

ACTION ON DECISION

Subject: *Green Rock LLC v. Internal Revenue Serv.*,
104 F.4th 220 (11th Cir. 2024).

Issue: Is Notice 2017-10, which identifies certain syndicated conservation easement arrangements as “listed transactions,” invalid under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq., because it was issued without following notice-and-comment rulemaking procedures?

Discussion: In March 2003, Treasury promulgated final regulations requiring taxpayers to affirmatively disclose their participation in “reportable transactions” and a sub-category of reportable transactions called “listed transactions.” Treas. Reg. § 1.6011-4. The regulations define a listed transaction as “a transaction that is the same as or substantially similar to one of the types of transactions that the [Service] has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.” Treas. Reg. § 1.6011-4(b)(2).

As part of the American Jobs Creation Act of 2004 (AJCA), Congress enacted I.R.C. § 6707A and amended I.R.C. §§ 6707 and 6708, which provide civil penalties with respect to reportable transactions; enacted I.R.C. § 6662A, which provides accuracy-related penalties on understatements with respect to reportable transactions; amended I.R.C. § 6501 to add subsection (c)(10), which provides an exception to the assessment period of limitations for undisclosed listed transactions; and amended I.R.C. § 6404(g)(2) to add subparagraph (E) which provides an exception to the suspension of interest rules for reportable transactions.

The Service generally identified listed (and other reportable) transactions through sub-regulatory guidance such as notices, which are issued without following APA notice-and-comment rulemaking procedures. Notice 2017-10, which identified certain syndicated conservation easement transactions as listed transactions, was no exception. 2017-4 I.R.B. 544. Notice 2017-10 identifies transactions in which promoters of syndicated conservation easement transactions offer prospective investors

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in a pass-through entity (“syndicate”) the possibility of a charitable contribution deduction that equals or exceeds 2.5 times the amount of the investor’s investment. *Id.* at 545.

In *Green Rock*, the plaintiff, Green Rock LLC, filed suit under the APA seeking to set aside Notice 2017-10 for violating notice-and-comment rulemaking requirements. *Green Rock LLC v. Internal Revenue Serv.*, 654 F. Supp. 3d 1249 (N.D. Ala. 2023). APA notice-and-comment rulemaking procedures require an agency, before publishing a legislative rule, to publish a Notice of Proposed Rulemaking in the Federal Register and provide the public with an opportunity to submit written comments. The District Court granted Green Rock LLC summary judgment. In its decision, the court adopted the reasoning of the Sixth Circuit in *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022), which invalidated a different listing notice and held that the statutory language in I.R.C. § 6707A lacked the necessary express statement of Congress’s intent to create an exception to the APA notice-and-comment rulemaking procedures. The *Green Rock* court set aside Notice 2017-10 as to Green Rock LLC.

On appeal, the Eleventh Circuit affirmed the District Court’s decision. *Green Rock LLC v. Internal Revenue Serv.*, 104 F.4th 220 (11th Cir. 2024). The court held that because Notice 2017-10 did not follow notice-and-comment rulemaking procedures, the Service violated the APA. As a result, the court held that Notice 2017-10 was set aside as to Green Rock LLC. The court held that the APA express-exemption rule sets a “high bar” and that the Internal Revenue Code does not expressly or otherwise exempt the listing of transactions from the APA notice-and-comment rulemaking procedures. See 5 U.S.C. § 559; *Marcello v. Bonds*, 349 U.S. 302 (1955); *Citizens for Resp. & Ethics in Washington v. FEC*, 993 F.3d 880 (D.C. Cir. 2021). Further, the court stated that, although Treas. Reg. § 1.6011-4(b)(2) provides that the Service may list transactions by notice, a regulation without anything more cannot displace the requirements of the APA. The court also indicated that Congress was aware of the aforementioned Treasury regulation, but that acquiescence alone is not enough when it comes to the APA. Thus, the court held that the Service failed a duty to comply with the APA’s notice-and-comment rulemaking procedures when issuing Notice 2017-10.

The court’s opinion clarified that it was not ruling on the validity of any listed transaction notices issued before the AJCA and briefly discussed that these notices were issued in a different regulatory context. Mainly, the pre-AJCA notices were not backed by the statutory penalties under § 6707A at the time of issuance, and those penalties, according to the court, are what render a listing notice a legislative rule subject to notice-and-comment rulemaking procedures.

The Eleventh Circuit largely followed the lead of the Sixth Circuit’s reasoning in *Mann Construction* and is now the second court of appeals to hold that a post-AJCA listing

notice must follow notice-and-comment rulemaking procedures. The Tax Court reached the same holding in *Green Valley Investors, LLC v. Commissioner*, 159 T.C. 80 (2022).

Despite our disagreement with the Eleventh Circuit's ruling, we recognize that there is controlling adverse precedent in both the Sixth Circuit and the Eleventh Circuit, as well as in the Tax Court. The reasoning of this precedent applies to all existing post-AJCA listing notices, which are not distinguishable with respect to the application of notice-and-comment rulemaking procedures. The Sixth Circuit, Eleventh Circuit, and Tax Court have all held that the post-AJCA notices create new substantive duties, the violations of which can lead to financial penalties and criminal sanctions. The Eleventh Circuit explicitly noted that 28 of the 34 existing listed transactions, issued pre-AJCA, were not backed by statutory penalties at the time of their issuance, and held that "penalties and criminal sanctions" are what render a listing notice a "legislative" rule subject to notice-and-comment rulemaking procedures. *Green Rock*, 104 F.4th at 229. Therefore, the reasoning of this adverse precedent applies to all existing post-AJCA reportable transaction notices.

The Service will follow the Sixth and Eleventh Circuit and the Tax Court decisions in all circuits and will no longer defend post-AJCA reportable transaction notices.¹ The Service will not enforce the disclosure and reporting requirements set forth in those notices and will not assert penalties under sections 6662A, 6707, 6707A, and 6708 resulting from identification of reportable transactions pursuant to post-AJCA guidance that did not go through notice-and-comment rulemaking procedures. The Service will also not take the position that transactions are reportable transactions solely due to being identified in post-AJCA guidance that did not go through notice-and-comment rulemaking procedures for purposes of other legal provisions; for example, the Service will not assert the exception to the assessment period of limitations under section 6501(c)(10) or the exception to the suspension of interest rules under section 6404(g)(2)(E) with respect to these transactions. Further, the Service will concede or abate penalties asserted under sections 6662A, 6707, 6707A, and 6708 in ongoing cases (whether pending in Tax Court and district courts or cases at any stage in which taxpayers request the abatement, removal, or refund of penalties administratively) resulting from identification of reportable transactions pursuant to post-AJCA notices that did not go through notice-and-comment rulemaking procedures. The Service will not take these steps in cases where there is a court-approved settlement or closing agreement relating to the aforementioned penalties, there is an existing final court

¹ In response to these decisions, Treasury has issued final and proposed regulations following APA notice-and-comment rulemaking procedures identifying certain transactions as listed transactions and transactions of interest. The issuance of T.D. 10007 identifying syndicated conservation easement transactions as a listed transaction is one such example.

decision, or the applicable statutes of limitations have expired. This AOD does not apply to pre-AJCA notices.

Recommendation: Acquiescence

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