimum standards for “qualified organization[s].”¹⁵⁹ These new standards would include: (1) the organization must not be or have for at least ten years been related to the easement donor or a relative of the donor; (2) the organization must have sufficient assets and expertise to be reasonably able to enforce the terms of the easements it holds; and (3) the organization must have an approved policy for selecting, reviewing, and approving conservation easements that fulfill a qualifying conservation purpose.¹⁶⁰ The Task Force is in conceptual agreement with (2) and (3), and believes the reforms recommended in Parts V.A.7. and V.C. are responsive to Treasury’s concerns.

The Task Force does not support the proposal to prohibit certain relationships with donors proposed in (1) above. While a restriction limited to organizations controlled by an easement donor or a close relative might be acceptable in order to avoid possible abuses, in the absence of a definition of “related,” the proposal is too restrictive. Many land trusts have been, and new land trusts are often, founded and initially governed by people who are committed to conserving land, including their own land. Such people often make good board members. Unless a donor has, for example, voting control of the board of a donee through his or her own votes and those of closely related persons, the presence on the board of a conservation easement donor should not be a disqualifying factor. Any concern about improper influence ought to be addressed through fiduciary rules and conflict of interest requirements.

¹⁵⁸ *See id.* at 216.

¹⁵⁹ *Id.* at 215.

¹⁶⁰ *See id.*

APPENDIX A**PERPETUITY REQUIREMENTS OF SECTION 170(H) AND THE
TREASURY REGULATIONS**

Section 170(h) and the Treasury Regulations contain numerous requirements intended to ensure that (1) tax-deductible conservation easements will protect the conservation values of the properties they encumber in perpetuity, and (2) in the rare event of extinguishment of an easement due to impossibility or impracticality, the public's investment in conservation will not be lost. These "perpetuity" requirements are briefly summarized below. This summary does not reflect the nuance and detail of the Code and Treasury Regulation requirements or the case law interpreting such requirements.

A. Granted in Perpetuity Requirement

A deductible conservation easement must be "a restriction (granted in perpetuity) on the use which may be made of the real property."¹⁶¹

B. Protected in Perpetuity Requirement

A deductible conservation easement must be donated "exclusively for conservation purposes."¹⁶² This requirement will not be met unless the conservation purpose of the contribution is "protected in perpetuity," which requires satisfaction of numerous requirements in the Code and the Treasury Regulations.¹⁶³

1. Eligible Donee Requirement¹⁶⁴

A deductible conservation easement must be donated to an "eligible donee," defined as a governmental or charitable "qualified organization" that has a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions.

¹⁶¹ I.R.C. § 170(h)(2)(C).

¹⁶² I.R.C. § 170(h)(1)(C).

¹⁶³ I.R.C. § 170(h)(5)(A) and (B); Treas. Reg. § 1.170A-14(e), (g); *see also* S. REP. NO. 96-1007, *supra* note 65, at 8 (providing legislative history of section 170(h) and discussing the "protected in perpetuity" requirement).

¹⁶⁴ *See* Treas. Reg. § 1.170A-14(c)(1).

2. Restriction on Transfer Requirement¹⁶⁵

A deductible conservation easement must prohibit the donee from transferring the easement except to another eligible donee that agrees that the conservation purposes the contribution was originally intended to advance will continue to be carried out.

3. Prohibition on Inconsistent Uses¹⁶⁶

A deductible conservation easement must not permit uses destructive of any significant conservation interests unless necessary for the protection of the conservation interests that are the subject of the contribution.

4. Enforceable in Perpetuity Requirements¹⁶⁷

The Treasury Regulations contain the following additional requirements under the “Enforceable in Perpetuity” heading.

a. Legally Enforceable Restrictions¹⁶⁸

A deductible conservation easement must contain legally enforceable restrictions that will prevent uses of the subject property that are inconsistent with the conservation purposes of the donation. The easement must be recorded in the local land records at the time of the donation.

b. Mortgage Subordination¹⁶⁹

For a conservation easement to be deductible, at the time of the gift, any outstanding mortgages on the subject property must be subordinated to the holder’s right “to enforce the conservation purposes of the gift in perpetuity.”

c. Mining Restrictions¹⁷⁰

A deductible conservation easement must prohibit surface mining and any other method of mining inconsistent with the conservation purposes of the contribution. If the easement protects land where the mineral estate

¹⁶⁵ See Treas. Reg. § 1.170A-14(c)(2).

¹⁶⁶ See Treas. Reg. § 1.170A-14(e)(2)-(3).

¹⁶⁷ See Treas. Reg. § 1.170A-14(g).

¹⁶⁸ See Treas. Reg. § 1.170A-14(g)(1).

¹⁶⁹ See Treas. Reg. § 1.170A-14(g)(2).

¹⁷⁰ See I.R.C. § 170(h)(5)(B); *see also* Treas. Reg. § 1.170A-14(g)(4).

has been severed from the surface estate, the easement will still be deductible if the probability of surface mining is so remote as to be negligible.¹⁷¹

d. Baseline Documentation¹⁷²

If the donor reserves rights that may impair the subject property's conservation interests, before the donation, the donor must provide the donee with baseline documentation sufficient to establish the condition of the property at the time of the gift.

e. Donee Notice, Access, and Enforcement Rights¹⁷³

If the donor reserves rights that may impair the subject property's conservation interests, the donor must agree to notify the donee, in writing, before exercising any such rights. The conservation easement must provide the donee with reasonable access rights to the subject property to determine compliance with the easement. The conservation easement must also provide the donee with the right to enforce the easement by legal proceedings, including by requiring restoration of the property to its condition at donation.

f. Judicial Extinguishment¹⁷⁴

An easement's restrictions may be extinguished, in whole or in part, only in a judicial proceeding, upon a finding that continued use of the property for conservation purposes has become impossible or impractical, and with the payment of proceeds to the donee (as provided below) to be used by the donee in a manner consistent with the conservation purposes of the original contribution.

g. Post-Extinguishment Proceeds¹⁷⁵

The donor must agree that the easement donation gives the donee an immediately vested property right with a fair market value at least equal to the proportionate value that the easement, at the time of the gift, bears to the value of the property as a whole at that time. If a change in conditions results in judicial extinguishment of an easement, the donee

¹⁷¹ See I.R.C. § 170(h)(5)(B)(ii); Treas. Reg. § 1.170A-14(g)(4)(ii)(A).

¹⁷² See Treas. Reg. § 1.170A-14(g)(5)(i).

¹⁷³ See Treas. Reg. § 1.170A-14(g)(5)(ii).

¹⁷⁴ See Treas. Reg. § 1.170A-14(g)(6)(i).

¹⁷⁵ See Treas. Reg. § 1.170A-14(g)(6)(ii).

must be entitled to at least its proportionate share of proceeds from a subsequent sale, exchange, or involuntary conversion of the subject property.

