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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GREEN ROCK, LLC,

Plaintiff,

Case No 2:21-cv-01320-ACA

v.

INTERNAL REVENUE SERVICE;
U.S. DEPARTMENT OF TREASURY;
and UNITED STATES OF AMERICA,

Defendants.
____________________________________/

DEFENDANTS' RESPONSE / CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Although most taxpayers report and pay their taxes in full, some engage in abusive transactions designed to help them avoid paying the taxes they owe. As a House Committee observed, "the best way to combat tax shelters is to be aware of them." H.R. Rep. No. 108-548, pt. 1, at 261 (2004). Congress thus created Internal Revenue Code Section 6707A(c) to ensure Treasury had a flexible, speedy, and effective way of compelling taxpayers to disclose tax shelters.

Congress wasn't writing on a blank slate when it created § 6707A(c). Four years earlier, Treasury issued a regulation requiring taxpayers to disclose their participation in "reportable transactions," i.e., transactions that the IRS has identified as potentially abusive, as well as a subset of those known as "listed transactions," which the IRS has determined to be abusive tax avoidance transactions. 65 Fed. Reg. 11205-02 (March 2, 2000); 65 Fed. Reg. 11269-01 (March 2, 2000). From the outset, the IRS has identified each new listed transaction, describing the transaction in detail and almost always by publishing a notice, as provided for in the regulation.

In Notice 2017-10, the IRS identified certain syndicated conservation easement transactions as listed transactions. In these transactions, promoters orchestrate the illegal sale of inflated tax deductions to investors under the guise of charitable donations, often by using appraisals giving unrealistic valuations of

undeveloped land. Because participants and material advisors to listed transactions must disclose their participation under Treasury Regulation § 1.6011-4, the IRS can better gather information on the transactions and unravel those that are abusive. The IRS's identification of these transactions by notice is valid because (1) Congress excepted the IRS from using the Administrative Procedure Act's notice-and-comment rulemaking procedures when identifying listed transactions, and (2) the Notice is not arbitrary and capricious.

First, Treasury's identification of listed transactions by notice, as provided in Treasury Regulation § 1.6011-4, is authorized by statute and ratified by nearly two decades of congressional action and supervision. Congress closely followed the IRS's use of notices to identify listed transactions from the start. When taxpayers disregarded the reporting requirement, Congress enacted penalties and codified disclosure requirements in the American Jobs Creation Act of 2004 ("AJCA") to enforce compliance with Treasury's ongoing practice. As a result, a taxpayer who fails to disclose a listed transaction faces a variety of adverse consequences, including substantial monetary penalties and an extended statute of limitations.

Specifically, § 6707A, enacted through the AJCA, expressly references then-existing regulations prescribed under § 6011, showing Congress's incorporation of and intent to build on Treasury's existing notice-based disclosure framework. Plaintiff now asks the Court to conclude that when Congress enacted

this statute, it actually intended to do the *opposite*. When Congress referred to a pre-existing regulation to define what transactions taxpayers must report, Plaintiff claims it silently overruled that regulation. And so, Plaintiff's argument says, at the moment Congress created a stiff penalty for failing to report listed transactions, Congress eliminated the requirement to report any listed transactions the IRS had already defined by issuing a notice. That is not what Congress wanted – and it is not what Congress did. Although the Sixth Circuit recently concluded otherwise, *see Mann Constr., Inc., v. United States*, 27 F.4th 1138 (6th Cir. 2022), the United States respectfully submits that the evidence, including statutory text not considered by the *Mann Construction* court, compels the conclusion that Congress intended the IRS to continue to identify listed transactions by notice.

Second, Notice 2017-10 is not arbitrary and capricious. The IRS's concern with abusive conservation easement transactions is well-founded, as documented in the Administrative Record. Its decision to identify those transactions as listed transactions – which are subject to reporting requirements to facilitate detection of potential abuse – is rationally related to addressing that concern. Notice 2017-10 itself contains ample explanation to show that the IRS's decision is "within the bounds of reasoned decisionmaking." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983).

For the reasons below, the Court should enter judgment for the United States for both Counts I and II and uphold Notice 2017-10.[1]

DISCUSSION

I. Background

A. Response to statement of facts and clarification of review standard

Defendants move for judgment as a matter of law and on the Administrative Record that is before the Court. But the usual summary judgment standard does not apply in cases, like this one, involving review of final agency action under the APA because "the district judge sits as an appellate tribunal" and "[t]he 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.").

Because the Court is not tasked with resolving disputed factual issues, traditional statements of facts are typically irrelevant in this type of case. But as Green Rock has included a statement of facts, the United States responds here as appropriate to serve the purposes of this type of action. The United States objects

[1] If the Court does not rule for the United States on both Counts I and II, the United States requests the opportunity to submit additional briefing on the scope of any remedy Green Rock may have.

to Paragraphs 6 through 14 because they consist of Green Rock's descriptions and characterizations of the law, as well as some of their legal arguments. Those are not appropriate factual assertions, and they are addressed in the legal analysis below. Paragraphs 15 through 23 are descriptions and legal arguments based on the Administrative Record. The contents of the Administrative Record are not in dispute, but the United States challenges Green Rock's interpretation of the contents of the record, as discussed below. The United States does not contest the factual allegations of the remaining paragraphs.

Green Rock's brief also omits background information critical to the core legal dispute in this case. That context is set out in the next two sections.

B. Legislative and regulatory background

Congress is presumed to act with knowledge of existing regulations. *See, e.g.*, *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 256 (1835). Here, Congress didn't just know about Treasury Regulation § 1.6011-4. The statutory context leaves no doubt that Congress specifically relied on and incorporated those regulations when it passed the statute at the heart of this case.

By 2000, Treasury had unsuccessfully fought the swift-moving tax shelter industry for years, *see, e.g.*, U.S. Dep't of the Treas., *The Problem of Corporate Tax Shelters*, 59-60 (July 1999), and piecemeal legislation had proven unworkable, *id.* at 99. Using its authority under 26 U.S.C. § 6011(a), which allows it to

prescribe the information contained on returns and statements, Treasury issued the temporary and proposed regulations that launched the reportable transaction disclosure regime. 65 Fed. Reg. 11205-02 (March 2, 2000); 65 Fed. Reg. 11269-01 (March 2, 2000). Those regulations required taxpayers who participate in reportable transactions, including a sub-category of reportable transactions called "listed transactions," to disclose that participation to the IRS. Treasury finalized the regulation in March 2003, after issuing revised temporary and proposed regulations and providing a notice-and-comment period. 68 Fed. Reg. 10161-01 (March 4, 2003); Treas. Reg. § 1.6011-4 (2004).

