April 28, 2014

Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington D.C. 20044


Dear Sirs and Mesdames:

On behalf of the Charitable Planning and Organizations Group of the American Bar Association’s Section on Real Property, Trust and Estate Law (“Section”), we are pleased to provide recommendations relating to Qualified Conservation Contributions under Internal Revenue Code (“IRC”) sections 170(h) and 2031(c) and Treasury Regulation (“Regulation”) section 1.170A-14. Our recommendations relate specifically to charitable contributions of perpetual conservation restrictions, referred to colloquially as “conservation easements.”

In response to Internal Revenue Service (“IRS”) Notice 2014-18, we have compiled a list of recommendations for inclusion in the 2014-2015 Priority Guidance Plan (the “Priority Guidance Plan”) issued by the Department of Treasury (“Treasury”) and the IRS. These recommendations are included in Part III of this letter. In a separate white paper to be submitted to Treasury in the near future (the “White Paper”), we intend to provide Treasury with additional detail and draft documents to implement the recommendations.

Part III of this letter also includes a recommendation for revisions to be made to the conservation easement reporting requirements on Schedule D to IRS Form 990 and the Instructions thereto, which may not be appropriate for inclusion in the Priority Guidance Plan but we believe to be an important project in this area. In the White Paper we also intend to provide Treasury with the detail needed to implement this recommendation.

These recommendations have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as
representing the position of the American Bar Association. These recommendations do not represent the views or positions of the law firms, nonprofit organizations, financial institutions, or universities of which the principal authors are shareholders, partners, or employees.

These recommendations were prepared by members of the Charitable Planning and Organizations Group (the “Group”) of the Section. Elaine Waterhouse Wilson, Chair of the Group, and Carol G. Kroch, Supervisory Council Member of the Group, supervised and participated in the preparation of these recommendations. The principal drafting responsibility was exercised by Nancy A. McLaughlin, with substantive contributions from Roger Colinvaux, David Dietrich, Grant Parker, Phillip Tabas, and W. William Weeks. The recommendations were reviewed by Jonathan Blattmachr of the Section's Committee on Trust and Estate Governmental Submissions. Contact information for the principal authors is attached to this letter.

Although some of the members of the Section who participated in preparing these recommendations have clients who may be affected by the federal tax principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization to which such member is affiliated) has been engaged by a client to make a governmental submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these recommendations.

I. Compelling Need for Guidance in Conservation Easement Context

The federal tax incentives for conservation easement donations assist in protecting unique or otherwise significant land areas and structures in perpetuity for the benefit of the public. This goal, however, can be very difficult to attain under existing rules, which are difficult to interpret and have resulted in confusion, non-compliance, abuses, and the unnecessary expenditure of judicial and administrative resources.

Since 2005, courts have issued more than forty decisions in cases involving IRS challenges to deductions claimed under IRC section 170(h). More than 40% of these cases have involved interpretation of one or more of the requirements of IRC section 170(h) or Regulation section 1.170A-14, outstripping the roughly 30% of cases involving valuation disputes. In addition, more than 25% of the cases have involved a motion for reconsideration or an appeal.

Uncertainty regarding the meaning of many of the requirements of IRC section 170(h) and Regulation section 1.170A-14 has led to wide disparities in the manner in which conservation easement instruments are drafted. Such drafting disparities, in turn, lead to marked differences in the administration, interpretation, and enforcement of the easements on behalf of the public over the long term across the United States, jeopardizing the security of the public’s investment in these perpetual gifts.
We believe additional guidance from the IRS and Treasury on selected issues would minimize legal uncertainties, improve compliance and enforcement, and foster better and lasting conservation outcomes.

II. Factors Considered in Selecting Projects For Inclusion in the Priority Guidance Plan

We believe the recommended guidance satisfies many of the factors considered in selecting projects for inclusion in the Priority Guidance Plan:

• We believe the recommended guidance would promote sound tax administration in an area in which there currently are many legal uncertainties.
• The law as it currently exists is difficult for taxpayers to understand and apply. We believe the recommended guidance would enable taxpayers to more easily understand and apply the law.

• The recommended guidance would involve a comprehensive update of twenty-eight-year-old regulations that are outdated and we think need to be clarified and expanded, especially in light of the significant litigation in this area.

• We believe the recommended guidance would enable the IRS to administer the rules relating to charitable contributions of conservation easements on a more uniform basis. The legal uncertainties in the current law lead to wide disparities in the manner in which conservation easement instruments are drafted.

• We also believe the recommended guidance would significantly reduce controversy and litigation and lessen the burdens on taxpayers and the IRS by making it much easier for taxpayers to comply with the federal requirements and for the IRS and the courts to review easement donation transactions for compliance purposes.

III. Recommendations

A. Recommendations for Inclusion in the 2014-2015 Priority Guidance Plan

(1) Technical corrections to the cross-references in Regulation section 1.170A-14. The cross-references in Regulation section 1.170A-14 were not updated when that regulation was published in final form in 1986. This has been a source of confusion for taxpayers, the IRS, and the courts, and was highlighted by the Tax Court in Kaufman v. Commissioner, in which the court noted that “apparently the Secretary failed to update the cross-references in the final regulations” (emphasis added).

In the White Paper we intend to provide a draft Notice making technical corrections to the cross-references in Regulation section 1.170A-14.
We believe this guidance would reduce confusion, aid taxpayer compliance and IRS enforcement efforts, and could be published quickly. Accordingly, we give this project High Priority.