C. Valuation at Time of Donation

Valuation of a conservation easement for purposes of the deduction is based on the condition of the property and the easement restrictions at the time of the donation.¹⁷⁶ If the terms of the easement are later modified through amendment, temporary license agreements, discretionary consents or approvals, failures to enforce, or otherwise, then, among other things, the tax benefit rule and the prohibitions on private inurement and private benefit may be implicated.

¹⁷⁶ See Treas. Reg. § 1.170A-14(h)(3).

APPENDIX B**RECOMMENDED SAFE HARBOR PROVISIONS**

The following are safe harbor provisions for a conservation easement that encumbers land. A similar set of provisions could be created for a facade easement. The footnotes could be the starting point for annotations.

1. Introductory Clause**[Full Donation]**

THIS DEED OF CHARITABLE GIFT OF CONSERVATION EASEMENT (hereinafter "Easement") is made and given as of this __ day of _____, 20__, by and from _____ (hereinafter "Owner"), to _____ (hereinafter "Holder"), to be held and enforced in perpetuity for the benefit of the public in accordance with the terms and for the conservation purpose(s) set forth herein.

[Bargain Sale]

THIS DEED OF PARTIAL CHARITABLE GIFT, PARTIAL SALE OF CONSERVATION EASEMENT (hereinafter "Easement") is made and given as of this __ day of _____, 20__, by and from _____ (hereinafter "Owner"), to _____ (hereinafter "Holder"), to be held and enforced in perpetuity for the benefit of the public in accordance with the terms and for the conservation purpose(s) set forth herein.

2. Nonexclusive Recitals

R1. Owner is the sole owner in fee simple of certain real property located in [County, Township, etc., and State in which Property is located], more particularly described in Exhibit _ attached hereto and incorporated herein by this reference (hereinafter the "Property"), comprising

approximately ___ acres, commonly known as [street address, name, or both];¹⁷⁷

R2. Holder is [**choose one or more as appropriate**]

- [a governmental unit described in section 170(b)(1)(A)(v) of the Internal Revenue Code of 1986 (hereinafter the “Code”]
- [an organization described in section 170(b)(1)(A)(vi) of the Internal Revenue Code of 1986 (hereinafter the “Code”]
- [a charitable organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (hereinafter the “Code”) that is in good standing and meets the public support test of section 509(a)(2) of the Code]
- [a charitable organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (hereinafter the “Code”) that is in good standing and meets the requirements of section 509(a)(3) of the Code and is controlled by an organization described in Treasury Regulation section 1.170A-14(c)(1)(i), (ii), or (iii),]

whose primary purpose is _____;¹⁷⁸

R3. [State in which Property is located] has authorized the creation of conservation easements pursuant to the [citation to applicable state conservation easement enabling statute], and Owner and Holder wish to avail themselves of the provisions of that law without intending that the existence of this Easement be dependent on the continuing existence of such law.¹⁷⁹

¹⁷⁷ In addition to state laws that provide for proper description of real estate in a deed, to be eligible for a deduction under § 170(h), the conservation easement must be “a restriction (granted in perpetuity) on the use which may be made of the real property.” I.R.C. § 170(h)(2)(C). In addition, the Fourth Circuit ruled that the easement must relate to a “defined and static parcel” of real property. *Belk v. Comm’r*, 774 F.3d 221, 227 (4th Cir. 2014); *cf.* *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547 (5th Cir. 2017). Identifying the specific “Property” encumbered by the easement in a legal description attached as an Exhibit to the easement is necessary.

¹⁷⁸ *See* I.R.C. § 170(h)(3); Treas. Reg. § 1.170A-14(c)(1).

¹⁷⁹ This provision is based on the fact that every state now has some form of a conservation easement-enabling statute. The possibility exists that a conservation easement may be valid under other state law, and in such a case, that other law should be addressed in this recital.

R4. The Property has substantial [e.g., natural, wildlife habitat, scenic, open space, historic, educational, and/or recreational] values (individually and collectively, the “Conservation Values”) of great importance to Owner, Holder, and the people of [state in which Property is located] and the United States [and, in the case of a contribution intended to satisfy the open space preservation conservation purposes test], and the protection of these Conservation Values will yield a significant public benefit.

R5. In particular, [describe specific Conservation Values];

R6. [In the case of Property intended to qualify as open space] WHEREAS, protection of the Property is in furtherance of the following clearly delineated federal, state, and/or local governmental conservation policy(ies); [identify policies]¹⁸⁰

R7. Owner and Holder intend that (1) this Easement will constitute a restriction granted in perpetuity on the use which may be made of the Property in accordance with section 170(h)(2)(C) of the Code; (2) the conservation purpose(s) of this Easement will be “protected in perpetuity” in accordance with section 170(h)(5)(A) of the Code by permitting only those activities and uses on the Property that do not significantly impair or interfere with such conservation purpose(s);¹⁸¹ (3) the contribution of this Easement will be “exclusively for conservation purposes” in accordance with section 170(h)(1)(C) of the Code by permitting only those activities and uses on the Property that do not injure or destroy other significant conservation interests;¹⁸² and (4) notwithstanding any rule of construction to the contrary, this Easement shall be construed and administered in accordance with the intent of Owner and Holder as set forth in this paragraph.

3. Now, Therefore Provision

[State conveyancing laws will differ, but this provision must specify that the Easement is “granted in perpetuity” to the holder.]¹⁸³

¹⁸⁰ See I.R.C. § 170(h)(4)(A)(iii)(II); Treas. Reg. § 1.170A-14(d)(4)(iii).

¹⁸¹ See Treas. Reg. § 1.170A-14(g)(1).

¹⁸² See Treas. Reg. § 1.170A-14(e); *see also supra* Part V.B.

¹⁸³ I.R.C. § 170(h)(1)(A), (h)(2)(C).