The final regulation defines a listed transaction as one "that is the same as or substantially similar to one of the types of transactions that the [IRS] has determined to be a tax avoidance transaction and *identified by notice, regulation, or other form of published guidance*." *Id*. § 1.6011-4(b)(2) (emphasis added). Contemporaneously with the temporary and proposed regulation, the IRS issued Notice 2000-15, identifying the first ten listed transactions.[2] 2000-12 I.R.B. 826.

But "compliance with the regulations [was], to put it bluntly, a joke." *See* *Corporate Tax Shelters: Looking Under the Roof: Hearing Before the S. Comm. on*

[2] IRS Notices are a form of official guidance "[i]ssued without public notice and comment," typically issued "when the Service determines that a public concern requires a speedy response." Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 Tax Law 245, 257-58 (2020).

Fin., 107th Cong., 2 (2002) ("2002 SFC Hearing") (Statement of Sen. Baucus, Chair). Treasury had no way to compel taxpayers to comply. It thus asked Congress to pass legislation imposing a penalty for failure to disclose a reportable transaction or a listed transaction, along with various other provisions intended to give teeth to the notice-based designation regime. *See* U.S. Dep't of the Treas., Treasury Department's Enforcement Proposals for Abusive Tax Avoidance Transactions, 15 (2002).

The Senate Finance Committee ("Committee" or "SFC") held hearings on tax shelter abuse in March 2002 and October 2003 to evaluate the problem. *See* 2002 SFC Hearing; *Tax Shelters: Who's Buying, Who's Selling, and What's the Government Doing About It?: Hearing Before the S. Comm. on Fin.*, 108th Cong., (2003) ("2003 SFC Hearing"). The transcripts of these hearings and the materials produced for them demonstrate that the Committee members, as they developed Congress's response to the IRS's efforts, understood and approved of the fact that the IRS was identifying listed transactions by notice. The Joint Committee on Taxation and various Treasury officials explained to the Committee the IRS's process of identifying listed transactions by notice, and cited specific examples of transactions. *See* Staff of J. Comm. on Tax'n, 107th Cong., *Background and Present Law Relating to Tax Shelters*, 2002 WL 34255160, at *24 (Comm. Print 2002) ("When the Treasury Department and the IRS determine a transaction has a

tax avoidance purpose, a notice is issued informing taxpayers of the details of such transaction."); 2002 SFC Hearing at 7-10 (statement of B. John Williams, Chief Counsel, IRS) (describing three listing notices); 2003 SFC Hearing at 36-37 (statement of Mark W. Everson, Comm'r, IRS) (describing three different listing notices). Indeed, members of the Committee asked about and noted the number of transactions that had been identified by notice. 2002 SFC Hearing at 15 (question to Larry Langdon, Comm'r of LMBD, IRS); 2003 SFC Hearing at 32-33 (statement of Mike Brostek, Director, Strategic Issues, GAO).

IRS witnesses also highlighted the importance of early detection, and the role identification by notice played in that. 2002 SFC Hearing at 12 (statement of Larry Langdon, Comm'r of LMBD, IRS) ("[D]isclosure is the key to shutting down tax shelters. Timely notices have been our most cost-effective tool in stopping these transactions."); 2003 SFC Hearing at 196 (letter from Pamela Olson, Assistant Sec'y for Tax Policy, to Sen. Charles Grassley) ("The Treasury Department believes that the ability to 'list' a transaction has been one of the most important tools in the fight against abusive tax avoidance transactions.").

The Committee ultimately noted that "the Treasury Department, using the tools available, [had] issued regulations requiring disclosure of certain transactions and requiring organizers and promoters of tax-engineered transactions to maintain customer lists and make these lists available to the IRS." S. Rep. No. 108-192, at

90 (2004). Those regulations included Treasury Regulation § 1.6011-4. And as the Committee knew, the specific transactions the regulation required to be disclosed were identified in Internal Revenue Bulletin guidance (notices and revenue rulings) under that regulation. *See* IRS Notice 2004-67, 2004-2 C.B. 600 (identifying the more than 30 listed transactions as of September 24, 2004).

"Nevertheless," the Committee concluded, "additional legislation is needed to provide the Treasury Department with additional tools to assist its efforts to curtail abusive transactions," and a penalty for non-disclosure would "provide an additional incentive for taxpayers to satisfy their reporting obligations under the new disclosure provisions." S. Rep. No. 108-192, at 90. Congress thus enacted 26 U.S.C. § 6707A, penalizing failure to disclose a reportable transaction, including an enhanced penalty for non-disclosure of a listed transaction. *See* American Jobs Creation Act of 2004, § 811(a), Pub. L. No. 108-357, 118 Stat. 1418, 1575. That law is at the heart of this case.

Section 6707A(c)(1) defines a "reportable transaction" as a transaction "with respect to which information is required to be included with a return or statement because, *as determined under regulations prescribed under section 6011*, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion." (Emphasis added.) Section 6707A(c)(2) defines "listed transaction" as "a reportable transaction" that is the same as or similar to "a

transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011." Along with § 6707A, other provisions in the AJCA support and enhance the IRS's efforts under its existing disclosure framework.

As explained in Part II below, the text and context of the statute establish beyond peradventure that Congress adopted and incorporated Treasury's practice of designating listed transactions by notice. And in late 2016, Treasury added syndicated conservation easement transactions to the list of listed transactions. Notice 2017-10, *Listing Notice – Syndicated Conservation Easement Transactions*, 2017-4 I.R.B. 544 (the "Notice").

C. Issuance of Notice 2017-10

Taxpayers who protect land in perpetuity by donating a qualifying conservation easement can claim a federal income tax deduction. 26 U.S.C. § 170(b)(1)(E), (h). Although the tax deduction for conservation easement donations exists for a noble purpose, syndicated conservation easement schemes exploit and abuse it. *See* ECF No. 17, Administrative Record ("AR") 593-97; 602-61. Under these schemes, a promoter typically markets and sells ownership interests in a tract of land to wealthy investors with the claim that the investors will receive tax deductions far greater than the amount of their contributions. AR510. The promoters "syndicate" the investors' ownership interests through a partnership or other pass-through entity created to hold title to the land on which the

conservation easement is to be donated. The promoters often obtain an appraisal that inflates the property's value based on unreasonable factual assumptions and conclusions about the development potential of the property. The entity then donates a conservation easement on the land. The resulting charitable deduction, representing the difference between the inflated appraisal and the reduced value of the encumbered land, passes through the entity to be allocated among the entity's investors. This results in "exaggerated tax benefits to the investors that are worth significantly more than the investors' initial investments." AR511.

