

PUBLICATION

No More Lists – IRS Concedes on Reportable Transaction Penalties

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January 07, 2025

Following the 11th Circuit's ruling in *Green Rock LLC v. IRS* this past summer, the IRS has decided to cease its defense of post-American Jobs Creation Act (AJCA) reportable transaction notices. In an Action on Decision memo (AOD 2024-01, 2024-52 IRB 1354) issued January 2, 2025, the IRS announced that it will acquiesce in the 11th Circuit's decision, which held that such notices, issued without adhering to notice-and-comment rulemaking procedures, are invalid under the Administrative Procedure Act (APA). This decision is a direct result of a series of court rulings invalidating other similar notices, including the Sixth Circuit's decision in *Mann Construction, Inc. v. United States* (2022).

Background

In March 2003, in an effort to combat tax avoidance schemes, the Treasury Department introduced stringent regulations requiring taxpayers to disclose their participation in a subset of reportable transactions that the IRS identifies as 'listed transactions.' Listed transactions are those deemed by the IRS as similar to tax avoidance schemes, often identified by the IRS through notices or other sub-regulatory guidance (listing notices).

The AJCA further strengthened these regulations by enacting several new provisions in the Internal Revenue Code, including civil penalties, accuracy-related penalties, and exceptions to the assessment period of limitations and suspension of interest rules for reportable transactions. One significant measure was the introduction of I.R.C § 6707A, which provided penalties for a failure to disclose reportable transactions on a tax return.

Thus, by designating specific transactions in listing notices, the IRS imposed new substantive duties on taxpayers to disclose such transactions, the violation of which resulted in civil penalties and criminal sanctions under the AJCA. Many courts have ruled that administrative actions of this kind must follow the notice-and-comment rulemaking procedures required by the APA.

The 11th Circuit's Holding

Green Rock centered on IRS Notice 2017-10 which identified certain syndicated conservation easement transactions as listed transactions. In the United States District Court for the Northern District of Alabama, the plaintiff, Green Rock LLC, filed suit under the APA seeking to invalidate Notice 2017-10 for violating notice-and-comment rulemaking requirements.

Influenced by the Sixth Circuit's decision in *Mann Construction*, the District Court granted summary judgment to Green Rock LLC, finding that the IRS lacked a clear mandate from Congress to bypass the APA's stringent notice-and-comment requirements. Consequently, Notice 2017-10 was set aside as it pertained to Green Rock LLC.

On appeal, the 11th Circuit affirmed the District Court's ruling, emphasizing that Notice 2017-10 did not adhere to the APA's procedural mandates. The court held that the APA's express-exemption rule sets a "high bar" and that the Internal Revenue Code does not provide an exemption for listing transactions from notice-and-comment rulemaking. Furthermore, the court noted that although Treasury regulations allow the IRS to list

transactions by notice, such a regulation cannot override the APA's requirements. The ruling also clarified that the court was not addressing the validity of pre-AJCA listed transaction notices, which were issued under a different regulatory context.

The IRS' Acquiescence and Penalty Relief for Taxpayers

Despite the IRS' disagreement with the 11th Circuit's holding, the agency now recognizes the controlling adverse precedent in both the Sixth and 11th Circuits, as well as in the Tax Court. See *Green Valley Investors, LLC v. Comm'r*, 159 T.C. 80 (2022). Consequently, the IRS will no longer enforce the disclosure and reporting requirements set forth by post-AJCA listing notices. In addition, penalties under Internal Revenue Code sections 6662A, 6707, 6707A, and 6708 will not be imposed for transactions identified solely based on the post-AJCA notices.

For taxpayers currently involved in disputes regarding these notices, the IRS has committed to conceding or abating penalties upon administrative request. In addition, where a penalty imposed under one of the applicable statutes has been paid within the past two years, taxpayers may file a claim for a refund of the penalty amount. However, this leniency will not extend to cases with court-approved settlements, closing agreements, final court decisions, or where the relevant statutes of limitations have expired.

Further, in response to these judicial setbacks, the IRS has announced its intention to comply with the APA's procedural requirements for the designation of listed transactions in the future. The agency has already begun this process, issuing final and proposed regulations that adhere to the notice-and-comment procedures.

If you have questions or concerns regarding this alert, please contact [Stuart M. Schabes](#), [Elizabeth J. Atkinson](#), [Seth Kossman](#), [Harrison Holmes](#), or any member of Baker Donelson's [Tax](#) team.