4. Charitable Gift for Qualified Conservation Purpose(s)¹⁸⁴

[Choose one or more as appropriate to the Property]

The charitable gift of this Easement is made exclusively for the purpose[s] of

- [preserving the Property for outdoor recreation by, or the education of, the general public]
- [protecting the Property, which constitutes a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,]
- [preserving the Property as open space (including farmland or forest land) for the scenic enjoyment of the general public and/or pursuant to a clearly delineated federal, State, and/or local governmental conservation policy, which will yield a significant public benefit]
- [preserving the Property, which constitutes an historically important land area and/or a certified historic structure,]

in perpetuity consistent with section 170(h) of Code and the Treasury Regulations. The Holder accepts the charitable gift of this Easement and agrees to hold, administer, and enforce this Easement for the benefit of the public in accordance with the terms and for the purposes set forth in this

¹⁸⁴ See I.R.C. § 170(h)(1)(C), (h)(4), (h)(5)(A); *Belk v. Comm’r*, 774 F.3d 221, 228 (4th Cir. 2014) (emphasis in original) (noting that “§ 170(h)(2)(C) requires that the gift of a conservation easement on a specific parcel of land be granted in perpetuity to qualify for a federal charitable deduction, *notwithstanding* the fact that state law may permit an easement to govern for some shorter period of time”); *Wachter v. Comm’r*, 142 T.C. 140, 147 (2014) (discussing both parties’ allegations that North Dakota law, which limits the duration of any easement in the state to ninety-nine years, “is unique because [North Dakota] is the only State that has a law that provides for a maximum duration that may not be overcome by agreement”); *Carpenter v. Comm’r*, T.C.M. 2012-1, *reconsideration denied and opinion supplemented*, T.C.M. 2013-172 (determining the conservation easements at issue were “restricted [charitable] gifts” under state law, or “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations,”) (quoting Michael M. Schmidt & Taylor T. Pollock, *Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds*, 31 COLO. LAW. 57, 58 (2002)); *see also, e.g.*, *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995 (Conn. 1997) (alterations in original) (internal quotation marks omitted) (“The general rule is that . . . gifts to charitable corporations for stated purposes are [enforceable] at the instance of the [a]ttorney [g]eneral,” and “[i]t matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift”; “a donor who attaches conditions to his gift has a right to have his intention enforced”) (quoting *Lefkowitz v. Lebersfield*, 417 N.Y.S.2d 715, 719–20 (1979)).

instrument. The Owner and the Holder further acknowledge and agree that the terms of this restricted charitable gift shall be binding upon each of them and their respective successors in interest in perpetuity.¹⁸⁵

5. Eligible Donee¹⁸⁶

The Holder represents that it is a “qualified organization” within the meaning of section 170(h)(3) of the Code. The Holder also agrees, by accepting this Easement, that it is committed to protect the conservation purpose(s) of this gift, and it has the resources to enforce the restrictions in this Easement as required by Treasury Regulation section 1.170A-14(c)(1).

6. Baseline Documentation

In accordance with Treasury Regulation section 1.170A-14(g)(5), the Conservation Values are documented in an inventory of the relevant features of the Property, dated _____ and signed by Owner and Holder (the “Parties”), [kept on file at the offices of Holder and/or attached hereto as Exhibit] and incorporated herein by this reference (hereinafter “Baseline Documentation”), which consists of such reports, maps, photographs, and other documentation that the Parties agree provide, collectively, an accurate representation of the condition of the Property at the time of this gift and which is intended to serve as an objective, but nonexclusive, information baseline for monitoring compliance with this Easement.¹⁸⁷

¹⁸⁵ This provision is intended to ensure that, even though state law might provide, for example, that a conservation easement can be released, in whole or in part, after the holding of a public hearing and approval of a public official, the provisions included in the easement (including those addressing transfer, amendment, extinguishment, and post-extinguishment proceeds) must be complied with in addition to those state law provisions. Similarly, if state law provides that a conservation easement can be modified, released, or terminated by the holder, the provisions included in the easement (including those addressing transfer, amendment, extinguishment, and post-extinguishment proceeds) must nonetheless be complied with. In other words, the terms of the easement must be complied with even if they are more restrictive than state law, and the easement does not excuse the owner and holder from also complying with any additional requirements that may be imposed by state law. The perpetuity requirements of section 170(h) and the Treasury Regulations are summarized in Appendix A of this Report.

¹⁸⁶ See I.R.C. § 170(h)(1)(B), (h)(3); Treas. Reg. § 1.170A-14(c)(1).

¹⁸⁷ See Treas. Reg. § 1.170A-14(g)(5)(i) (applying when Owner reserves rights, the exercise of which may impair the conservation interests associated with the Property, as is generally the case).

7. Mining Restrictions¹⁸⁸

No mining activities, including but not limited to the extraction of minerals by any surface mining method within the meaning of section 170(h)(5)(B) of the Code, shall be permitted on the Property by the Owner, the Holder, or any other person.¹⁸⁹

or

Although the Owner has retained qualified mineral interests within the meaning of Treasury Regulation section 1.170A-14(b)(1)(i), at no time may there be extractions or removal of minerals by any surface mining method within the meaning of section 170(h)(5)(B) of the Code and Treasury Regulation section 1.170A-14(g)(4)(i); no other mining method may be used that is or would be inconsistent with the particular conservation purpose(s) of this contribution or the Conservation Values intended to be protected by this Easement; any other mining method must have only a limited, localized impact on the Property and not be irretrievably destructive of any significant conservation interests; and any production facilities must be concealed or compatible with existing topography and landscape and any surface alteration must be restored to its original state.¹⁹⁰

or

The ownership of the Property's surface estate and mineral interest were separated before June 13, 1976, and remained so separated up to and including the time of the contribution of this Easement. The present owner of the mineral interest is not a person whose relationship to the owner of the surface estate is described in section 267(b) or section 707(b) of the Code at the time of the contribution of this Easement. At the time of the contribution of this Easement, the Owner had obtained a report from an appropriate specialist who is independent of the Owner and Holder opining that, based on the facts, and considering all relevant factors (including, but not limited to, geological, geophysical, and economic data

¹⁸⁸ See I.R.C. § 170(h)(5)(B), (h)(6); *Great N. Nekoosa Corp. v. United States*, 38 Fed. Cl. 645, 660 (1997); Treas. Reg. § 1.170A-14(g)(4).

¹⁸⁹ This provision should be used if all mining activities are to be prohibited.

¹⁹⁰ See I.R.C. § 170(h)(5)(B)(i); Treas. Reg. § 1.170A-14(g)(4)(i). This provision should be used if the Owner retains qualified mineral interests and intends to extract them. The method permitted by this paragraph could be further restricted, such as by limiting it to "slant" drilling from other property only.

showing the absence of mineral reserves on the property, or the lack of commercial feasibility at the time of the contribution of surface mining (the mineral interest), the probability of extraction or removal of minerals from the Property by any surface mining method is so remote as to be negligible.¹⁹¹

8. Inspection and Enforcement¹⁹²

Holder has the right and obligation to enter upon the Property, or to authorize its agent to enter upon the Property, to inspect the Property to determine if there is compliance with the terms of this Easement and to obtain evidence for the purpose of seeking judicial enforcement of this Easement, provided that such entry shall not unreasonably interfere with Owner's quiet enjoyment of the Property. When reasonable under the circumstances, Holder shall advise Owner in advance of its intention to enter the Property to inspect or monitor.