The IRS determined that it needed to gather information about these transactions to identify them more quickly and to better direct its enforcement efforts. Thus, it issued the Notice, designating certain syndicated easement transactions as listed transactions. Accordingly, there are disclosure obligations for participants, *see* § 6011; Treas. Reg § 1.6011-4, as well as disclosure and recordkeeping obligations for material advisors, § 6111, to these transactions.

II. Congress authorized the IRS to identify listed transactions without notice-and-comment rulemaking.

In enacting the AJCA, Congress built on the existing transaction-reporting framework already used by the IRS. The plain text of the statute shows Congress incorporated the existing disclosure framework set forth in Treasury Regulation § 1.6011-4: the statute expressly references "regulations prescribed under section 6011" and adopts the "reportable transaction" and "listed transaction" terminology

used in the regulations. 26 U.S.C. § 6707A(c). In doing so, Congress excepted the identification of listed transactions from the APA. Congress's intent is confirmed in other sections of the AJCA, which complement and depend on the disclosure framework and are written specifically to encompass transactions identified by notice before the AJCA was enacted. Notice 2017-10 did not require notice-and-comment procedures under the APA. It was validly issued.

Green Rock disagrees and supposes that § 6707A(c)(1) means that the IRS may define listed transactions only through new regulations. This interpretation is wrong because it fails to give effect to all the words used in the statute. Moreover, it would lead to the absurd conclusion that Congress, in seeking to bolster an existing regulatory regime by penalizing taxpayers who failed to comply with it, simultaneously invalidated that entire regime. The United States' interpretation of the statute is the only reasonable one. And if there is any ambiguity in the statute, the legislative history conclusively resolves it in the United States' favor.

A. Congress can authorize agencies to promulgate rules using procedures other than those outlined in the APA.

Congress has the power to determine the procedures by which agencies promulgate rules. The APA generally requires notice-and-comment rulemaking. *See* 5 U.S.C. § 553. In that process, the public is given an opportunity to comment on a proposed version of a rule and the agency considers comments before it releases the final version. *Id*. This can be lengthy, and is not a one-size-fits-all

approach suited for every type of agency rule. Congress can modify the APA's requirements in later statutes and provide for alternative procedures better suited for the specific agency action, as long as it "does so expressly." *Id.* § 559.

Notwithstanding the APA's statement that exceptions to its procedures must be made "expressly," the Supreme Court has "long recognized" that such a law "creates what is in effect a less demanding interpretive requirement" – a "background principle of interpretation." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). A later Congress "remains free to repeal the earlier statute," to modify its reach, or to exempt a new statute from the earlier one's reach, and "to express any such intention either expressly or by implication as it chooses." *Id.*

For this reason, Congress is not required "to employ magical passwords in order to effectuate an exemption" from notice-and-comment rulemaking. *See Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Although Congress must make its intent to alter the prior legislation clear, "the Court has described the necessary indicia of congressional intent by the terms 'necessary implication,' 'clear implication,' and 'fair implication,' phrases it has used interchangeably." *Dorsey*, 567 U.S. at 274 (citations omitted); *see also Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (notice-and-comment rulemaking not required where "Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm").

Thus, an agency need not follow APA procedures if Congress has shown its intention that the agency use some other procedure, whether expressly or by "fair implication." *Dorsey*, 567 U.S. at 274.

B. The plain text of § 6707A expressly adopted the existing Treasury Regulation authorizing the IRS to identify listed transactions by notice.

Construing a statute is a "holistic endeavor," and the entirety of a statutory scheme can lend context to clarify the meaning of a provision. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Here, the text of § 6707A and the overall statutory scheme leave no doubt. Congress relied on and ratified the IRS's practice of identifying listed transactions by notice, and intended for that practice to continue.

In § 6707A, Congress expressly defined reportable transactions by reference to the existing Treasury regulations under § 6011:

> The term "reportable transaction" means any transaction with respect to which information is required to be included with a return or statement because, ***as determined under regulations prescribed under section 6011***, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion.

§ 6707A(c)(1) (emphasis added). In the next provision, Congress defined "listed transactions" as a subset of "reportable transactions" – those "specifically identified by the Secretary as a tax avoidance transaction." § 6707A(c)(2).

The core of both definitions – indeed, the concepts of reportable and listed transactions – were drawn from existing regulations issued under 26 U.S.C. § 6011: Treasury Regulation § 1.6011-4(b)(1) and (b)(2) (2003), respectively. And those regulations themselves referred to designations of listed transactions by notice. Treasury Regulation § 1.6011-4(b)(2) defined a listed transaction as one that is the same or substantially similar to one the IRS "has determined to be a tax avoidance transaction and ***identified by notice***, regulation, or other form of published guidance as a listed transaction." (Emphasis added.) It makes sense for Congress to refer to Treasury Regulation § 1.6011-4 because that regulation sets forth the reporting requirements for which the § 6707A penalty applies.

This language is not just a reference in passing without purpose. The text of § 6707A(c)(1) shows Congress's intent to incorporate the existing process by which the IRS identified reportable transactions, including listed transactions. The prefatory phrase "as determined" refers to the manner or method of determination. In the context here, the most relevant meaning of the adverb "as" is "in the manner in which." *See* Black's Law Dictionary 113 (6th ed. 1997); *see also As*, Merriam-Webster.com. In the next part of the phrase, *i.e.*, "under regulations prescribed under section 6011," Congress revealed where to find the manner of determination. Congress's direction to look to the regulations under § 6011 incorporated the regulations that existed at the time.

The phrase "as determined under regulations prescribed under section 6011" is a highly specific one. It stands in contrast to other places, even in the AJCA and dealing with the same subject matter, where Congress used more general language to authorize the Secretary to issue new regulations. *See* AJCA § 815(a), 118 Stat. at 1582 (codified at 26 U.S.C. § 6111(c)) ("The Secretary may prescribe regulations which provide . . . ."). In § 6707A(c)(1), Congress referred to regulations "prescribed under section 6011," not merely to regulations "prescribed by the Secretary." Congress was so specific in referring to § 6011 because it was pointing to the regulations ***already*** "prescribed under section 6011": Treasury Regulation § 1.6011-4, which created the disclosure framework. Green Rock's reading of the statute does not account for that specificity. Indeed, it reads it out of the law altogether. The text and legislative context, working together, irrefutably show that Congress relied on Treasury Regulation § 1.6011-4 in framing § 6707A(c)(1), and viewed the Regulation's provisions as valid. Thus, Congress's reference gave the IRS the green light to keep identifying transactions as described in that regulation.