(2) Guidance clarifying the requirements that must be satisfied to comply with IRC section 170(h)(1)(C)’s “exclusively” requirement. IRC section 170(h)(1)(C) requires a qualified conservation contribution to be made “exclusively for conservation purposes.” This requirement has two distinct elements: “exclusively” and “conservation purposes.” Thus, even if a contribution is made for qualifying conservation purposes, it also must meet the “exclusively” requirement to be deductible.

IRC section 170(h)(5)(A) provides that “[a] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.” The legislative history explains that the “exclusively for conservation purposes” requirement “is not satisfied unless the conservation purpose is protected in perpetuity.”

IRC section 170(h) and Regulation section 1.170A-14 impose numerous requirements that must be satisfied to comply with IRC section 170(h)(1)(C)’s “exclusively” requirement. These requirements are, however, difficult to comprehend, particularly as they relate to the “protected in perpetuity” requirement. This causes confusion among taxpayers, the IRS, and the courts, and impedes taxpayer compliance and IRS enforcement efforts.

In the White Paper we intend to provide details regarding the requirements that must be met to satisfy the “exclusively” requirement and how those requirements relate to the “protected in perpetuity” requirement.

We believe this guidance would greatly reduce confusion, aid taxpayer compliance and IRS enforcement efforts, and could be published quickly. Accordingly, we give this project Very High Priority.

(3) A Notice providing sample conservation easement provisions that satisfy certain of the requirements in IRC section 170(h) and Regulation section 1.170A-14. There are wide disparities in the manner in which conservation easement instruments are drafted, caused in part by a paucity of guidance in this area, ongoing litigation, and unclear regulations. Standardization of certain of the key provisions in tax-deductible easements would greatly facilitate taxpayer compliance, IRS and court review of conservation easement donation transactions, and consistency in the administration, interpretation, and enforcement of these perpetual gifts on behalf of the public over the long term. It also would help to ensure that similarly situated taxpayers are treated similarly, regardless of the state of residence.

In the White Paper we intend to provide sample provisions to be included in conservation easement instruments to satisfy certain of the key requirements of IRC section 170(h) and Regulation section 170A-14.
As with the sample Charitable Remainder Trust and Charitable Lead Trust forms previously released, we believe sample provisions to be included in conservation easement instruments would enhance certainty and promote uniformity. We also think such guidance could be issued more quickly than revised regulations. Accordingly, we give this project Very High Priority.

(4) A comprehensive update of Regulation section 1.170A-14. Final Regulation section 1.170A-14 was issued twenty-eight years ago (in 1986), well before the recent growth in the use of and litigation over perpetual conservation easements. In our view, this regulation should be updated to (i) clarify provisions that have proved to be ambiguous and therefore difficult to comply with and enforce, (ii) reflect years of litigation in the area, and (iii) address issues the drafters did not cover or contemplate.

In the White Paper we intend to provide comprehensive suggestions for revisions to Regulation section 1.170A-14.

We believe revising Regulation section 1.170A-14 would be an important but lengthy process. We also think the guidance suggested in subparts (1) through (3) above would greatly facilitate compliance and enforcement efforts in the interim. Accordingly, we give this project High Priority.

(5) A Notice defining “de minimis commercial recreational use” for purposes of IRC section 2031(c). To be eligible for the estate tax exclusion under IRC section 2031(c) with regard to land subject to a conservation easement, the easement instrument must include “a prohibition on more than a de minimis use for a commercial recreational activity.” We believe the absence of guidance regarding the meaning of this requirement makes it difficult for landowners and government and nonprofit holders of conservation easements to comply.

In the White Paper, we intend to provide suggestions regarding the meaning of this requirement.

Due to the recent increase in the size of the estate tax exemption amount, IRC section 2031(c) may be a less compelling incentive than IRC section 170(h). Accordingly, we give this project Medium Priority.

B. Recommended IRS Form 990 Conservation Easement Reporting Requirement Revisions. At the present time, the reporting of conservation easement-related activities on Schedule D to IRS Form 990 can be difficult to prepare and to understand, particularly with regard to conservation easement transfers, modifications, and terminations. This is due, in part, to ambiguities in the Instructions for Schedule D to the Form 990 as they relate to conservation easements. We believe revisions to those Instructions regarding the information that must be reported and the manner in which it should be reported would greatly facilitate compliance with the reporting requirements and aid the IRS, state regulators, and the public in their review and understanding of the information reported. We also think greater transparency in this context could assist the IRS and state
regulated in detecting and preventing abuses and serve as a deterrent to inappropriate transfers, modifications, and terminations of perpetual conservation easements.

In the White Paper we intend to provide proposed changes to the Instructions for Schedule D to the Form 990 as they relate to conservation easements. The proposed changes will be designed to facilitate nonprofit compliance with the reporting requirements and IRS (as well as state regulator and public) review and understanding of the information provided.

Because we believe the proposed changes would greatly assist both compliance and enforcement efforts and could be implemented quickly, we give this project High Priority.

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Thank you for the opportunity to provide our thoughts regarding recommended guidance in the conservation easement context. Should you have any questions, please do not hesitate to contact Elaine Waterhouse Wilson or Nancy A. McLaughlin.

Sincerely,

Susan G. Talley,
Chair, Section of Real Property, Trust and Estate Law
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