Holder has the right and obligation to enforce this Easement, including the right to prevent any activity on or use of the Property inconsistent with the protection of the Conservation Values of the Property or the conservation purpose(s) of this Easement, by legal proceedings or otherwise as appropriate, and to require restoration of any areas or features of the Property damaged by any activity or use that is inconsistent with the protection of the Conservation Values of the Property or the conservation purpose(s) of this Easement.¹⁹³

If Holder, in its sole discretion, determines that circumstances require immediate action to prevent, terminate, or mitigate damage to the Conservation Values of the Property, or to prevent, terminate, or mitigate a violation of this Easement, Holder may pursue its remedies under this paragraph without prior notice to Owner.

Holder may exercise discretion in enforcing this Easement subject, however, to its fiduciary obligations to the public as beneficiary of the

¹⁹¹ See I.R.C. § 170(h)(5)(B)(ii); Treas. Reg. § 1.170A-14(g)(4)(ii). This provision should be used if ownership of the surface estate and mineral interests has been and remains separated, and the other requirements of section 170(h) and the Treasury Regulations are met.

¹⁹² See Treas. Reg. § 1.170A-14(c)(1), (g)(5)(ii).

¹⁹³ A right to require restoration of the Property to its condition "at the time of the donation" is technically required but should be qualified given that changes consistent with the terms and purpose of the easement may occur over time, and restoration of the Property to its condition at the time of the donation may not be possible or desirable. See Treas. Reg. § 1.170A-14(g)(5)(ii).

easement.¹⁹⁴ No delay or omission by Holder in the exercise of any right or remedy under this Easement or applicable law shall impair such right or remedy or be construed as a waiver. Enforcement of this Easement shall not be defeated because of any subsequent adverse possession, laches, or estoppel. The Parties agree that the rights of the public, as beneficiary of this Easement, shall not be forfeited by any acts or omissions of Holder.

9. Overarching Prohibition¹⁹⁵

Any activity on or use of the Property inconsistent with the conservation purpose(s) of this Easement and the continued protection of the Conservation Values is prohibited.¹⁹⁶ Without limiting the general application of the foregoing sentence, all of the following activities and uses are expressly prohibited:

[list specifically prohibited activities and uses].

10. Prohibition on Inconsistent Uses¹⁹⁷

Any activity or use of the Property that would permit destruction of significant conservation interests is prohibited, except that a use that is destructive of significant conservation interests will be permitted if such use is necessary for the protection of the conservation interests that are the subject of the contribution of this Easement as provided in Treasury Regulation section 1.170A-14(e).¹⁹⁸

11. Approvals and Notification of Exercise of Other Reserved Rights

a. Approvals. For activities or uses that are expressly permitted by the terms of this Easement subject to Holder's approval, Owner's request for

¹⁹⁴ In some cases, a conservation easement may provide that "Enforcement of this Easement is solely at the discretion of the Holder" or similar language. Inclusion of such language in a conservation easement deed risks rendering the contribution nondeductible because it would arguably permit the Holder to allow prohibited activities on the Property in violation of the granted in perpetuity and protected in perpetuity requirements. *See* I.R.C. § 170(h)(2)(C), (h)(5)(A). The perpetual use restrictions in the Easement may not be effectively released or otherwise eliminated in Holder's discretion.

¹⁹⁵ *See* I.R.C. § 170(h)(2)(C), (h)(5)(A); Treas. Reg. § 1.170A-14(c)(1), (g)(1).

¹⁹⁶ *See id.*

¹⁹⁷ *See* I.R.C. § 170(h)(1)(C); Treas. Reg. § 1.170A-14(c)(1), (e).

¹⁹⁸ *See supra* Part V.B, suggesting that guidance be issued to clarify the inconsistent use regulations.

approval shall be in writing and shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity or use in sufficient detail to permit Holder to make an informed determination regarding approval or denial of the request. Such a request shall be delivered to Holder at least sixty (60) days prior to the anticipated start date of such activity or use. Holder agrees to use reasonable diligence to respond to the request within sixty (60) days of delivery. Holder's failure to respond within the sixty (60) day period shall be deemed a constructive denial, and Owner may seek relief from the courts and recover reasonable fees and costs if a court rules the constructive denial unjustified.¹⁹⁹ This paragraph is not intended for any other purpose, including, without limitation, to request approval of (1) an activity or use expressly prohibited by this Easement, (2) an existing or threatened violation of this Easement, or (3) an activity or use for which an amendment to this Easement would be needed.

b. Notification of Exercise of Other Reserved Rights. Owner agrees to notify Holder, in writing, not less than sixty (60) days before exercising any reserved right in this Easement that is not subject to Holder's approval but may have an adverse impact on the conservation interests associated with the Property.²⁰⁰ The purpose of this requirement is to provide Holder with the opportunity to ensure that the exercise of any such reserved right is designed and shall be carried out in a manner that is consistent with the terms and conservation purpose(s) of this Easement and will not have an adverse impact on the conservation interests associated with the Property. The written notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed exercise of the

¹⁹⁹ In some cases, the approval provision in a conservation easement is drafted to provide that Holder's failure to respond within the given time period shall be deemed an approval. Such a provision could result in authorization of an activity contrary to the protection of the property's conservation values and the conservation purposes of the easement as a result of Holder's negligence or other failure. Thus, we define the Holder's failure to respond in a timely fashion as a constructive denial. The perpetual use restrictions in a conservation easement should not be modified, released, or otherwise altered or eliminated as a result of Holder's negligence, inactivity, dissolution, or other failures. *See* I.R.C. § 170(h)(2)(C), (h)(5)(A). If Holder fails to "use reasonable diligence" to respond to a request within sixty (60) days of delivery, Owner can seek redress from the courts.

²⁰⁰ *See* Treas. Reg. § 1.170A-14(g)(5)(ii) (applying when Owner reserves rights, the exercise of which may impair the conservation interests associated with the Property, as is generally the case).

reserved right in sufficient detail to permit Holder to make an informed determination.

12. Restrictions on Transfer, Extinguishment, De Minimis Release, Limited Power of Amendment, and Limited Power of Discretionary Consent

Article _____. Restrictions on Transfer, Extinguishment, De Minimis Release, Limited Power of Amendment, and Limited Power of Discretionary Consent²⁰¹

a. Restrictions on Transfer²⁰² Holder is prohibited from assigning or otherwise transferring this Easement, whether or not for consideration, unless:

(1) the transferee is, at the time of the transfer, a “qualified organization” and an “eligible donee,” as those terms are defined in section 170(h) of the Code and the Treasury Regulations promulgated thereunder, and

(2) Holder, as a condition of the transfer, requires that the transferee agree in writing that the conservation purpose(s) that the contribution of this Easement was originally intended to advance will continue to be carried out.

If Holder shall cease to exist, or cease to be a qualified organization or eligible donee (as those terms are defined in section 170(h) of the Code and the Treasury Regulations promulgated thereunder), and a prior transfer is not made in accordance with the requirements of this paragraph, then Holder’s rights and obligations under this Easement shall vest in such entity as a court of competent jurisdiction shall direct pursuant to the applicable laws of [State in which Property is located], provided that the

²⁰¹ Including these provisions in one section or article of the easement facilitates interpretation and minimizes confusion and cross-referencing errors.