Congress used the word "determine" a second time in § 6707A(c)(1): a reportable transaction is one "of a type which the Secretary *determines* as having a potential for tax avoidance or evasion." The same word, used twice in close proximity, should have the same meaning. *See, e.g.*, *Env. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). And it does. In this second use, Congress

highlighted the Secretary's discretion in deciding what transactions should be reportable. Both uses of "determine" concern elements of Treasury's discretion: the first use covers the process, and the second covers the substance. Coming just after the specific reference to "regulations under section 6011," this aspect of § 6707A(c)(1) recognizes and approves the categories of reportable transaction the Secretary set out in Treasury Regulation § 1.6011-4(b).

Similarly, the definition of "listed transaction" in § 6707A(c)(2) incorporates the definition of "reportable transaction," but those "specifically identified by the Secretary as a tax avoidance transaction." Congress knew that the Secretary had already made specific identifications. And the mechanism for doing so was by notice. *See* Treas. Reg. § 1.6011-4(b)(2). Thus, Congress did not just incorporate the regulation; it recognized and incorporated the Secretary's ability to issue notices to identify listed transactions, including those that had already been issued.

C. The statutory text of other AJCA provisions makes clear that Congress viewed the existing listed transaction notices and regulation as valid.

Other provisions of the AJCA confirm that Congress adopted and ratified the IRS's notice-based process for designating listed transactions because they implicitly rely on the fact that the IRS had already done so. If those notices were invalid, Congress passed dead letters. The Court should avoid a reading of the AJCA that renders its provisions nullities. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88,

101 (2004) (citing rule against superfluities). And if the pre-AJCA notices were validly issued, it means Congress approved listing transactions by notice.

To encourage taxpayers who were participating in listed transactions to disclose them, Congress held open the statute of limitations for assessing a tax deficiency until one year after the taxpayer's participation was disclosed. *See* AJCA § 814(a), 118 Stat. at 1581 (codified at 26 U.S.C. § 6501(c)(10)). Congress made this new provision effective for tax years with an open statute of limitations on October 22, 2004, the date the AJCA was enacted. *See id*. § 814(b), 118 Stat. at 1581. In other words, Congress gave the IRS more time to assess tax against taxpayers who had failed to comply with the IRS's listed transaction disclosure requirements before October 22, 2004. If Congress believed the existing notices identifying listed transactions were invalid, then there would have been no listed transactions to which § 6501(c)(10) could apply when AJCA was enacted. Indeed, the Tax Court applied § 6501(c)(10) to uphold the timeliness of a § 6707A penalty for failure to disclose a pre-AJCA transaction. *Blak Invs. v. Commissioner*, 133 T.C. 431 (2009). In doing so, it found that § 6707A "does not alter the definition of reportable transaction or listed transaction," holding that the term "listed transaction" as used in § 6707A is the pre-existing regulatory definition. *Id*. at 441.

Congress also decided to increase the cost for taxpayers who underpay tax due to a listed transaction – regardless of whether they comply with the IRS's

disclosure rules. Ordinarily, 26 U.S.C. § 6404(g) suspends the accrual of interest on a taxpayer's liability if the IRS fails to notify the taxpayer of the taxpayer's liability within a certain time. But exceptions apply, such as for fraud, gross misstatements, or criminal penalties. In the AJCA, Congress created a new exception to the suspension rule for listed transactions. AJCA § 903(c), 118 Stat. at 1652 (codified at 26 U.S.C. § 6404(g)(2)(E)). As a result, interest continues to accrue on a tax liability relating to a listed transaction no matter how long it takes for the IRS to notify the taxpayer of that liability. Again, the effective date Congress crafted for this provision shows that Congress's target included taxpayers who had *already* participated in listed transactions identified by notice – the new exception applies with respect to interest accruing after October 3, 2004. *Id.* § 903(d)(2), 118 Stat. at 1652. Congress specifically made that effective date different from – and generally earlier than – the effective date for its other changes to the interest suspension rules. *See id.* § 903(d)(1), (2), 118 Stat. at 1652. If the existing listing notices were invalid, no taxpayers could have any liability with respect to a listed transaction as of October 3, 2004. Again, the Court should not construe the statute to create a nullity.

D. The context and legislative history of the AJCA and later statutes reinforces Congress's intent to allow identification by notice.

The text of § 6707A(c), taken together with § 6501 and § 6404, is clear: Congress blessed and adopted the IRS's designation of listed transactions by

notice. But if the Court thinks that Green Rock's interpretation is reasonable, that means only that the statute is ambiguous – and the legislative history conclusively resolves any ambiguity in the United States' favor. *See United States v. Pringle*, 350 F.3d 1172, 1180 n.11 (11th Cir. 2003) ("When a statute is vague or ambiguous, other interpretative tools may be used, including an examination of the act's purpose and of its legislative history."). The hearing transcripts and committee reports for the AJCA show Congress was aware of, endorsed, and built upon the existing reportable transaction disclosure framework, and subsequent statutory enactments show continued ratification of it.

1. *Congress passed § 6707A to give teeth to the IRS's efforts to detect and prevent tax avoidance transactions, not to undermine the IRS's existing efforts.*

If there is any ambiguity as to whether Congress intended to ratify or repeal Treasury's then-existing efforts to force disclosure of tax shelters, the legislative history conclusively resolves it in favor of ratification. In passing the AJCA, Congress responded to the IRS's request to enhance the efficacy of its existing disclosure process, as detailed above. *See supra* Part I.B. There can be no question that Congress understood that the IRS had identified dozens of listed transactions by notice, and that the notice-based procedure helped the IRS to act quickly in identifying tax avoidance transactions because of the fast-moving nature of the tax shelter industry. The IRS emphasized to Congress on multiple occasions that

identifying transactions by notice was key to detecting abusive transactions early and timely informing the public of which transactions to avoid. *See supra* Part I.B.

Congress's awareness reveals more than mere passive acquiescence. Rather, Congress actively monitored the IRS's efforts and noted that more action was needed to strengthen their efficacy. *See* 2002 SFC Hearing at 15; S. Rep. No. 108-192, at 90. Congress's assessment of the purpose and performance of the IRS's disclosure framework shaped its action in the AJCA. Indeed, the committee reports state Congress's intent to provide the IRS with a firmer foundation for the disclosure framework, not to pull the rug out from under its efforts by invalidating what it had done. *See* S. Rep. No. 108-192, at 90; H.R. Rep. No. 108-548, at 261.