²⁰² See Treas. Reg. § 1.170A-14(c). In the last sentence of Treasury Regulation § 1.170A-14(c)(2), the cross-reference to “paragraph (b)(3)” should be to “paragraph (b)(2),” and the cross-reference to “paragraph (g)(5)(ii)” should be to “paragraph (g)(6).” The Treasury failed to update the cross-references in Treasury Regulation § 1.170A-14(c)(2) when it finalized the regulations. See Qualified Conservation Contribution; Proposed Rulemaking § 1.170A-13, 48 Fed. Reg. 22941 (proposed May 23, 1983) (to be codified at 26 C.F.R. pt. 1).

requirements of this paragraph shall be satisfied. A transfer of this Easement in connection with a judicial extinguishment that satisfies the requirements of paragraph b below shall not violate the provisions of this paragraph. Any subsequent transfer of this Easement shall also be subject to this paragraph. Any attempted transfer of all or a portion of this Easement contrary to this paragraph shall be invalid.²⁰³

b. Extinguishment²⁰⁴

(1) The terms “extinguish” and “extinguishment” used herein encompass any removal of some or all of the Property from this Easement, whether through release, termination, abandonment, swap, exchange, condemnation, or otherwise.

(2) Owner and Holder agree that the gift of this Easement creates a property right that immediately vests in Holder. Owner and Holder further agree that this property right has a fair market value at least equal to the proportionate value that this Easement, at the time of the gift, bore to the value of the Property as a whole (unencumbered by this Easement) at that time, and such minimum proportionate value of Holder’s property right, expressed as a percentage (the “Minimum Percentage”), shall remain constant.

(3) This Easement can be extinguished in whole or in part only:

(a) in a judicial proceeding in a court of competent jurisdiction,

²⁰³ This sentence is intended to ensure that the parties must comply with the requirements of this “Restriction on Transfer” provision notwithstanding state law. *See supra* note 185.

²⁰⁴ *See* Treas. Reg. § 1.170A-14(g)(6); *see also* *Belk v. Comm’r*, 774 F.3d 221, 225 (4th Cir. 2014) (“The Treasury Regulations offer a single—and exceedingly narrow—exception to the requirement that a conservation easement impose a perpetual use restriction[]”—i.e., the judicial extinguishment upon impossibility or impracticality and division of proceeds requirements); *Carpenter v. Comm’r*, T.C.M. 2013-172, *denying reconsideration of and supplementing* T.C.M. 2012-1 (stating “extinguishment by judicial proceedings is mandatory”).

(b) upon a finding by the court that a subsequent unexpected change in the conditions surrounding the Property has made impossible or impractical continued use of the Property (or the portion thereof to be removed from this Easement) for conservation purposes, and

(c) with a payment of proceeds to Holder, calculated as provided in subparagraph (4) below, and all such proceeds shall be used by Holder in a manner consistent with the conservation purposes of this gift.²⁰⁵ Holder has the right to record a lien to secure its recovery of such proceeds from the record owner of the Property.

(4) In the event of an extinguishment, Holder shall be entitled to a share of the proceeds from a subsequent sale, exchange, or involuntary conversion of the property removed from this Easement (excluding the value of any permitted improvements Owner made to such property after the date of this gift as determined by a “qualified appraisal” as defined in the Code and Treasury Regulations,²⁰⁶ unless such improvements were required by this Easement)²⁰⁷ equal to the greater of:

²⁰⁵ The Holder should be deemed to have used the proceeds “in a manner consistent with the conservation purposes of this gift” if Holder uses the proceeds to (i) acquire a conservation easement or easements with a conservation purpose similar to that of the extinguished easement, and the new easement(s) would qualify for a § 170(h) deduction if conveyed to Holder as a charitable contribution, and (ii) acquire fee title to land that is similarly protected in perpetuity for a conservation purpose similar to that of the extinguished easement. The Holder also should be permitted to transfer an amount that is reasonable under the circumstances to a restricted perpetual endowment fund to be used by Holder to steward the easement(s) and land acquire pursuant to (i) and (ii) of the previous sentence. If the acquisition of a conservation easement or easements or land as provided in the first sentence of this paragraph is not feasible within a reasonable period of time following the Holder’s receipt of proceeds, the Holder should be permitted to transfer the proceeds to a restricted perpetual endowment fund to be used by Holder to steward the easements and land it holds for conservation purposes, with a preference for conservation purposes similar to those of the original gift.

²⁰⁶ I.R.C. § 170(f)(11)(E)(i); Treas. Reg. § 1.170A-17.

²⁰⁷ The Task Force recognizes that the Fifth Circuit, in *PBBM-Rose Hill v. Commissioner*, 900 F.3d 193 (5th Cir. 2018), held that Treasury Regulation § 1.170A-

(a) the Minimum Percentage of such proceeds or

(b) the appraised value of this Easement (or portion of this Easement encumbering the property to be removed) immediately before and ignoring the extinguishment, calculated using before and after valuation methodology similar to that provided in Treasury Regulation section 1.170A-14(h)(3).²⁰⁸

14(g)(6) does not permit the value of improvements to be subtracted from the proceeds prior to determining the holder's share. The Task Force suggests that the Treasury reconsider this position.

In response to *PBBM-Rose Hill*, an easement donor that plans to construct valuable improvements on the encumbered property is likely to opt to either (i) leave the designated building area out of the conservation easement and therefore unrestricted or (ii) convey two easements, one nondeductible easement encumbering the designated building area, and a second deductible easement encumbering the remaining property that satisfies all federal tax law requirements. Neither option is ideal from a conservation perspective. The first option—leaving the building area entirely unrestricted—could have a negative impact on the protected land. The second option—conveyance of two easements—increases the expense and complexity of the donation and, as a result, may discourage donations.

The Task Force has not had an opportunity to reach consensus on a resolution to the dilemma occasioned by the decision in *PPBM-Rose Hill*. A clause providing for the payment of only the Minimum Percentage of proceeds to the holder will disadvantage the holder if the value of the easement relative to the value of the land increases following the date of the donation. Not allowing the value of post-donation permitted improvements to be subtracted from the proceeds prior to the holder taking its share will disadvantage the owner. One equitable solution would be a safe harbor provision that provides: (i) for the payment to the holder of the *greater of* the Minimum Percentage of proceeds *or* the appraised value of the easement immediately before and ignoring the extinguishment, (ii) for the subtraction of the value of any post-donation permitted improvements from the proceeds prior to determining the holder's Minimum Percentage of such proceeds, (iii) that the value of the post-donation permitted improvements for purposes of the subtraction be limited to their replacement cost (to avoid confusion and strategic use of varied valuation methodologies), as determined by a "qualified appraisal," (iv) that the "qualified appraiser" be chosen by the holder because the holder, unlike the owner, will generally be a repeat player and could suffer reputational harm from choosing an unscrupulous appraiser, and (v) that each party be responsible for paying a percentage share of the cost of the appraisal based on the value of their percentage interests in the proceeds.