The legislative history also confirms that the amendment to § 6501(c)(10) stemmed from a concern that taxpayers had not been disclosing their participation in listed transactions in the hope that the IRS would not find them until after the statute of limitations had run. *See* H.R Rep. No. 108-548, pt. 1, at 267 (2004). Section 6501(c)(10) was designed to close the loophole, as the House Report notes. "The Committee . . . believes that it is appropriate to extend the statute of limitations for unreported listed transactions." *Id*. Congress designed the amendment with a specific eye towards addressing participants of transactions already identified by notice. *See Blak Invs.*, 133 T.C. at 442 (*citing* Press Release, Senator Charles Grassley, *Details of Plans to Ensure Continued "Son of Boss"*

Enforcement (July 23, 2004)). Yet Green Rock would have this Court hold, against all evidence and reason, that what Congress actually did was give those taxpayers a get-out-of-jail-free card by *eliminating* the disclosure requirements for participants of all transactions already identified in the IRS's listing notices. If Congress had thought the IRS's method of identifying transactions before the AJCA was invalid, it would not have enacted, without reservation, provisions that applied to transactions identified through that process.

2. *Subsequent statutory enactments relating to listed transactions left the IRS's identification process unchanged.*

Congress's post-AJCA actions underscore its approval of the IRS's identification procedure. A year after the AJCA, Congress expanded the suspension-of-interest exception in § 6404(g), *see supra* Part II.C, to interest accruing ***before*** the date of the AJCA's enactment. *See* Gulf Opportunity Zone Act of 2005 ("GOZA") § 303(a)(1), Pub. L. 109-135 (amending § 903(d)(2) of the AJCA retroactively as if included in the AJCA). Congress also provided that the interest rule would not apply to taxpayers that participated in an IRS settlement initiative for listed transactions. The GOZA specifically referred to IRS Announcement 2005-80, which described the settlement initiative and identified 16 listed transactions as covered. These backward-looking provisions would have served no purpose if the IRS's regulation and listing notices were invalid.

Then, in 2006, Congress enacted 26 U.S.C. § 4965, which imposes an additional tax on nonprofit organizations that participate in listed transactions. *See* Tax Increase Prevention and Reconciliation Act of 2005, § 516, Pub. L. No. 109-222, 120 Stat. 345, 368 (2006). Again, Congress passed this law knowing that the IRS was, under Treasury Regulation § 1.6011-4, identifying listed transactions by "notice, regulation, or other form of published guidance." H.R. Rep. No. 109-455, at 125 (2006) (Conf. Rep.). That Congress again legislated against the backdrop of Treasury Regulation § 1.6011-4, and that the legislation would have an effect only if the regulatory scheme for identifying listed transactions was valid, "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent." *See Boeing Co. v. United States*, 537 U.S. 437, 457 (2003) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

In 2010, Congress amended § 6707A to revise the penalties against taxpayers that fail to report their participation in a listed transaction. *See* Small Business Jobs Act of 2010, § 2041(a), Pub. L. No. 111-240, 124 Stat. 2504, 2560 (2010). In doing so, Congress left unchanged § 6707A's definition of reportable and listed transactions, as well as Treasury Regulation § 1.6011-4's procedure of identifying listed transactions by notice. As was the case six years earlier when Congress first enacted § 6707A, almost all listed transactions identified at the time of the amendment were in notices and none were identified following notice and

comment. *See* Notice 2009-59, 2009-2 C.B. 170, (July 15, 2009). Congress amended § 6707A without modifying its reliance on Treasury Regulation § 1.6011-4, showing Congress adopted the Treasury Department's continuing interpretation of § 6707A(c) that permitted it to designate listed transactions by notice. *See Lorillard*, 434 U.S. at 580-81 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

These later statutes, like the AJCA's creation of § 6707A itself, show Congress's approval of the IRS's method of identifying reportable transactions. Congress meant the penalty for nonprofits participating in listed transactions in § 4965 and the heightened penalties under § 6707A to apply to transactions that had already been identified as "listed transactions," which happened by notice. If Congress had wished listed transactions to be identified solely by notice-and-comment, it could have made that correction in any of these laws rather than continuing to bolster Treasury's existing framework. This conclusion is reinforced by the well-settled rule that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 561 (1991)); *see also Sewards v. Commissioner*, 785 F.3d 1331, 1335 (9th Cir. 2015) (applying

Cottage Savings); *Oakbrook Land Holdings, LLC v. Commissioner*, 28 F. 4th 700, 719 (6th Cir. 2022) (same); *McCoy v. United States*, 802 F.2d 762, 766 (4th Cir. 1986) (holding that administrative interpretations of statutory provisions that have been reenacted by Congress without substantial change are given the force and effect of law).

3. *Congress's reference to and reliance on Notice 2017-10 further confirms its intent to except the identification of listed transactions from notice-and-comment rulemaking.*

For the last 15 years, Congress has not only left undisturbed Treasury Regulation § 1.6011-4's procedure of allowing the IRS to identify listed transactions by notice. It has closely monitored and relied on the IRS's use of that procedure, particularly in the context of syndicated conservation easements. In March 2019, the Senate Finance Committee launched an investigation of syndicated conservation easement transactions. Press Release, S. Fin. Comm., *Grassley, Wyden Launch Probe of Conservation Tax Benefit Abuse*, (March 27, 2019). Congress asked the IRS Commissioner detailed questions about disclosures the IRS had received under the Notice and requested analysis of that information. Letter from Charles P. Rettig, Commissioner of the IRS, to Charles Grassley, Chairman, Sen. Fin. Comm., 2-7 (Feb. 12, 2020) (responding to SFC's questions). Based on the information gathered in this investigation, Committee Chairman Grassley and Ranking Member Wyden concluded, "the IRS has strong reason for

taking enforcement action against syndicated conservation-easement transactions, *as it has to date*" and that "Congress, the IRS and the Treasury Department … should take further action to preserve the integrity of the conservation-easement tax deduction." Press Release, S. Fin. Comm., *Finance Committee Releases Report on Syndicated Conservation-Easement Transactions*, (August 25, 2020) (emphasis added); *see also* Staff of S. Comm. on Fin., 116th Cong., *Rep. on Syndicated Conservation-Easement Transactions*, 44 (Comm. Print 2020).

This shows that the designation process is functioning as Congress intended. It allows the IRS to detect and gather information about abusive transactions quickly and share with Congress the information obtained; it also allows Congress to use the information to consider further action. Congress repeatedly requested updates about taxpayers' self-reporting of their participation in listed transactions generally, and conservation easements in particular, without criticizing or modifying the way the IRS gathered those reports. That's because Congress intended the IRS to gather them that way.

The only fair implication to draw from Congress's repeated actions over nearly twenty years is that Congress intended the IRS to identify listed transactions by notice. That procedure differs from the APA's notice-and-comment requirements. Thus, Congress intended to except the designation of listed transactions from those procedures. *Cf. Asiana Airlines*, 134 F.3d at 397.

E. *Mann Construction* was wrongly decided.

We recognize the Sixth Circuit decided otherwise in *Mann Construction*, but respectfully submit that the case is non-binding and was wrongly decided. Its analysis is flawed because it uses too narrow a lens to search for Congress's intent. It also did not consider the significance of statutory text from *other* parts of the AJCA (besides § 6707A) and other legislation showing Congress viewed listed-transaction notices, and the authorizing regulation, as valid. And while the Sixth Circuit considered § 6707A, it failed to give meaning to all aspects of that section, as well as the regulatory background against which Congress was legislating.

To start, the Sixth Circuit did not consider the effective date provisions for AJCA's amendments to §§ 6501 and 6404, which are predicated on the validity of the IRS's regulation and listing notices.[3] It also did not consider the significance of the many listing notices that the IRS had issued before the AJCA's enactment, or the absurdity of concluding that when Congress passed the AJCA, it invalidated all those notices. Congress would not have taken numerous steps to bolster the IRS's regulation and listing notices unless it viewed them as valid. *See supra* Part II.C.

[3] Indeed, the Sixth Circuit did not consider the effect of Congress's changes in §§ 6501(c)(10) and 6404(g) at all. To be fair, the United States focused its argument in that case on § 6707A and did not bring the significance of those other statutes to the Sixth Circuit's attention. But we make clear now: invalidating the IRS's notice procedure would also invalidate other provisions of the AJCA. Congress did not intend that result, and the Court should avoid it.

Short of "magical passwords," which the Sixth Circuit acknowledged are not required, it is hard to imagine stronger evidence of Congress's intent.

The Sixth Circuit also failed to give meaning to all portions of § 6707A itself. While it recognized that Congress's cross-reference in § 6707A(c)(1) to Treasury Regulation § 1.6011-4 is "probative of whether Congress was aware" of the IRS's notice-based designation, it failed to recognize what that "aware[ness]" meant. *Mann Constr.,* 27 F.4th at 1146. It makes no sense for Congress to incorporate that regulation by reference into the statute, without modification, if it did not intend to incorporate and endorse one of its most fundamental provisions.

The Sixth Circuit wrongly discounts the significance of the reference to the existing regulations because it says the "statute's key feature is to describe the types of transactions." *Id*. (internal quotations omitted). But a court's role is not to determine which features of a statute are "key" versus ancillary; it is to give effect to all text included by Congress in a statute. Indeed, a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted). Furthermore, the Sixth Circuit missed that § 6707A(c) defines the "types of transactions" by referring to the *process* of determination – the two are intrinsically tied together.

In ignoring the only "fair implication" of the statutory text, *Mann Construction* goes beyond requiring a "clear" exemption from the APA's procedures. Its reasoning would, under the circumstances of this case, require Congress to repeat what it already said in referring to the regulation. In other words, in addition to incorporating the regulation, the Sixth Circuit would require Congress to say, "and we specifically mean also by notice." The decision defies the Supreme Court's admonition in *Dorsey*, 567 U.S. at 274, that a later Congress is always free to modify a statute implicitly, and is akin to requiring the "magical passwords" the *Marcello* Court deemed unnecessary. 349 U.S. at 310.

The Sixth Circuit's narrow lens caused it to fundamentally misapprehend the case. At one point, the Sixth Circuit suggested that "Congress's 'mere acquiescence' to the IRS's non-conforming practices over the years" did not suffice to show an exemption from the APA. *Mann Constr.*, 27 F.4th at 1147. But the AJCA and subsequent legislation are not "mere acquiescence." Congress used the IRS's regulation and listing notices, in multiple contexts, as the very foundation of the legislation it enacted to combat tax shelters. Congress understood the regulatory background it was legislating within, and it crafted a statute that incorporated both the process and the substance of the IRS's practices.

In enacting the AJCA, Congress legislated to put teeth into the regulatory tax shelter disclosure regime already created by Treasury. In doing so, it adopted and

ratified that regime's procedures, excepting it from the APA. This Court should not follow *Mann Construction's* contrary conclusion.

III. Notice 2017-10 is a valid, reasonable response to years of abusive syndicated conservation easement transactions.

A. The arbitrary and capricious standard of review is exceedingly deferential towards agency action.

Although the APA allows a court to set aside agency action that is "arbitrary and capricious," 5 U.S.C. § 706(2)(A), that standard "is exceedingly deferential" towards agency action, *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). Under that standard, the Court should only set aside agency action in the limited circumstances when it finds the agency: (1) relied on factors Congress did not intend for it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its action that runs counter to the evidence before the agency; or (4) offered an explanation "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This inquiry focuses on whether the agency examined "the relevant data" and articulated "a satisfactory explanation" for its decision, "including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotations omitted); *see also Dep't of Com. v. New York*, 588 U.S. ___, 139 S. Ct. 2551, 2578 (2019).

In the APA, Congress directed courts to evaluate agency action upon "the whole record or those parts of it cited by a party." 5 U.S.C. § 706; *see also Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971) (holding judicial review is based on the "full administrative record that was before [the agency] at the time [it] made [its] decision"), *abrogated on other grounds by Califano v. Saunders*, 430 U.S. 99 (1977). The record need only show the agency "engaged substantively with the question" at hand and adequately explained the reasoning supporting its conclusion. *Air Transp. Ass'n of America, Inc. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 32 (D.D.C. 2010).

The Court should uphold a "decision [of] less than ideal clarity… if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004); s*ee also Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The question is whether the agency's decision is "within the bounds of reasoned decision making." *Balt. Gas & Elec. Co.*, 462 U.S. at 105. An agency need not act with "pinpoint precision" as long as the solution relates to the underlying concern. *New Jersey v. EPA*, 989 F.3d 1038, 1051 (D.C. Cir. 2021). "As long as a reasonable basis appears for [the] decision, it must be upheld as not being arbitrary and capricious, even if there is evidence that would support a contrary decision." *Jett v. Blue Cross & Blue Shield of Ala., Inc.*, 890 F.2d 1137, 1140 (11th Cir. 1989). The Court should not "become

a superagency that can supplant the agency's expert decision maker." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976).