²⁰⁸ This alternative, which can be referred to as the "greater of" proceeds formula, complies with Treasury Regulation § 1.170A-14(g)(6) because Holder will always receive *at least* the required minimum proportionate (or floor) share of proceeds. This alternative also (i) ensures that Holder will receive all of the appreciation, if any, in the value of the easement following the donation to be used "in a manner consistent with the conservation purposes of the original contribution," and (ii) eliminates Owner's perverse incentive to

If Holder, in Holder's sole discretion, determines that the cost to Holder of obtaining an appraisal of this Easement (or relevant portion thereof) immediately before extinguishment is likely to exceed any benefit to Holder from obtaining such appraisal, or that the benefit of having such an appraisal prepared is so small as to be insignificant, Holder may elect to receive the amount determined pursuant to (a) above (the Minimum Percentage of such proceeds);²⁰⁹

or

(4) In the event of an extinguishment, Holder shall be entitled to a share of the proceeds from a subsequent sale, exchange, or involuntary conversion of the property removed from this easement (excluding the value of any permitted improvements Owner made to such property after the date of this gift as determined by a "qualified appraisal" as defined in the Code and Treasury Regulations,²¹⁰ unless such improvements were required by this Easement)²¹¹ equal to at least the Minimum Percentage of such proceeds[.]²¹²

and

[In certain jurisdictions]²¹³

seek an extinguishment to benefit from the difference between the appreciated value of the easement and the Minimum Percentage of proceeds, which, over time, may become significant.

²⁰⁹ This alternative gives Holder the discretion to decline to seek an appraisal when the cost of the appraisal would be out of proportion to the benefit gained.

²¹⁰ I.R.C. § 170(f)(11)(E)(i); Treas. Reg. § 1.170A-17.

²¹¹ See *supra* note 207.

²¹² This alternative complies with Treasury Regulation section 1.170A-14(g)(6) but (i) deprives Holder of proceeds attributable to the full appreciated value of the easement to be used to be used "in a manner consistent with the conservation purposes of the original contribution," and (ii) creates a perverse incentive on the part of Owner to seek extinguishment to benefit from the difference between the appreciated value of the easement and the Minimum Percentage of proceeds, which, over time, may become significant.

²¹³ Treasury Regulation section 1.170A-14(g)(6)(ii) contains a limited exception regarding the payment of post-extinguishment proceeds to the holder—the holder need not

, provided, however, that Holder is not entitled to proceeds in the event of a subsequent involuntary conversion if [state code provision] provides that Owner is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.

or

, and, although [state code provision] may provide that Owner is entitled to the full proceeds from a conversion without regard to the terms of the prior perpetual conservation restriction, Owner nonetheless hereby agrees to pay Holder its share of proceeds calculated as provided herein.

(5) If all or any part of the Property is taken under the power of eminent domain (which would make continued use of the Property, or the portion thereof to be removed from this Easement, for conservation purposes impossible or impractical), Owner and Holder shall join in appropriate proceedings at the time of such taking to recover the full value of their interests subject to the taking and all incidental or direct damages resulting from the taking.

(6) All provisions of this paragraph shall survive any partial or full extinguishment of this Easement. Any attempted extinguishment of all or a portion of this Easement contrary to this paragraph shall be invalid.²¹⁴

be entitled to at least the Minimum Percentage of proceeds in the event of a subsequent involuntary conversion if “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 following safe harbor alternatives address this exception, with the second alternative permitting Owner to nonetheless agree to pay a portion of the proceeds received upon conversion to Holder to be used “in a manner consistent with the conservation purposes of the original contribution.” Treas. Reg. § 1.170A-14(g)(6)(i). An Owner may wish to agree to the second alternative to ensure that successor Owners will not have a perverse incentive to agree to conversions so that they can benefit from proceeds attributable to both the restricted value of the land and the value of the easement.

²¹⁴ This sentence is intended to ensure that the parties must comply with the requirements of this “Extinguishment and Division of Proceeds” provision notwithstanding state law. *See supra* note 185.

c. De Minimis Release for a Bona Fide Boundary Line Adjustment or Settlement In Lieu of Condemnation. Notwithstanding the foregoing paragraph of this [Article], Holder may release a de minimis portion of the Property from this Easement, which constitutes a partial extinguishment (for purposes of this paragraph, a “Release”), upon satisfaction of any conditions in [the applicable conservation easement enabling statute], and provided Holder’s legal counsel has determined, as documented in a writing kept on file at the offices of Holder, that:

(1) the amount of land to be removed from this Easement as a result of the Release at issue and any other Releases in the five (5) years preceding the Release at issue would represent no more than the lesser of (i) one (1) percent of the total acreage of the Property or (ii) twenty (20) acres of the Property;

(2) the Release would be agreed to in connection with (i) a condemnation or a settlement in lieu of a condemnation where the condemning authority has complied with all of the provisions of law necessary to vest it with the legal authority and power to condemn the property at issue for public health, welfare, or safety purposes, and there is no defense to the condemnation on the merits,²¹⁵ or (ii) a bona fide boundary line dispute between Owner and an abutter or abutters, the resolution of which would entail addition to this Easement of a similarly-sized parcel of adjacent land with substantially the same conservation values as the land released from this Easement;

(3) [as established by an independent conservation review,] there would be no, or only a negligible, adverse impact on the perpetual protection of the Conservation Values of the Property and the conservation purpose(s) of this Easement (that is, an impact so small or unimportant as not to be worth considering);

(4) Holder would receive a share of proceeds as a result of the Release, in cash or in kind, calculated as

²¹⁵ See *Tecumseh Corrugated Box Co. v. Comm’r*, 94 T.C. 360, 379–80 (1990).

provided in the previous paragraph (governing judicial extinguishment), and would be required to use such proceeds in a manner consistent with the conservation purposes of this Easement;²¹⁶ and

(5) the Release would not involve impermissible private benefit or private inurement.