B. Notice 2017-10 is a reasoned response to combat the pervasive abuse of syndicated conservation easement transactions.

Deductions related to the donation of conservation easements have amounted to billions of dollars of tax savings to those claiming them. AR591, 594, 657. The IRS has long wrestled with abusive tactics that attempt to take unfair advantage of that type of deduction. AR431-581. Notice 2017-10 aimed to thwart the spread of this abuse. Syndicated conservation easements rely on "hyperinflated conservation donations as a tool for selling bogus federal tax deductions to wealthy investors." AR656. Before issuing the Notice, the IRS – and the conservation community – knew that the IRS's existing enforcement efforts were woefully inadequate. AR586. Commentators characterized the IRS as "outnumbered, outgunned, and [lacking] the audit capacity to stop those transactions." AR584. Members of the conservation community called on the IRS to take action to prevent continued abuse that would "substantially undermine" legitimate land conservation efforts. AR656.

The IRS issued the Notice to address these concerns. Exercising the broad scope of discretion authorized by Congress in § 6707A,[4] the IRS drew on years of case studies of abusive syndicated conservation easement transactions; experience litigating artificially inflated conservation easement deductions in court; and dialogue with stakeholders in the conservation community. The cases cited in the Administrative Record highlight the IRS's difficulty obtaining information related to syndicated conservation easement transactions before the Notice and the need for more streamlined reporting. AR11-32. The case studies and promotional materials show the nature of abuse and the inflated deductions within these transactions to be addressed by the Notice. AR677-765. The correspondence and articles in the record from members of the conservation community – on top of showing the public call for agency action to address the problem – show the IRS considered the perspectives of stakeholders in shaping the scope of the Notice. AR427-676; 766-805. In October 2016, the IRS previewed forthcoming guidance on § 170(h), and that the most likely outcome was a notice designating certain conservation easements donations as "listed transactions." AR777. Following that announcement, the IRS considered additional views from the impacted community,

[4] As Congress observed, § 6707A "does not define the terms 'listed transaction' or 'reportable transaction,'" but instead "authorizes the Treasury Department to define [those terms] under section 6011." H.R. Rep. No. 108-755, at 582-84 (Conf. Rep.) (2004); *see also* H.R. Rep. No. 108-548, pt. 1, at 261-62 (Conf. Rep.).

including support for and critiques of the listed transaction designation.[5] AR675, 777. Thus, the Administrative Record shows that the IRS took a holistic look at all aspects of the issue and "engaged substantively with the question" before releasing the Notice in its final form. *Air Transp.*, 719 F. Supp. 2d at 32.

The Notice was a solution tailored to address the issue before the IRS. The Notice states that the Treasury and IRS are "aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested." As discussed above, the Administrative Record demonstrates how the IRS learned of these schemes. The Notice provides a background description supported by the Administrative Record explaining why syndicated conservation easement transactions carry a high risk of abuse when bogus appraisals greatly inflate the value of the donated land. AR2-3. It also connects that description to the IRS's rationale for subjecting these transactions to more reporting requirements by designating them as listed transactions by explaining that the IRS "intends to challenge the purported tax benefits" flowing from "the overvaluation of the conservation easement." AR2.

[5] While the IRS was not required to engage in formal notice-and-comment procedures, the fact the IRS considered views of outside stakeholders supports the reasonable basis for its actions.

By requiring participants and material advisors to disclose their involvement in syndicated conservation easements, the IRS can more easily detect and challenge abusive transactions. Indeed, a central purpose of the listed transaction disclosure regime is to allow the IRS to gather information. Issuing the Notice was a reasonable way to address the problem the IRS considered, even if it were not the only option available. *State Farm*, 463 U.S. at 43. The purpose of "arbitrary and capricious" review is not to "inject[] the judge into day-to-day agency management" to make policy choices of the best solution to a problem, but to determine whether the agency had a reasonable basis for its decision. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66–67 (2004). The Notice provides sufficient description so that the path from the information considered to the IRS's decision can "reasonably be discerned," and is therefore not arbitrary and capricious. *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 497.

C. Green Rock's challenges do not show Notice 2017-10 is arbitrary and capricious.

Green Rock's challenges to the Notice are meritless. They amount to a request to this Court to usurp the discretion of the Commissioner of the IRS and engage in drafting exercises and policy decisions. The Court should deny that request. The United States responds to Green Rock's six specific challenges as follows:

1. Green Rock repeats its erroneous assertion that the Notice was not issued in accordance with the law for lack of notice and comment. ECF No. 22 at 16. As discussed above in Part II, the IRS issued the Notice under an alternative procedure authorized by Congress, which did not require notice and comment.

2. Green Rock erroneously contends the Notice does not identify any facts or data supporting the IRS's determination. ECF No. 22 at 16. The Notice explains how syndicated conservation easement transactions are used to avoid tax. It describes how promoters lure investors with advertisements that they can receive tax deductions two and one-half times the amount of the investment. AR2. To do so, the Notice explains, the promoters obtain a bogus appraisal that inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property, resulting in inflated tax deductions. AR2. This language is not conclusory, but descriptive of the problem shown in the Record and addressed through the Notice. The Notice also explains that the IRS intends to challenge the purported tax benefits of these transactions based on the overvaluation. AR3. This shows a sufficient description of the problem, tied to the final choice made by the IRS under arbitrary and capricious review.

3. Green Rock erroneously contends that the Notice "restricts conservation easements that Congress wanted to incentivize, without grappling with that fact or considering obvious alternatives." ECF No. 22 at 17. In 26 U.S.C.

§170(h), Congress intended to promote land conservation, not scam investment schemes and improperly inflated tax deductions. Moreover, nothing in the Notice prevents a taxpayer from donating a conservation easement on land for a charitable purpose, including in a syndicated transaction; they just must inform the IRS. Participants merely must adhere to the disclosure requirements of Treasury Regulation § 1.6011-4, and the Notice announces the IRS's intent to challenge the deductions on other bases, such as overly inflated property valuation. And the IRS could reasonably decide that even if the Notice occasionally required taxpayers to report wholly valid transactions, it would be worth it to ensure that most or all abusive transactions were also captured. "Regulation, like legislation, often requires drawing lines." *Mayo Found. v. United States*, 562 U.S. 44, 59 (2011).

In reaching this solution, the IRS considered the consequences of designating syndicated conservation easement transactions as listed transactions and other alternatives. *See* AR675, 777, 786, 782. That the IRS chose this action while other options may have been available is irrelevant in the arbitrary and capricious analysis. *Jett*, 890 F.2d at 1140.

4. Green Rock erroneously argues that "Notice 2017-10 made the reporting and recordkeeping requirements retroactive … without any explanation or justification." ECF No. 22 at 18. The Notice did not create retroactive requirements. Material advisors did not have disclosure obligations under Treas.

Reg. § 301.6111-3 and § 301.6112 until after December 23, 2016, when the Notice was released.[6] Then material advisors had a future obligation to disclose advice given with regard to transactions that occurred before the effective date of the Notice. This requirement stems from Treas. Reg. § 1.6011-4(e), however, not the Notice. And imposing a future obligation to disclose transactions that occurred in the past is not creating a retroactive recordkeeping requirement – the requirement is entirely prospective.

In any event, the Notice adequately explains the justification for including transactions that occurred before the Notice was issued. As the Notice explains, at least some syndicated conservation easement transactions are tax avoidance transactions, and the IRS intends to challenge the resulting tax benefits when appropriate. The nature of these transactions is abusive no matter when they occurred. By including syndicated conservation easement transactions in which taxpayers participated and material advisors advised in the past, the Notice ensured that participants in these transactions would be treated similarly regardless of the date of their participation.

Material advisors must file their disclosure statement so that the IRS is aware they provided advice and can follow up with a request for a client list.

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[6] In fact, the IRS repeatedly extended the time for material advisors to disclose involvement in any applicable past transactions. *See* IRS Notice 2017-29, 2017-20 I.R.B. 1243; IRS Notice 2017-58, 2017-42 I.R.B. 326.

Material advisors must maintain lists of their clients going back 6 years to allow the IRS to detect and respond to past participation in transactions, which it can do so long as the assessment period of limitations has not expired. The January 1, 2010, date identified in the Notice is directly in line with this goal because it captures years for which the assessment window is most likely to still be open, as the period for assessment of taxes can, in some instances, be extended up to six years. 26 U.S.C. § 6501. Thus, the Notice is not arbitrary and capricious for including years before its effective date because the path from the IRS's selection of these years to its stated goal is easily discernable.

5. Green Rock also challenges the IRS's determination that transactions promoting a share of a charitable contribution deduction of 2.5 times the amount of the investor's investment are most likely to be abusive tax-avoidance schemes subject to challenge. ECF No. 22 at 18. This amount reflects the IRS's intent to capture the most inflated land valuations, grounded in the IRS's experience challenging those valuations and supported by the materials in the Administrative Record. The 2.5 number was not plucked out of thin air but was based on the analysis of the Land Trust Alliance – representing its 950-member land trusts and their 6.4 million supporters nationwide – suggesting that this was the approximate break-even point for the promoter in attracting investors to tax avoidance schemes. AR785. The APA does not require the IRS to act with such

precision as to divine the exact percentage of inflated valuation that makes a transaction abusive, as long as its ultimate choice is grounded in the record, as it is here. *See, e.g.*, *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (noting that the Court is "generally unwilling to review line-drawing" by agencies unless the lines drawn are "patently unreasonable."). Nor can the Court "supplant the agency's expert decision maker" in its review under the arbitrary-and-capricious standard. *Ethyl Corp.*, 541 F.2d at 36. The IRS's goal was not to find the definitive threshold of when a transaction becomes a definite violation, but to identify transactions that warrant further scrutiny. Thus, because there is a "rational connection between the facts found and the choice made," the IRS's decision to set a 2.5-times-investment threshold is not arbitrary and capricious. *State Farm*, 463 U.S. at 43.

6. Green Rock erroneously contends the Notice is arbitrary and capricious for failing to define some terms, including "substantially similar" transactions and "promotional materials." ECF No. 22 at 21. But this case is unlike *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201-02 (10th Cir. 2001), the case on which Green Rock relies. In *Qwest*, the terms were "inadequate to enable appellate review . . . and, if accepted, would provide only a circular argument in support of the FCC's position." *Id.* at 1201 (discussing failure to define "sufficient"). The terms Green Rock picks out suffer from no such infirmity. They are reasonably self-defining. In the absence of any specific pleading that would crystallize the

dispute beyond Green Rock's conclusory complaints, the Court should uphold the Notice if the terms "provide a fair and reasonable warning of what" they require. *Georgia-Pac. Corp. v. OSHRC*, 25 F.3d 999, 1004 (11th Cir. 1994) (applying constitutional standard). And both terms do.

First, the "substantially similar" language is used by Congress in § 6707A(c)(2); it is defined in Treasury Regulation § 1.6011-4(c)(4) as a transaction "that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy." The elements identified in Notice 2017-10 as bringing a transaction within the direct ambit of that Notice provide the guidelines for any transaction that is "substantially similar." That phrase's meaning is sufficiently discernible: an ordinary person could determine which transactions are substantially similar to those listed in the Notice. *See Interior Glass Sys., Inc. v. United States*, 927 F.3d 1081, 1085 (9th Cir. 2019) (finding that the definition of "substantially similar" in Treasury Regulation § 1.6011-4(c)(4) is not unconstitutionally vague).

As for "promotional materials," the Notice partially incorporates the definition in Treasury Regulation § 301.6112-1(b)(3)(iii)(B). Beyond that, however, an ordinary person would easily understand "promotional materials" to carry its ordinary meaning: materials that are offered to potential participants to explain the transaction or to induce them to participate. Read in the overall context

of the Notice's description of syndicated conservation easement transactions, the meaning of "promotional materials" can be reasonably discerned.

Thus, both phrases that Green Rock challenges are rooted in the existing statutory and regulatory framework, their meanings are apparent to an ordinary reader, and they provide fair warning of what they require. As a result, neither phrase can render the Notice invalid under the Court's arbitrary and capricious review. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 497 (the Court must uphold agency actions even where they fail to provide perfect detail or clarity).

CONCLUSION

Notice 2017-10 is valid. Because Congress expressed its intent for the IRS to identify listed transactions by notice, the IRS was not required to follow the APA's notice-and-comment procedures in creating Notice 2017-10. Further, the substance of Notice 2017-10 is not arbitrary and capricious. The IRS's decision to combat abusive syndicated conservation easement transactions by making them a listed transaction is rooted in the Administrative Record and sufficiently articulated through the notice. Thus, the Court should deny the Plaintiff's summary judgment motion and grant the United States' summary judgment motion on Counts I and II.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I served this document on plaintiff's counsel by electronically filing it with the Clerk of Court using the CM/ECF system.

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