Nothing in this paragraph shall require Holder to agree to or to consult or negotiate regarding a condemnation, a settlement in lieu of condemnation, or a boundary line adjustment. Any Release that does not comply with this paragraph or the previous paragraph (governing judicial extinguishment) shall be invalid.²¹⁷

d. Limited Power of Amendment. Owner and Holder intend that the Conservation Values of the Property and the conservation purpose(s) of this Easement will be protected in perpetuity by this Easement. While Owner and Holder have endeavored to foresee all possible threats to the perpetual protection of the Conservation Values of the Property and the conservation purpose(s) of this Easement, there may come a time when this Easement should be amended to clarify a provision of this Easement that may be ambiguous or otherwise further or better protect the Conservation Values of the Property and the conservation purpose(s) of this Easement. To that end, Owner and Holder have the right to agree to amendments to this Easement, provided, however, that any amendment must comply with all of the Section 170(h) Amendment Principles and Procedures.²¹⁸

A proposed amendment that exceeds the scope of the discretion granted Owner and Holder under this paragraph and the

²¹⁶ In the case of a bona fide boundary line dispute, the addition to this Easement of a similarly sized parcel of adjacent land with substantially the same conservation values as the land released from this Easement could constitute “in kind” proceeds that would satisfy this provision in whole or in part, depending on the economic value of the easement interest on that parcel.

²¹⁷ This sentence is intended to ensure that the parties must comply with the requirements of this De Minimis Release provision notwithstanding state law. *See supra* note 185.

²¹⁸ The proposed Section 170(h) Amendment Principles and Procedures are set forth in Part V.A.3. They could be included in this safe harbor Limited Power of Amendment provision itself.

Section 170(h) Amendment Principles and Procedures is not permitted except by order of a court having jurisdiction in a proceeding that the [State in which Property is located] Attorney General or other public official charged with enforcement responsibilities regarding charitable gifts is given notice of and an opportunity to participate in to represent the interest of the public in ensuring that the easement is administered in accordance with its terms and charitable conservation purpose. Owner and Holder acknowledge that this Easement constitutes a donor-restricted charitable gift.²¹⁹

Nothing in this Limited Power of Amendment provision shall require Owner or Holder to agree to any amendment. Any amendment that does not comply with the terms of this Limited Power of Amendment provision and the Section 170(h) Amendment Principles and Procedures shall be invalid.²²⁰

[e. Limited Power of Discretionary Consent.²²¹ In the limited circumstances set forth in this Consent provision, Holder may give written consent to Owner to temporarily engage in an activity or use not expressly permitted, restricted, or prohibited by this Easement. Holder may give its consent only if the consent complies with all of the Section 170(h) Discretionary Consent Principles and Procedures.²²²

Holder may further condition, qualify, or otherwise circumscribe its consent under this provision in any manner, including by: (1) making the consent revocable either in Holder's discretion or upon the occurrence or termination of specified conditions; (2) further limiting the duration of the consent, including by providing for termination of the consent upon abandonment or suspension of the activity or use; (3) limiting the

²¹⁹ For a discussion of this provision, see *supra* note 81 and accompanying text. See also *supra* note 184.

²²⁰ This sentence is intended to ensure that the parties comply with the requirements of this Limited Power of Amendment provision and the Section 170(h) Amendment Principles and Procedures notwithstanding state law. See *supra* note 48.

²²¹ This provision is in brackets because no consensus emerged among the Task Force members that this provision should be authorized. See *supra* Part V.A.4 for a discussion of this issue.

²²² The proposed Section 170(h) Discretionary Consent Principles and Procedures are set forth in Part V.A.4. They could be included in this safe harbor Consent provision itself.

time of the day or year in which the activity or use may be conducted; and (4) specifying the individuals or entities who may engage in the activity or use, including specifying professional qualifications of individuals or entities conducting the activity or use.

Nothing in this Consent provision shall require Holder to agree to any consent request. Any consent that does not comply with the terms of this Consent provision and the Section 170(h) Discretionary Consent Principles and Procedures shall be invalid.²²³

This Consent provision is not intended for any other purpose, including, without limitation, to request approval of (1) an existing or threatened violation of this Easement or (2) an activity or use for which an amendment to this Easement would be needed.]

13. Interaction With State Law

Owner and Holder are prohibited from exercising any power or discretion granted under state law that would be inconsistent with the provisions of this Easement, the status of this Easement as a “qualified conservation contribution” under section 170(h) of the Code and the Treasury Regulations,²²⁴ the status of the Holder as an “eligible donee” under such Regulations,²²⁵ or the continued protection in perpetuity of the Conservation Values and the conservation purpose(s) of this Easement.²²⁶

14. Section 2031(c) Federal Estate Tax Exclusion²²⁷

The Parties intend that this Easement will enable the Owner to qualify for the estate tax exclusion under section 2031(c) of the Code. Accordingly, notwithstanding anything herein to the contrary, and to

²²³ This sentence is intended to ensure that the parties must comply with the requirements of this Consent provision and the Section 170(h) Discretionary Consent Principles and Procedure notwithstanding state law. *See supra* note 54.

²²⁴ I.R.C. § 170(h); Treas. Reg. § 1.170A-14.

²²⁵ Treas. Reg. § 1.170A-14(c).

²²⁶ This sentence is intended to ensure that the parties must comply with all of the provisions and the purpose of this Easement notwithstanding state law. *See supra* note 185.

²²⁷ This provision is not required to qualify for the section 170(h) deduction. It is required to qualify for the estate tax exclusion under section 2031(c) of the Code.

comply with section 2031(c)(8)(B) of the Code, more than a de minimis use of the Property for a commercial recreational activity is prohibited.

15. No Merger²²⁸

The Parties intend that this Easement is to constitute a “qualified conservation contribution” within the meaning of section 170(h) of the Code and the Treasury Regulations and that this Easement may be extinguished in whole or in part only as provided in [Article ____] herein. To that end, the Parties hereby agree that (1) no purchase by or transfer to Holder of the underlying fee interest in the Property shall be deemed to extinguish this Easement, or any portion thereof, under the doctrine of merger or other legal doctrine, and (2) should Holder come to own all or a portion of the underlying fee interest in the Property, (a) Holder, as successor in title to the Owner, shall observe and be bound by the obligations of Owner under and the restrictions imposed upon the Property by this Easement, and (b) Holder shall continue to hold this Easement as a restricted charitable gift for the benefit of the public and be bound by its terms.

²²⁸ To be eligible for a deduction, a conservation easement must be extinguishable only in a judicial proceeding upon a finding of impossibility or impracticality as provided in Treasury Regulation section 1.170A-14(g)(6). Although the merger doctrine generally should not apply to conservation easements (see Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 DUKE J. L. & CONTEMP. PROBS. 279 (2011)), and a few states statutes expressly so provide, the state of the law in many jurisdictions is uncertain and state statutes can change at any time. To satisfy the requirements that the conservation purpose of a contribution be protected in perpetuity under § 170(h)(5)(A) and the easement be extinguished only in a judicial proceeding as provided in Treasury Regulation section 1.170A-14(g)(6), in situations where it is likely at the time of the easement donation that the holder of a conservation easement will later acquire the underlying fee, a provision should be included in the easement providing that merger should not occur. Inclusion of such a provision in all conservation easements is considered best practice and should not disqualify a conservation easement for the section 170(h) deduction. See I.R.C. § 170(h)(1); Treas. Reg. § 1.170A-14(a).

16. Public Access²²⁹

[When access is required by section 170(h) or the Treasury Regulations]

[Specify the applicable section 170(h) and Treasury Regulation provisions that require public access and provide the time, place, and manner of public access authorized by the easement.]

17. Good Title, Owner Warranty Provision

Owner covenants, represents, and warrants that: Owner is the sole owner and is seized of the Property in fee simple and has good right to grant and convey this Easement; any outstanding mortgages or deeds of trust have been subordinated to this Easement; the Property is free and clear of any other encumbrances [except those which will not affect the conservation values or the permanence of the easement]; Holder shall have the use of and enjoy all of the benefits derived from and arising out of this Easement; and no pending or threatened litigation in any way affects, involves, or relates to the Property.

²²⁹ The outdoor-recreation-or-education conservation purpose test will be satisfied only if the easement grants the general public the right to “substantial and regular use” of the property for recreational or educational purposes. See Treas. Reg. § 1.170A-14(d)(2)(ii) and -14(f), ex. 1. With regard to the habitat-protection conservation purpose test, “[l]imitations on public access . . . shall not render the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation . . . would not cause the donation to be nondeductible.” Treas. Reg. § 1.170A-14(d)(3)(iii). To satisfy the scenic-enjoyment-by-the-general-public conservation purpose test,

[v]isual (rather than physical) access to or across the property by the general public is sufficient. . . . [T]he entire property need not be visible to the public . . . , although the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public.

Treas. Reg. § 1.170A-14(d)(4)(ii)(B).

With regard to the preservation-of-open-space-pursuant-to-a-governmental-policy conservation purpose test,

[A] limitation on public access . . . shall not render the deduction nondeductible unless the conservation purpose of the donation would be undermined or frustrated without public access. For example, a donation pursuant to a governmental policy to protect the scenic character of land near a river requires visual access to the same extent as would a donation under paragraph (d)(4)(ii) of this section.

Treas. Reg. § 1.170A-14(d)(4)(iii)(C).

18. Holder's Obligation to Maintain Enforceability²³⁰

Holder hereby acknowledges and agrees that, if a state's marketable title act or similar law requires that this Easement be rerecorded or that another form of legally sufficient notice be filed periodically for the Easement to remain enforceable, Holder has a fiduciary obligation to take the actions necessary to maintain this Easement's enforceability, and Owner hereby authorizes Holder to take the actions necessary to comply with this provision.

19. Successors in Interest

All covenants, terms, conditions, restrictions, and other provisions of this Easement shall be binding upon, and inure to the benefit of, the Parties and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Owner" wherever used herein, and any pronouns used in place thereof, shall include the above-named Owner and his or her personal representatives, heirs, successors, and assigns, including, but not limited to, all future owners of any interest in the Property. The term "Holder" wherever used herein, and any pronouns used in place thereof, shall include the above-named Holder and its successors and assigns.

20. Holder's Acceptance of Gift

As attested by its authorized signature below, Holder hereby accepts the rights and responsibilities conveyed by the charitable gift of this Easement, agrees that it is bound by the terms and provisions of this Easement, and acknowledges its fiduciary obligation to enforce the terms and provisions of this Easement on behalf of the public in perpetuity.²³¹

²³⁰ To be eligible for a deduction, a conservation easement must be extinguishable only in a judicial proceeding upon a finding of impossibility or impracticality, as provided in Treasury Regulation section 1.170A-14(g)(6). This provision confirms that, if a state's marketable title act or other law requires that the easement be rerecorded periodically to remain enforceable, Holder has a fiduciary obligation to so rerecord the easement on behalf of the public. While a few states, by statute, exempt conservation easements from their marketable title acts, state laws can change at any time. Accordingly, a provision obligating the holder to rerecord the easement on behalf of the public to maintain its enforceability should be included in a conservation easement deed.

²³¹ Although not necessary to bind Holder, in this provision Holder confirms that it is bound by the terms and provisions of the Easement.

If Property is Subject to Outstanding Mortgage/Deed of Trust

This subordination agreement must be recorded contemporaneously with the conservation easement and the recording information for the conservation easement must be inserted in this agreement prior to recording this agreement.

SUBORDINATION AGREEMENT

This is a subordination agreement between _____, a _____ under the laws of the State of _____, (“**Lender**”) and [name of donee of easement], a _____ under the laws of the State of _____, (“**[name of donee of easement]**”).

RECITALS:

- A. _____ (“**Owner[s]**”) [is/are] the owner(s) of real property located in [County, State] as legally described in Exhibit A (“**Property**”).
- B. Lender is the owner and holder of that certain mortgage dated _____ from [Owner(s) or original mortgagor name] to [Lender or original mortgagee, if different] and recorded on [date] in Official Records Book _____ at Page _____ (or as Instrument No. _____), of the Public Records of [County, State] (“**Mortgage**”).
- C. The Mortgage encumbers the Property.
- D. Lender desires to subordinate the Mortgage to that certain Conservation Easement dated _____ from Owner[s] to **[name of donee of easement]** and recorded on _____ in Official Records Book _____ Page _____ (or as Instrument No. _____), of the Public Records of [County, State] (“**Conservation Easement**”).]

NOW, THEREFORE, for and in consideration of the sum of _____ and other good and valuable consideration, receipt of which is hereby acknowledged, Lender does hereby absolutely and unconditionally subordinate the lien of the Mortgage to the Conservation Easement as it now exists. It is the intent of Lender that this Subordination Agreement shall have the same legal effect as if the Mortgage had been executed and recorded after the Conservation Easement, and said Mortgage shall hereafter for all purposes be junior and

inferior to the Conservation Easement. Lender agrees that in the event of a foreclosure of the Mortgage or a transfer in lieu of foreclosure of any portion of the property subject to the Mortgage, the purchaser at any such foreclosure or the transferee under any such deed in lieu of foreclosure shall take title to the property so conveyed subject to all the terms and conditions of the Conservation Easement. Lender further agrees that this Subordination Agreement shall be binding on Lender’s successors and assigns.

Any recital or preliminary statement in this Subordination Agreement and all Exhibits referred to in this Subordination Agreement are an integral part of and are incorporated by reference into this Subordination Agreement.

[LENDER NAME]:

By: _____

Its: _____

Date: _____

COUNTY OF _____)

) ss

STATE OF _____)

Before me, a notary public in and for said county and state, personally appeared before me _____, the _____ of **[lender’s name]** who acknowledged that [s/he] did sign the foregoing instrument and that the same is the free act and deed of said **[lender’s name]** and the free act and deed of [him/her] personally as such officer.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____, _____ this _____ day of _____, 20__.

Notary Public

My commission expires:

