Bloomberg Tax

Tax Management
Real Estate Journal™

IRS Guidance Permits Opportunity Zone Transactions to Proceed

By Steven F. Mount, Esq.[*]

The Opportunity Zone program, contained in new §1400Z-2,[1] has generated widespread interest, but has gotten off to a slow start due to overly restrictive statutory rules on timing and holding funds for the improvement of property, and the lack of defined terms and ambiguities in the statute.[2] Generally, the Opportunity Zone program encourages investment in low-income communities by allowing individual and corporate taxpayers to defer paying tax on gains from the sale of stock, business assets, or any other property by investing the proceeds into a ''qualified opportunity fund,'' as defined in §1400Z-2(d)(1) (O Fund), which in turn must invest at least 90% of its assets, directly or indirectly, in businesses located in certain low-income communities designated as ''qualified opportunity zones,'' as defined in §1400Z-1(a) (O Zone). Partial forgiveness of tax on deferred gains and on future appreciation is possible for O Fund investments held for five, seven, and 10 years.

Proposed regulations released on October 19, 2018, provide critical guidance that should permit O Fund investments to proceed. For the most part, the proposed regulations are favorable and provide the flexibility needed to structure an O Fund investment without undue risk.

Among other things, the proposed regulations:

- provide a safe harbor that allows an O Zone Business (defined below) to hold funds for up to 31 months for the acquisition, construction, or improvement of real and other tangible property;
- calculate the substantial improvement test by reference to the basis of the building, excluding the basis of the land;
- require that an O Zone Business have only 70% of its assets invested in O Zone Business Property (defined below);
- allow gains recognized by a partnership to be invested in an O Fund by either the partnership or its partners;
- allow all of the benefits of the program to be claimed by taxpayers through December 31, 2047, despite the earlier expiration of the O Zone designations;
- allow an O Fund to specify the first year and month in which it will be classified as an O Fund; and
- limit the eligible gains that can be deferred under the program to capital gains, arguably contrary to the statute.

The proposed regulations will be effective on the date published as final regulations in the Federal Register, but special rules permit taxpayers to rely on them if they are applied consistently and in their entirety.[3]

---

[*] Steven F. Mount is a partner in the Columbus office of Squire Patton Boggs. His practice focuses on Opportunity Fund transactions and tax credit financings under the New Markets Tax Credit, Historic Tax Credit, and Energy Tax Credit programs. He also represents clients in real estate joint venture transactions and concerning issues in partnership taxation and real estate investment trusts.

[1] As added by §13823 of Pub. L. No. 115-97. All section references are to the Internal Revenue Code of 1986, as amended (Code), and the regulations thereunder, unless otherwise specified.

[2] A detailed description of the benefits and requirements of the Opportunity Zone program is contained in two articles by the author published in the Bloomberg Tax Real Estate Journal: *New Program Allows Deferral and Possible Forgiveness of Capital Gains Invested in Low-Income Community Businesses*, 34 Real Est. J. 23 (Feb. 7, 2018) and *Moving Onward with the Opportunity Zone Program*, 34 Real Est. J. 129 (July 4, 2018).

[3] Prop. Reg. §1.1400Z-2(a)-1(e); Prop. Reg. §1.1400Z-2(c)-1(d); Prop. Reg. §1.1400Z-2(d)-1(f); Prop. Reg. §1.1400Z-2(e)-1(c).

The various provisions of the proposed regulations are explained in more detail below.[4]

SAFE HARBOR FOR 'REASONABLE WORKING CAPITAL' AND RELATED PROVISIONS

The most favorable rule in the proposed regulations is a generous safe harbor that allows a ''qualified opportunity zone business''[5] (O Zone Business) to hold funds for up to 31 months for the acquisition, construction, or improvement of real and other tangible property.[6]

There is no similar rule in the proposed regulations with respect to investments made by the O Fund directly. Direct O Fund investments will therefore continue to be subject to the statutory requirement that 90% of the O Fund's assets be invested in tangible property in six months or less following receipt. This will force many investments in real property to be done indirectly through an O Zone Business,[7]and will require O Funds formed as multi-asset funds or blind pools to coordinate drawdowns from investors and investments in property carefully.

An O Zone Business may take advantage of the safe harbor if all of the following requirements are satisfied: (1) the amount of funds intended to be within the safe harbor is designated in writing (presumably at the time such funds are received) as being for the acquisition, construction, and/or substantial improvement of tangible property in an O Zone; (2) there is a written schedule for the expenditure of the funds within 31 months of receipt consistent with the ordinary start-up of a trade or business; and (3) the funds are actually used in a manner that is substantially consistent with the preceding two requirements. Although this third requirement is not further explained, the use of the qualifier ''substantially'' presumably would allow some leeway for construction delays resulting from weather and other force majeure events.

The proposed regulations also helpfully modify three other rules applicable to an O Zone Business that might have prevented use of the safe harbor: (1) the 50% gross income requirement; (2) the limitation on holding intangible property; and (3) the minimum tangible property requirement.

One of the requirements to be an O Zone Business is that at least 50% of its gross income be derived from the active conduct of a trade or business in an O Zone.[8] The proposed regulations provide that for this purpose income earned on funds qualifying for the safe harbor is treated as income satisfying this test.[9]

A second requirement to be an O Zone Business is that a substantial portion of the intangible property held by the business be used in the active conduct of its business.[10] The proposed regulations provide that this requirement will be treated as being satisfied during any period that the business is proceeding in a manner substantially consistent with the safe harbor.[11]

Third, substantially all of the tangible property owned or leased by the O Zone Business must be ''qualified opportunity zone business property,''[12] (O Zone Business Property). The proposed regulations provide that if the property designated pursuant to the safe harbor is expected to satisfy the requirement as a result of the expenditure of funds pursuant to the safe harbor, then this requirement will be deemed satisfied during the construction period.[13]

An example in the proposed regulations illustrates all three of the above rules.[14] In the example, a taxpayer realized a $w million capital gain and timely invested the same amount in an O Fund, which immediately invested the entire amount in a partnership intended to be an O Zone Business. The O Zone Business complied with the three requirements of the safe harbor, including designating the entire $w million as for land acquisition, construction of a building,

---

[4] The IRS also issued contemporaneously with the proposed regulations Rev. Rul. 2018-29, a draft IRS Form 8996 and instructions, and updated Q&As, which provide additional guidance.

[5] §1400Z-2(d)(3).

[6] Prop. Reg. §1.1400Z-2(d)-1(d)(5)(iv). The safe harbor characterizes such funds as reasonable working capital, and thus as an exception to the restrictive rules on holding nonqualified financial property. *See* §1400Z-2(d)(3)(A)(ii), §1397C(b)(8), and §1397C(e)(1).

[7] This will require compliance with the additional requirements that apply to an O Zone Business but not an O Fund, such as the gross income test, limitations on intangible property and the prohibition on investment in certain ''sin'' businesses and property subject to a triple net lease.

[8] §1400Z-2(d)(3)(A)(ii), by cross reference to §1397C(b)(2). Note that the requirement that the gross income be derived from the O Zone is not technically contained within the cited statutory provisions. This change could matter in some cases, e.g., a catering business that prepares food at a facility located in an O Zone but serves the food at locations both within and without an O Zone.

[9] Prop. Reg. §1.1400Z-2(d)-1(d)(5)(v).

[10] §1400Z-2(d)(3)(A)(ii), by cross reference to §1397C(b)(4).

[11] Prop. Reg. §1.1400Z-2(d)-1(d)(5)(vi).

[12] §1400Z-2(d)(2)(D); generally O Zone Business Property is tangible property used in a trade or business (1) acquired by purchase from an unrelated party after December 31, 2017, (2) the original use of which by the O Fund or O Zone Business is in an O Zone, or the property is substantially improved, and (3) during substantially all of the holding period for such property, substantially all of such property is used in an O Zone.

[13] Prop. Reg. §1.1400Z-2(d)-1(d)(5)(vii). Note, the prospective satisfaction of this requirement only applies when construction of property is being funded with working capital held as part of the safe harbor.

[14] Prop. Reg. §1.1400Z-2(d)-1(d)(5)(viii).

ISSN 8755-0628

and ancillary but necessary expenditures for the project. Although not mentioned in the example, the working capital would have been treated as intangible property under general tax principles.[15] The O Zone Business acquired land within a month, and proceeded to construct the building and to incur the ancillary but necessary expenditures over the next 30 months. The example held that the O Zone Business was deemed to satisfy the 50% gross income test, the requirement concerning holding intangible property, and the tangible property test during the 31-month period following receipt of the cash. In addition, the example contained the odd statement that the building would not fail the substantial improvement test (discussed below) despite the fact that the basis in the building had not yet doubled, even though the example illustrates new construction.

SUBSTANTIAL IMPROVEMENT TEST

The proposed regulations also contain a very favorable definition of ''substantial improvement.''[16] One of the requirements for property to qualify under the program, whether acquired directly by the O Fund or indirectly by an O Zone Business, is that either the original use of the property by the O Fund or O Fund Business commence with the O Fund or O Fund Business, **or** that the O Fund or O Fund Business ''substantially improve'' the property.[17] For this purpose, the statute defines ''substantial improvement'' as the addition to basis of the property during any 30-month period that exceeds the adjusted basis of such property at the start of the 30-month period.[18]

Rev. Rul. 2018-29 confirms that, given the permanence of land, the original use of land can never commence with the O Fund or O Fund Business.[19] The proposed regulations, however, contain a favorable definition of ''substantial improvement'' that makes this statement unimportant in many cases.[20]

A property consisting of land and an existing building will satisfy the substantial improvement test if the basis of the **building** is doubled in a 30-month period, without regard to the basis of the land. In addition, if additions to the basis of the building satisfy the substantial improvement test, there is no additional requirement that such test be separately satisfied with respect to the land. This will permit the test to be satisfied in areas where land is expensive compared to the costs of the improvement.

Rev. Rul. 2018-29, which contains the identical substantial improvement test as the proposed regulations, provides the following example: An O Fund purchases land and an existing factory building for $800, and allocates $480 to the land and $320 to the building. Within a 30-month period, the O Fund invests an additional $400 converting the building to residential rental property.[21] The example finds that the substantial improvement test is satisfied with respect to the building and that no separate substantial improvement requirement applies with respect to the land.

This example may seem to invite taxpayers to allocate an amount to land to assure that the substantial improvement test will be satisfied with respect to the building. However, if the allocation to the land exceeds its fair value, the IRS could challenge the allocation under general tax principles. In addition, the taxpayer would deprive itself of depreciation deductions to the extent it under-allocated the purchase price to the building.

The substantial improvement test (in the proposed regulations and in Rev. Rul. 2018-29) does not address the acquisition of vacant land followed by new construction on the land.[22] The example illustrating the working capital safe harbor for O Zone Businesses (described above) involved new construction, and contained the statement suggesting that the substantial improvement test was satisfied, but the example did not indicate the allocation of costs among land, building and other costs, and did not indicate how the substantial improvement test was being applied. New construction should satisfy the original use requirement, and if the cost of the new construction (over a 30-month period) exceeds the purchase price of the land, it would seem that the substantial improvement test would be satisfied with respect to the land, but further clarification by the IRS on this point would be desirable.

SUBSTANTIALLY ALL TEST

The term ''substantially all'' is used five times but not defined in §1400Z-2. In three instances it refers to

---

[15] *See IT&S of Iowa v. Commissioner*, 97 T.C. 496 (1991); *but see Blodgett v. Silberman*, 277 U.S. 1, 48 S. Ct. 410 (1928), which treated currency as tangible property for certain gift tax purposes.

[16] The identical substantial improvement test is also contained in Rev. Rul. 2018-29, issued contemporaneously with the proposed regulations.

[17] §1400Z-2(d)(2)(D)(i)(II).

[18] §1400Z-2(d)(2)(D)(ii).

[19] The preamble to the proposed regulations solicits comments on whether a special rule should be promulgated that would treat land or a building acquired by an O Fund or O Fund Business that had been vacant for a certain period of time as originally used by the O Fund or O Fund Business.

[20] Prop. Reg. §1.1400Z-2(d)-1(c)(8)(ii).

[21] Note that this statement seems to dispense with a concern raised by some commentators as to whether residential rental property qualified for the program, although technically the concern is that an O Zone Business (as opposed to an O Fund) could not hold such property.

[22] This is one case where the special rule described in footnote 20 could be helpful.

ISSN 8755-0628

a time period and the other two refer to an amount of property (or use thereof).

The proposed regulations define the term as 70%, but only for purposes of determining whether substantially all of the property owned or leased by an O Zone Business is O Zone Business Property.[23]

The required percentage is determined differently depending on whether the O Zone Business does or does not have an ''applicable financial statement,'' as defined in Reg. §1.475(a)-4(h).[24] If it has an applicable financial statement, then the values reported in such statement are used to determine the percentage. If the O Zone Business does not have an applicable financial statement, then it may use the method (discussed below) used by its O Fund owner to satisfy the 90% test in §1400Z-2(d)(1). Where the O Zone Business has only one O Fund owner (regardless of the percentage interest held by such O Fund), the method used by that O Fund applies. If there is more than one O Fund owner, and two or more of such owners hold at least 5% in voting rights and value (for a corporation) or capital and profits (for a partnership) in the O Zone Business, then the O Zone Business may use the methodology used by the O Fund holding at least 5% that results in the highest percentage. The proposed regulations do not address how an O Zone Business that does not have an applicable financial statement would value its assets for purposes of the substantially all test for periods before it had an O Fund owner.

It is unclear why the IRS chose a standard that uses accounting values rather than tax values, and that requires subjective determinations as to whether a financial statement of an O Fund or O Zone Business is an ''applicable financial statement.''

It seems likely that many O Funds or O Zone Businesses will not have an applicable financial statement. In this case, they will default to cost both to determine if the O Zone Business satisfies the substantially all test and for purposes of applying the 90% test to the O Fund. This actually may be preferable, because the relative value of the assets would not change, whereas on an applicable financial statement the aggregate value of the depreciable assets would decline compared to cash and other non-depreciable assets.

The preamble to the proposed regulations solicits comments as to how the term ''substantially all'' should be defined for its other four occurrences. The preamble mentions that the IRS has considered a percentage as high as 90% for defining the term.

DEFINITION OF ELIGIBLE TAXPAYER AND SPECIAL RULE FOR PARTNERSHIPS

The statute provides that a ''taxpayer''[25] that has a gain from the sale or exchange of property to or with an unrelated person can defer tax on the gain by timely investing in an O Fund if the various requirements of §1400Z-2 are satisfied. The proposed regulations expand on this requirement by coining the term ''eligible taxpayer.''[26] Consistent with the broad scope of the statute, the proposed regulations define eligible taxpayer as a person who may recognize gains for federal income tax accounting, including individuals, C corporations, regulated investment companies (mutual funds), real estate investment trusts (REITs), partnerships, S corporations, trusts and estates.[27]

A special rule for partnerships allows **either** the partnership or the partners to invest in an O Fund with respect to a gain recognized by the partnership.[28] In the first instance, the partnership can elect to defer the gain and invest in an O Fund. In such case, the gain is not passed through to the partners and there is no step-up in the partners' basis in the partnership with respect to such gain.[29] If the partnership does not elect to defer the gain, then each partner may so elect with respect to their share of the gain if the gain did not arise from a sale or exchange with a person related to such partner.[30]

The proposed regulations provide a favorable timing rule for the partners to invest, allowing them to do

---

[23] Prop. Reg. §1.1400Z-2(d)-1(d)(3).

[24] An ''applicable financial statement'' is defined as a financial statement that is the taxpayer's primary financial statement for the year if (1) it is prepared in accordance with U.S. GAAP and is filed with the Securities and Exchange Commission, or (2) the taxpayer makes significant business use of the financial statement (as described in detail in Reg. §1.475(a)-4(j)) and it is either prepared in accordance with U.S. GAAP and required to be provided to a federal government agency other than the IRS, or is a certified audited financial statement prepared in accordance with U.S. GAAP and given to creditors, equity holders, or provided for other substantial non-tax purposes and the taxpayer reasonably anticipates that it will be relied upon for the purposes for which it was given. The preamble to the proposed regulations solicits comments as to whether another standard, such as tax adjusted basis, would be better for purposes of assurance and administration.

[25] ''Taxpayer'' is defined in §7701(a)(14) as any person subject to any internal revenue tax.

[26] Prop. Reg. §1.1400Z-2(a)-1(b)(1).

[27] In addition to the persons listed in the proposed regulations, the preamble adds common trust funds described in §584, qualified settlement funds, disputed ownership funds, and other entities taxable under Reg. §1.468B. Although not listed, it seems clear that a non-U.S. person can be an eligible taxpayer if it has gains subject to U.S. tax.

[28] Prop. Reg. §1.1400Z-2(a)-1(c).

[29] Prop. Reg. §1.1400Z-2(a)-1(c)(1).

[30] Prop. Reg. §1.1400Z-2(a)-1(c)(2)(i), §1.1400Z-2(a)-1(c)(2)(ii).

ISSN 8755-0628

so up to 180 days beginning with the last day of the taxable year of the partnership that recognized the gain, or within the 180 days beginning with the sale or exchange, if the partnership does not make the deferral election.[31] For partners to take advantage of these timing rules, partnerships will need to report currently to partners concerning the recognition and amount of a gain and the date of the sale or exchange, and whether or not the partnership will make the deferral election.

Analogous rules apply to S Corporations, trusts, and estates.[32]

TREATMENT FOLLOWING EXPIRATION OF O ZONE DESIGNATIONS

The designations of low-income census tracts as O Zones expire on December 31, 2028.[33] The statute is unclear as to the treatment of O Fund investments held on such date and disposed of afterwards.

The proposed regulations provide that, despite the expiration of the O Zone designations, a taxpayer will be entitled to step up the basis in their O Fund interest to fair market value on disposition, thus permanently avoiding tax on the appreciation in their O Fund interest, if such O Fund interest is disposed of on or prior to December 31, 2047.[34]

O FUND CERTIFICATION REQUIREMENTS AND CALCULATION OF 90% TEST

The proposed regulations provide favorable rules concerning certification of an O Fund and define how the 90% test is to be calculated. Generally, an O Fund must have at least 90% of its assets invested in O Zone Property, on average, as of two dates each year, generally June 30 and December 31 for each year after the first year.[35] For purposes of calculating the 90% test, the O Fund must use values shown on its applicable financial statement,[36] if it has one, or otherwise use cost.[37]

Pursuant to the proposed regulations, an O Fund can specify the first taxable year and the month in the taxable year in which it will first be treated as an O Fund.[38] This will allow it to time the first six-month period, the end of which is one of the measuring dates for the 90% test. The proposed regulations clarify that if the first six-month period begins on or after July 1, it does not extend into the next taxable year, but instead December 31 will be the only measuring date for the first year.[39]

The proposed regulations refer to an entity ''classified as a corporation or partnership for Federal tax purposes''[40] as eligible to be an O Fund, thus dismissing concerns of over-cautious commentators as to whether an O Fund could be organized as a limited liability company.[41]

There is no prohibition on pre-existing entities electing to be an O Fund (or an O Zone Business), as long as it satisfies all the requirements.[42]

Generally, an O Fund must be organized in one of the 50 states or the District of Columbia, but the proposed regulations permit an O Fund to be organized in Puerto Rico or another possession if it operates solely in such possession.

ELIGIBLE GAINS

The Opportunity Zone program generally allows a taxpayer to defer tax on gain from the sale or exchange of any property with an unrelated person to the extent an amount up to such gain is timely invested in an O Fund, and the other requirements of §1400Z-2 are satisfied. Gain from the sale or disposition of property is defined in §1001(a) as ''the excess of the amount realized [from such sale or other disposition] over the adjusted basis provided in section 1011 for determining gain . . . .'' Other sections of the Code determine whether gains are taxed at ordinary income rates or at preferential rates.

Section 1400Z-2 uses the word ''gain'' ten times, and never uses the term ''capital gain.''[43] Therefore, based on a plain reading of the statute, all gains — and not just capital gains — should be eligible for deferral.

---

[31] Prop. Reg. §1.1400Z-2(a)-1(c)(2)(iii).

[32] Prop. Reg. §1.1400Z-2(a)-1(c)(3).

[33] §1400Z-1(f).

[34] Prop. Reg. §1.1400Z-2(c)-1(b).

[35] §1400Z-2(d)(1); ''qualified opportunity zone property'' (O Zone Property) is defined generally in §1400Z-2(d)(2) as an interest in an O Zone Business or in O Zone Business Property.

[36] *See* above n. 25.

[37] Prop. Reg. §1.1400Z-2(d)-1(b).

[38] Prop. Reg. §1.1400Z-2(d)-1(a)(1)(ii), §1.1400Z-2(d)-1(a)(1)(iii).

[39] Prop. Reg. §1.1400Z-2(d)-1(a)(2)(i).

[40] Prop. Reg. §1.1400Z-2(d)-1(a)(1).

[41] The updated Q&As also state explicitly that an O Fund can be a limited liability company.

[42] Prop. Reg. §1.1400Z-2(d)-1(a)(3).

[43] The heading to §1400Z-2 is ''[s]pecial rules for **capital gains** invested in opportunity zones'' (emphasis added), but it is clear that in interpreting a provision of the Code, headings are ignored. §7806(b); *Grapevine Imports, Ltd. v. U.S.*, 71 Fed. Cl. 324 (2006); *Amergen Energy Co. v. U.S.*, 113 Fed. Cl. 52 (2013).

ISSN 8755-0628

Despite the lack of ambiguity on this point, the proposed regulations define ''eligible gain'' to be limited to capital gains.[44] The rationale for this limitation, as explained in the preamble, is the legislative history of the provision and the structure and text of the statute. The text of the statute uniformly uses the word ''gain,'' so it is not clear what that reference means. The legislative history[45] does use the phrase ''capital gain'' several times, but it is axiomatic when interpreting a statute that if the statute is clear on its face, a court should not resort to legislative history.[46] However, unless the IRS changes its interpretation or such interpretation is challenged, O Fund investors must limit their investments to capital gains.

Determining which gains are capital gains will be straightforward in many cases, but in other cases it is not as clear. Curiously, the term ''capital gain'' (unlike the word ''gain'') is **not** defined in the Code.[47] Most taxpayers would recognize it as a gain resulting from the sale of a ''capital asset,''[48] which is subject to the rules of §1222 (defining long-term gain, short-term gain, etc.), and eligible for more favorable tax rates provided in §1(h).

Assets used in a business would be wholly or largely excluded from the definition of capital assets, but §1231 treats the net gain from the sale of property used in a trade or business as a long-term capital gain, so presumably such net gain could be invested in an O Fund.[49] Gain from the sale of an interest in a partnership is treated as capital gain under §741, except to the extent that §751 applies (which treats a portion of the gain as ordinary income). Other provisions, such as §1245 (involving depreciation recapture) would characterize amounts otherwise treated as capital gains as ordinary income. Capital gains taxed at different rates in §1(h), such as unrecaptured §1250 gain and collectibles gain, would still be capital gain and thus eligible for investment in an O Fund.

OTHER RULES

The proposed regulations provide other rules of more limited application or of primary interest to particular taxpayers.

The proposed regulations specify that for purposes of §1400Z-2 the deemed contribution of money pursuant to §752(a) is ignored.[50] This is a technical provision that deals with determining the tax basis in a partnership interest related to debt borrowed by the partnership. Some had questioned whether such deemed contribution of money might be treated as an actual contribution under the O Zone program, but the IRS properly rejected that misconstruction. Although this rule is narrow, it should alleviate concerns about using debt financing either at the O Fund or O Zone Business.

The proposed regulations provide rules as to when the 180-day period begins in particular circumstances.[51] For stock sold in a regular-way trade on an exchange, the period begins on the trade date. For capital gain dividends received from a regulated investment company or REIT, the 180-day period begins on the date the dividend is paid. For undistributed capital gains of a regulated investment company or REIT, the period begins on the last date of the taxable year of the regulated investment company or REIT.

A gain deferred under the program retains its attributes when it is later subject to tax.[52] For example, a short-term capital gain retains its character as such and is treated as a short-term capital gain (and thus subject to all of the rules in §1222 applicable to short-term capital gains) when it is eventually taxed. The proposed regulations refer to §1(h), §1222, and §1256 as Code sections where the attributes would be important. It is not clear if the reference to §1(h) includes the tax rates listed in that section, i.e., whether the gain when eventually recognized would be taxed at the same rate as in the year of the sale or exchange.

Rules on how to track attributes of O Fund investments for a taxpayer with multiple investments are

---

[44] Prop. Reg. §1.1400Z-2(a)-1(b)(2).

[45] *See* H.R. Rep. No. 115-466, at 537–540 (2017) (Conf. Rep.).

[46] *Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Mayo Foundation for Medical Ed. & Research v. U.S.*, 562 U.S. 44 (2011). It is unknown what any particular senator or representative or their staff members believed the program covered, but that is wholly irrelevant, because the statute speaks for itself.

[47] Similar terms, such as ''short-term capital gain,'' ''long-term capital gain,'' ''net capital gain,'' and ''capital gain net income'' are defined in §1222.

[48] ''Capital asset'' is defined in §1221 generally as property held by the taxpayer (whether or not connected with a trade or business), excluding stock in trade or other property held in inventory or primarily for sale to customers in the ordinary course of a trade or business, depreciable assets and real property used in a trade or business, certain patents, inventions, copyrights, etc., certain accounts or notes receivable, and a few other categories of property.

[49] Note that pursuant to §702(a)(3), each partner in a partnership must separately take into account his distributive share of §1231 gains and losses, and then determine the net §1231 gain or loss at the partner level. A possible result is that a partnership cannot invest in an O Fund with respect to gains from the sale of business assets, since it does not determine a net §1231 gain at the partnership level. A partner must also separately take into account short-term and long-term gains and losses (§702(a)(1) and §702(a)(2)), but these do not need to be netted to constitute a capital gain, so it appears that gains from the sale of investment property by a partnership could be invested in an O Fund.

[50] Prop. Reg. §1.1400Z-2(e)-1(a)(2).

[51] Prop. Reg. §1.1400Z-2(a)-1(b)(4).

[52] Prop. Reg. §1.1400Z-2(a)-1(b)(5).

ISSN 8755-0628

provided. Generally, the proposed regulations adopt a first-in, first-out approach (FIFO).[53] If, after application of FIFO, a taxpayer is treated as having disposed of less than all of his O Fund interests acquired on one day, and the interests would have different attributes, then a pro rata method is used.[54]

As explained in the preamble to the proposed regulations, if a taxpayer invests in an O Fund and later sells its entire interest at a gain (including the original deferred gain), it can elect to further defer the gain by timely investing in the same or another O Fund.

Special rules are provided for gains from §1256 contracts and gains where there are offsetting positions.[55]

The draft IRS Form 8996 also clarifies two important points. An O Fund has until the end of its first taxable year to amend its organizing documents to add the required purpose of investing in O Zone Property. Also, the form clarifies that the penalty for failure to satisfy the 90% test is the underpayment rate on an annual basis, not a monthly basis, i.e., if the O Fund fails its 90% test by $100,000 for each of six months when the underpayment rate is 5%, the penalty is $100,000 X 5% divided by 2. The statute was unclear on this point.

ADDITIONAL GUIDANCE NEEDED

The proposed regulations provide critical rules that should permit O Fund investments to proceed. However, additional guidance is needed on many other issues. The preamble lists the following issues where the IRS expects to issue additional guidance in the near future:

- the meaning of ''substantially all'' for the four uses not addressed in the proposed regulations;
- transactions that may trigger gain that has been deferred (e.g., based on distributions from the O Fund);
- the reasonable period in which an O Fund can reinvest proceeds from a sale of O Zone Property without penalty;
- administrative rules for imposing a penalty where the O Fund fails to meet the 90% test; and
- information reporting requirements.

In addition to these issues, it would be very helpful to have additional guidance on several other issues, including:

- definition of which gains qualify for the program;
- a safe harbor that allows an O Fund to hold funds for the acquisition, construction or improvement of property for more than six months;
- rules on disposing of an interest in an O Fund indirectly, e.g., by the disposition of property by the O Fund;
- rules describing permissible distributions from an O Fund, including those funded by refinancing proceeds; and
- rules on how to treat leases.

---

[53] Prop. Reg. §1.1400Z-2(a)-1(b)(6).

[54] Prop. Reg. §1.1400Z-2(a)-1(b)(7).

[55] Prop. Reg. §1.1400Z-2(a)-1(b)(2)(iii), §1.1400Z-2(a)-1(b)(2)(iv).

ISSN 8755-0628

Bloomberg Tax

Tax Management
Real Estate Journal™

Moving Onward with the Opportunity Zone Program

By Steven F. Mount, Esq.[*]

A new program to encourage investment in low-income community businesses was included in the Tax Cuts and Jobs Act,[1] signed into law on December 22, 2017.

Generally, new §1400Z-2[2] allows individual and corporate taxpayers to defer paying tax on gains from the sale of stock, business assets, or any other property by investing the proceeds into a ''qualified opportunity fund'' (O Fund),[3] which in turn must invest at least 90% of its assets, directly or indirectly, in businesses located in certain low-income communities designated as ''qualified opportunity zones'' (O Zone).[4] Partial forgiveness of tax on deferred gains and on future appreciation is possible for O Fund investments held for five, seven, and 10 years.

A detailed description of the benefits and requirements of the O Zone program is contained in an article by the author published in the *Bloomberg Tax Real Estate Journal*, 34 Real Est. J. 23 (Feb. 7, 2018).

The O Zone program was not self-executing. Instead, three things were needed to enable taxpayers to reasonably take advantage of the program: (1) each state (and the District of Columbia and certain territories) were required to nominate O Zones within their jurisdictions pursuant to rules in §1400Z-1, which nominations had to be certified by the Treasury Department; (2) rules on how to certify an O Fund were needed; and (3) guidance from the IRS concerning compliance with several of the basic requirements of the statute was required. The first two have now occurred, but the timing of guidance from the IRS is unknown.

This article explores, in Q&A format, several practical questions that have been raised by potential investors and project owners that must be resolved for taxpayers to take full advantage of the program and speculates on guidance that may be forthcoming.

CERTIFICATION AND OTHER O FUND REQUIREMENTS

Question 1: How is an O Fund certified?

Answer 1: A taxpayer must self-certify an O Fund by filing an election with their tax return.[5] No approval or action by the IRS is required. Absent additional requirements being promulgated by the IRS, self-certification can only address the statutory requirements. These are (i) the O Fund is organized as a corporation or partnership, and (ii) the O Fund is organized for the purpose of investing in ''qualified opportunity zone property'' (O Zone Property).[6] The requirement that the O Fund be a corporation or partnership references its treatment for federal income tax purposes, and thus a state law limited liability company with more than one member (and that has not made an election to be treated as an association tax-

---

[*] Steven F. Mount is a partner in the Columbus office of Squire Patton Boggs. His practice focuses on tax credit financings including New Markets Tax Credit, Historic Tax Credit, and Energy Tax Credit transactions. He also represents clients concerning partnership taxation and other real estate joint venture transactions, and issues concerning real estate investment trusts.

[1] P. L. 115-97 (hereinafter the 2017 tax act).

[2] As added by §13823, the 2017 tax act. All section references are to the Internal Revenue Code of 1986, as amended (Code), and the regulations thereunder, unless otherwise specified.

[3] §1400Z-2(d)(1).

[4] §1400Z-1(a). Other provisions of §1400Z-1 contain requirements for states to nominate and the Treasury Department to certify O Zones. O Zones have now been certified for all 50 states, the District of Columbia and Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. *See* https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx for a list and maps of O Zones.

[5] IRS, Opportunity Zone Frequently Asked Questions, https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions.

[6] §1400Z-2(d)(2)(A). ''Qualified opportunity zone stock'' and ''qualified opportunity zone partnership interest'' are, generally, stock in a corporation or a capital or profits interests in a partnership, in each case issued by the entity after December 31, 2017 solely in exchange for cash, if the entity is (or is organized for purposes of being) an O Zone Business (defined below).

able as a corporation) would be treated as a partnership.

An additional requirement in §1400Z-2(d)(1) that an O Fund hold at least 90% of its assets in O Zone Property is a requirement to qualify for the benefits of the program but should not be part of the self-certification and should not be included in the purpose clause of the organizational documents of the O Fund.[7]

Question 2: What other requirements are there to form an O Fund?

Answer 2: There are no other requirements to form an O Fund. In most cases, the formation of an O Fund will involve only filing a certificate of formation to create a limited liability company, drafting an appropriate operating agreement, and, if necessary, preparing offering documents.

There are no restrictions on who may organize, own, or manage an O Fund. Many O Funds will likely be single-investor funds in which a taxpayer who recognized a gain forms their own fund that they control to invest in projects they select. At the other end of the spectrum, there likely will also be multi-investor funds in which a sponsor raises funds from several taxpayers who have recognized gains and invests those funds in projects selected by the sponsor.

TIMING REQUIREMENTS

Question 3: How much time does a taxpayer have to invest proceeds from a sale transaction into an O Fund?

Answer 3: The statute provides a 180-day period in which the investment into the O Fund must be made beginning with (and including) the date of the sale or exchange.[8]

The statute is explicit that the event that starts the 180-day period is the sale or exchange, and thus without IRS dispensation a later start date would not be available in situations that may reasonably justify it. This could include a case where the gain is recognized for tax purposes on a date later than the date of the sale or exchange, for example, if the gain were deferred under the installment sale provisions in §453.

If gain were recognized by a partnership or an S corporation, the partners or shareholders may not know about the gain until they received their Schedule K-1 in the following year, which could be after the 180-day period had run. Thus, hedge funds may want to notify their investors about significant gains on a real-time basis. See Q&A 8 below concerning the identity of the investor where gain is recognized by a pass-through entity.

Question 4: How much time does an O Fund have to invest proceeds into O Fund Property?

Answer 4: The only time requirement provided in the statute are two specified dates[9] on which, on average, the O Fund must have at least 90% of its assets invested in O Fund Property. Thus, depending on when funds are contributed into an O Fund, the O Fund would have six months at the most to invest at least 90% of its assets into O Zone Property. It is unclear how the rule would be applied to a short taxable year, but it appears that for the short year (assuming a calendar taxable year) the two dates could be six months following formation of the O Fund and December 31. Thus, the O Fund should not be formed prematurely, or the taxable year of the entity may start and the first six-month period would begin to run.[10]

The IRS is expected to provide a grace period to give an O Fund more time to invest its funds. A 12-month grace period, at minimum, seems likely, based on a similar rule in the New Markets Tax Credit program,[11] but a longer period, up to 30 months, would not be unreasonable in light of the substantial improvement requirement discussed in Q&A 6.

Question 5: How long does a corporate or partnership subsidiary of an O Fund have to invest funds so as to qualify as a ''qualified opportunity zone business'' (O Zone Business)?[12]

Answer 5: An O Fund can invest in qualifying projects directly (including through a single member limited liability company) or indirectly through a corporation or partnership. The time for an O Fund to make its investment directly or into the stock or partnership interest of a subsidiary is discussed in Q&A 4. This Q&A 5 discusses the time for a subsidiary corporation or partnership to invest funds received from an O Fund.

The statute does not specify when a subsidiary must satisfy the requirements to qualify as an O Zone Business. Many of the requirements, including the requirement that the subsidiary derive at least 50% of its

---

[7] If the 90% test is not met, a specific monetary penalty is prescribed, but the O Fund does not lose its certification.

[8] §1400Z-2(a)(1)(A).

[9] §1400Z-2(d)(1) refers to ''the last day of the first 6-month period of the taxable year of the fund, and . . . the last day of the taxable year of the fund.''

[10] The tax rules concerning when the first taxable year of a newly-formed partnership begins are surprisingly unclear. Reg. §1.6031(a)-1(a)(3), concerning the requirement to file a partnership return, provides that no return is required if the partnership has no income, deductions, or credits for the year. Although it would not be illogical to interpret this to say that a partnership's first year does not start until it first has income, deductions, or credits, the regulation does not say that.

[11] *See* Reg. §1.45D-1(c)(5)(iv).

[12] §1400Z-2(d)(3) and §1397C(b)(2), §1397C(b)(4), and §1397C(b)(8).

ISSN 8755-0628

gross income from the active conduct of a trade or business, have less than 5% of the average of the aggregate unadjusted basis of its property attributable to ''nonqualified financial property,''[13] and use a substantial portion of any intangible property in an active business, are incorporated by cross-reference to another section, which required that such tests be satisfied on a taxable year basis. Investing cash so as to satisfy these tests by the end of the first taxable year (which could be a short year) would be very challenging for most O Zone Businesses, and impossible in many cases.

The IRS is expected to provide relief by giving a subsidiary more time to satisfy the O Zone Business tests, and allowing it to hold cash for purposes of improving or constructing property. In the New Markets Tax Credit program, the IRS provided a safe harbor to ameliorate the nonqualified financial property problem, which deemed certain proceeds held to construct real property to be reasonable working capital for a 12-month period.[14] Hopefully the IRS will provide a more generous safe harbor for this purpose, because the New Markets Tax Credit safe harbor has been insufficient based on its short time period, the application to only certain proceeds, and the limitation to real estate projects.

Question 6: How much time does an O Fund have to ''substantially improve'' property?

Answer 6: Either an O Fund or its subsidiary must substantially improve[15] the property it acquires unless the ''original use'' of the property in the O Zone commenced with the O Fund or subsidiary. See Q&A 13 below for a discussion of the original use requirement. Section 1400Z-2(d)(2)(D)(ii) provides that this must occur ''during any 30-month period beginning after the date of acquisition of such property . . . .'' Although the statute appears open-ended on when the 30-month period must commence, until further guidance is issued by the IRS, taxpayers should plan to complete required improvements of their property during the 30-month period beginning on the date of acquisition. Note that until the IRS provides relief concerning other requirements in the statute, as discussed in Q&A 5, a taxpayer would not be able to take advantage of the substantial improvement rule.

LIMITATIONS ON CASH

Question 7: What are the limitations on cash?

Answer 7: Because an O Fund must invest at least 90% of its assets in O Zone Property, it could retain only up to 10% in cash and other liquid investments. In addition, if an O Fund invests through a corporate or partnership subsidiary, such subsidiary could retain up to an additional 5% of its assets in cash and other liquid investments, plus an amount equal to reasonable working capital. Even together, these limitations are likely not high enough to allow an O Fund or subsidiary to hold enough cash to fund construction or improvement of real property, or acquisition of assets to fund an operating business.

Therefore, guidance from the IRS, including safe harbors for holding cash for construction or improvement of property, are critically needed to permit smooth operation of the program.

TAXPAYERS ELIGIBLE TO INVEST

Question 8: Who can/must be the investor in the O Fund?

Answer 8: Where an individual or C corporation sells property at a gain, it is clear that such individual or C corporation must be the person that makes the investment in the O Fund. However, where a partnership or S corporation is the seller, it is unclear if the pass-through entity, the partner or shareholder in the pass-through entity, or both, may be the investor.

The statute requires ''the taxpayer'' recognizing a gain to invest in an O Fund. ''Taxpayer'' is defined as ''any person subject to any internal revenue law.''[16] Although a pass-through entity does not normally pay tax, in certain instances it is required to,[17] and in any event it is subject to various internal revenue laws, such as tax return requirements. Each partner and S corporation shareholder would also be a taxpayer. It would therefore seem that with respect to a gain recognized by a partnership or S corporation, either the entity or a partner/shareholder should be able to invest in an O Fund.

Because the ''taxpayer'' recognizing gains must be the investor in the O Fund, feeder funds, or partner-

[13] §1400Z-2(d)(3)(A)(ii) by cross-reference to §1397C(b)(8). ''Nonqualified financial property'' is defined in §1397C(e) as ''debt, stock, partnership interests, options, futures contracts, forward contracts, warrants, notional principal contracts, annuities, and other similar property specified in regulations; except that such term shall not include (1) reasonable amounts of working capital held in cash, cash equivalents, or debt instruments with a term of 18 months or less, or (2) debt instruments described in section 1221(a)(4).'' Such term would include bank accounts, checking accounts and other time and demand deposits. Although not specifically listed, it appears that it would also include cash on-hand.

[14] Reg. §1.45D-1.

[15] Pursuant to §1400Z-2(d)(2)(D)(ii), to ''substantially improve'' a property, an O Fund (or subsidiary) must make additions to basis with respect to such property during a 30-month period in the hands of the O Fund (or subsidiary) that exceed the basis at the beginning of the 30-month period.

[16] §7701(a)(14).

[17] *See, e.g.,* §1374 (certain built in gains tax imposed on an S corporation) and §6225 (certain taxes imposed on a partnership following an audit).

ISSN 8755-0628

ships aggregating investors with gains, could not be an investor in an O Fund, unless the IRS specifically permits.

TYPES OF PROJECTS/PROPERTY

Question 9: What types of projects/property are permissible investments?

Answer 9: All types of projects/property qualify as permissible investments, with the exception of the limited types of businesses listed in §144(c)(6)(B)[18] if the investment is made through a subsidiary (but not if the O Fund invests directly).

One of the requirements to be an O Zone Business (applicable if an O Fund invests through a corporate or partnership subsidiary, but not if it invests directly in projects) is that at least 50% of its total gross income be derived from the ''active conduct'' of a trade or business; some have raised the possibility that this may cause certain types of projects, particularly rental real estate, to not qualify. A similar requirement applied with respect to certain benefits available for projects in the Gulf Opportunity Zone, and authorities under those provisions are instructive. In Notice 2006-77, the IRS stated that ''the determination of whether a trade or business is actively conducted by the taxpayer is to be made based on all of the facts and circumstances. A taxpayer generally is considered to actively conduct a trade or business if the taxpayer meaningfully participates in the management or operations of the trade or business.''[19] Examples illustrate the application of the rule. In one example a partnership (and thus all of its partners) are deemed to actively conduct a business of owning and renting an apartment building where one of the partners manages and operates the building. In another example, a partnership owns and triple net leases a commercial building. The example holds that due to the triple net lease, the partnership does not meaningfully participate in the management or operations of the building. However, with respect to a second commercial building leased not pursuant to a triple net lease, and managed by one of the partners, the partnership is deemed to actively conduct a business.[20]

DIRECT INVESTMENT VS. INDIRECT INVESTMENT

Question 10: What requirements apply whether the O Fund invests directly in projects, on the one hand, or invests indirectly through a corporate or partnership subsidiary, on the other hand?

Answer 10: In all cases, property must be acquired by the O Fund (or subsidiary) after December 31, 2017, from an unrelated person, and the original use of the property in the O Zone must commence with the O Fund (or subsidiary) **or** the O Fund (or subsidiary) must substantially improve the property.

Question 11: What requirements are different if the O Fund invests directly or indirectly?

Answer 11: The requirements for direct and indirect investments that differ are summarized in the table below:

[18] §144(c)(6)(B) lists a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.

[19] Notice 2006-77, §3.02(2).

[20] *See also* PLR 201618008 (taxpayer deemed to actively conduct business where real property leased pursuant to an operating lease and not a triple net lease).

Comparison of Requirements for Direct and Indirect Investment by O Fund

Requirement	Direct Investment	Indirect Investment
Percentage of O Fund's assets that must be invested in qualified opportunity zone business property	90%	N/A
Percentage of O Fund's assets that must be invested in qualified stock or partnership interests	N/A	90%
Percentage of O Fund's assets that may be held in cash or other liquid investments	10%	5% plus reasonable working capital
Percentage of O Fund's assets that may be invested in intangible property	10%	Unlimited, but intangible property must be used in active conduct of trade or business
Percentage of O Fund's assets that must be invested in tangible property	90%	No minimum

ISSN 8755-0628

Comparison of Requirements for Direct and Indirect Investment by O Fund		
Percentage of gross income that must be derived from O Zone	None	50%
Ineligible Businesses	None	Sin businesses
Active business test	None	50% of gross income must be derived from ''active'' conduct of trade or business

USE OF LEVERAGE

Question 12: Can leverage be used in connection with an O Fund investment?

Answer 12: Yes, leverage can be used at several different levels. Because there is no required connection between gain a taxpayer desires to defer and cash proceeds to fund an investment in an O Fund, a taxpayer could borrow such amounts. In addition, there is no prohibition on an O Fund borrowing to partially fund (together with the taxpayer's equity investment in the O Fund) the purchase of O Zone Property. Similarly, a partnership or corporate subsidiary of an O Fund could borrow to help fund a project. Borrowing at the subsidiary level could potentially be tailored to comply with the timing requirements and cash limitations discussed above, e.g., a taxpayer's equity could be used to acquire an existing property and then borrowed funds could be drawn down as needed to improve the property.

ORIGINAL USE REQUIREMENT

Question 13: What is the ''original use'' rule and how is it applied to land and existing businesses?

Answer 13: For all projects, the original use of the property in the O Zone must commence with the O Fund, **or** the O Fund must substantially improve the property.[21] The original use standard has been used in other programs similar to the O Zone program, including the Gulf Opportunity Zone program and the DC Enterprise Zone program. The application to tangible personal property is straightforward: new tangible personal property purchased by the O Fund or a subsidiary that constitutes an O Zone Business and first used in an O Zone will clearly qualify. Apparently, used tangible personal property previously used outside the O Zone but purchased and relocated to the O Zone would also qualify.

The rules with respect to real property are less clear. An existing building located in an O Zone could not satisfy the original use test when purchased by an O Fund, and thus would have to be substantially improved. It appears that vacant land located in an O Zone would also fail the original use test, and therefore would have to be substantially improved. This could be problematic in locations where land is expensive.

CONCLUSION

The O Zone program promises to bring needed capital to low-income communities, but critical guidance is needed on many items. Hopefully, the IRS will issues guidance soon that is consistent with the policy of the program and flexible enough to allow the program to operate efficiently.

---

[21] §1400Z-2(d)(2)(D)(i)(II). The substantial improvement requirement is discussed in Q&A 6.

ISSN 8755-0628

Bloomberg Tax

Tax Management
Real Estate Journal™

New Program Allows Deferral and Possible Forgiveness of Capital Gains Invested in Low-Income Community Businesses

By Steven F. Mount[*]

A new Opportunity Zone program to encourage investment in low-income community businesses was included in the 2017 tax act,[1] signed into law by the President on December 22, 2017.

New Code §1400Z-1 and §1400Z-2[2] allow individual and corporate taxpayers to defer capital gains on the sale of stock, business assets, or any other property (whether or not the asset sold was located in or related to a low-income community) by investing the proceeds in an Opportunity Fund, which in turn must invest at least 90% of its assets, directly or indirectly, in businesses located in certain low-income communities designated as Opportunity Zones. Partial forgiveness of deferred capital gains and gains from future appreciation is possible for Opportunity Fund investments held for five, seven, and ten years.

OVERVIEW

Deferral and Possible Forgiveness of Capital Gains

Any taxpayer can defer capital gains in an unlimited amount from the sale or exchange of any property to an unrelated person by investing part or all of the proceeds from such sale or exchange in an Opportunity Fund. The property sold can be stock, business assets, personal assets, or any other property. The property sold need not be located in or connected in any way with a low-income community.

To defer a gain, a taxpayer must invest proceeds from the sale in an Opportunity Fund within 180 days, beginning on the date of the sale or exchange, in an amount equal to the gain to be deferred. For example, if an individual sells stock with a tax basis of $200,000 for $1 million, the entire capital gain of $800,000 could be deferred if at least $800,000 of proceeds were timely invested in an Opportunity Fund. If the taxpayer instead invested only $500,000 of the proceeds in an Opportunity Fund, then that amount of gain could be deferred and the other $300,000 of gain would be taxable in the year of sale. If the taxpayer invested the entire $1 million of proceeds in an Opportunity Fund, the investment would be treated as two investments of $800,000 and $200,000, with only the first investment eligible for the program.

The deferred gains are taxable when the investment in the Opportunity Fund is sold or, if earlier, on December 31, 2026.

Ten percent of the deferred gain is forgiven for Opportunity Fund investments held for five years, and 15% is forgiven if the investment is held for seven years. It is not clear how the five- and seven- year provisions would apply where those periods straddle December 31, 2026, the date on which deferred gains are triggered into income whether or not the Opportunity Fund investment has been sold.

For an Opportunity Fund investment held for 10 years, the tax basis of the new investment is deemed to be its fair market value on sale. Because a 10-year holding period will necessarily straddle December 31,

---

[*] Steven Mount is a partner in the Columbus office of Squire Patton Boggs. His practice focuses on tax credit financings including New Markets Tax Credit, Historic Tax Credit and Energy Tax Credit transactions. He also represents clients concerning partnership taxation and other real estate joint venture transactions, and issues concerning real estate investment trusts.

This article will be published in the upcoming Real Estate Journal, Vol. 34, No. 2 (Feb. 7, 2018).

[1] Pub. L. No. 115-97.

[2] Added by §13823 of the 2017 Tax Act, effective beginning on December 22, 2017.

2026, the result of this rule is that further appreciation on the investment (but not the deferred gain) is eliminated permanently.

Definition of 'Opportunity Zone'

The governor of each state (and the mayor of the District of Columbia) has until March 21, 2018, (with a possible 30-day extension) to nominate up to 25% of the qualified census tracts in their state as Opportunity Zones. If the state has less than 100 qualified census tracts, the governor can nominate up to 25 of such tracts. A small number of census tracts contiguous to a qualified census tract can also be nominated, subject to certain limitations. The Secretary of the Treasury has 30 days to certify a governor's nominations and designate the tracts as an Opportunity Zone, with a possible extension of another 30 days.

If a governor fails to nominate Opportunity Zones by the deadline, the opportunity may be lost forever, thus depriving the state of potential beneficial investments.

The definition of ''qualified census tract'' for this purpose is generally any census tract that has a poverty rate of at least 20% or that has a median income that does not exceed the higher of 80% of the median income of the metropolitan area or of the statewide median income.

The designation of a qualified census tract as an Opportunity Zone will be effective until December 31, 2028.

Definition of 'Opportunity Fund'

An Opportunity Fund is any corporation or partnership that invests at least 90% of its assets in Opportunity Zone businesses, either directly or through qualifying corporations or partnerships. The Opportunity Fund must be ''certified'' under rules to be promulgated by the Treasury Secretary. The statute does not provide requirements for certification, but legislative history references the New Markets Tax Credit program for this purpose, so it is likely that the certification process will be similar to certification of a ''community development entity'' (CDE) under that program.

The statute does not specify who may sponsor or manage an Opportunity Fund; persons who now manage a CDE or a ''community development financial institution'' (CDFI), as well as bank and investment bank participants in the New Markets Tax Credit program, are likely to be participants in the Opportunity Fund program.

Definition of 'Opportunity Zone Business'

An Opportunity Fund may hold interests in an Opportunity Zone Business directly or through a subsidiary partnership or corporation. In all cases, to qualify as an Opportunity Zone Business, substantially all of the tangible assets of the business must be used in an Opportunity Zone, at least 50% of the gross income earned by the business must be from the active conduct of a business in the Opportunity Zone, and the business can hold only a limited amount of investment assets. With the exception of a limited number of ''sin businesses,'' almost any type of business will qualify. Many of the requirements to qualify as an Opportunity Zone Business are similar to rules applicable to an ''enterprise zone business'' and to ''qualified Gulf Opportunity Zone property.'' Some requirements are also similar to those for a ''qualified active low-income community business'' in the New Markets Tax Credit program. Hopefully taxpayers will be permitted to rely on existing guidance in those areas in determining whether a business qualifies as an Opportunity Zone Business.

ANALYSIS

Deferral of Capital Gains

Any individual, corporation, or trust, whether foreign or domestic, can elect to defer an unlimited amount of capital gain from the sale or exchange of any property to an unrelated person by investing part or all of the proceeds from such sale or exchange in a ''qualified opportunity fund,'' as defined below (Opportunity Fund or O Fund) during the 180-day period beginning on the date of the sale or exchange.[3] The property sold can be stock, business assets, personal assets, or any other property. The property sold need not be located in, or connected in any way with, a qualified census tract (as defined below). Only capital gains realized in sales or exchanges on or before December 31, 2026, can be deferred under this program.[4]

A taxpayer may elect to defer all or only a portion of the gain from a particular sale or exchange.[5] For example, if an individual sells stock with a tax basis of $200,000 for $1 million , the entire capital gain of $800,000 could be deferred if at least $800,000 of proceeds were timely invested in an Opportunity Fund. If the taxpayer instead invested only $500,000

---

[3] §1400Z-2(a)(1)(A) . Unless otherwise indicated, all section references herein refer to sections of the Code, as amended by the2017 Tax Act. In a taxable exchange, the ''proceeds'' would be other property, and not cash. It is unclear whether the taxpayer could contribute the property received to an Opportunity Fund (or whether the Opportunity Fund would accept such contribution), or if instead the taxpayer would need to contribute cash equal to the value of the property received.

[4] §1400Z-2(a)(2)(B).

[5] §1400Z-2(a)(1)(A).

ISSN 8755-0628

in an Opportunity Fund, then that amount of gain could be deferred and the other $300,000 of gain would be taxable in the year of sale. If the taxpayer invested the entire $1 million of proceeds in an Opportunity Fund, the investment would be treated as two investments of $800,000 and $200,000, with only the first investment eligible for the program.[6]

The deferred gains are taxable when the investment in the Opportunity Fund is sold or, if earlier, on December 31, 2026.[7] The requirement that all deferred gains be included in income on December 31, 2026, whether or not the investment in the O Fund has been sold, would create a ''phantom income'' issue, and may negate all or some of the benefits of holding the Opportunity Fund investment long enough to satisfy the five-, seven-, or 10-year holding periods, as discussed below.

The amount of the deferred gain subject to tax is generally the entire amount of such gain, except that if the O Fund investment is sold at a loss, only the actual gain realized is taxable. This is accomplished by taxing the following amount: (i) the lesser of the amount of the deferred gain or the fair market value of the taxpayer's investment in the O Fund on the date of gain recognition *minus* (ii) the taxpayer's basis in the O Fund.[8] For this purpose, the taxpayer's basis in the O Fund is deemed to be zero,[9] except as adjusted as discussed below. Presumably the gain would be taxed in the same manner as it would have been taxed in the year of the sale or exchange, e.g., as capital gain from the sale of a business asset, capital gain that constitutes ''net investment income'' pursuant to §1411, ''unrecaptured §1250 gain,'' etc. The deferred gain would be taxed at the rate in effect for the year of gain recognition (i.e., either the year the taxpayer's interest in the O Fund is sold, or 2026).

The taxpayer's basis in the O Fund is increased by the amount of deferred gain included in income,[10] so that if the gain is recognized in 2026,[11] but the taxpayer continues to hold the property, such gain will not be taxed again when the taxpayer sells its interest in the O Fund.

Partial Forgiveness of Gain for O Fund Investment Held for Five Years or Seven Years

If a taxpayer holds an investment in an O Fund for at least five years, the taxpayer's basis in the O Fund is increased (over zero) by 10% of the amount of the deferred gain,[12] so that on sale of the O Fund investment, 10% of the deferred gain is permanently forgiven. A similar provision increases the basis by an additional 5% for an O Fund investment held for at least seven years.[13] It is unclear whether an investor would receive the benefit of these provisions if the five- or seven-year holding period straddles December 31, 2026. Because all of the deferred gain would be taxable on that date, the 10% or 15% basis increase could not offset deferred gain. However, it appears that it would nonetheless step up the basis in the O Fund, and thus could offset gain from appreciation (if any) on sale of the O Fund interest.

For example, if on July 1, 2018, a taxpayer sold stock having a tax basis of $200,000 for $1 million, timely invested the $800,000 of proceeds in an Opportunity Fund, and then sold his O Fund investment on August 15, 2023, then only $720,000 (i.e., $800,000 – [10% of $800,000]) of the $800,000 deferred gain would be subject to tax. If the sale of the O Fund investment were instead on August 15, 2025, only $680,000 (i.e., $800,000 – [15% of $800,000]) of deferred gain would be subject to tax. However, if the stock were sold and the O Fund investment were made on July 1, 2022, neither the five-year nor the seven-year holding period would be met by December 31, 2026, and so on that date the taxpayer would have to include the entire $800,000 of gain in income for the 2026 taxable year. The taxpayer's basis in the O Fund would be increased from zero to $800,000. If the taxpayer continued to hold the investment until August 15, 2027, and then sold his or her interest for $1.5 million , it appears that his or her basis would be further increased by $80,000 (10% of the original deferred gain), and thus the gain on the sale would be $620,000 ($1,500,000 – $880,000).

Forgiveness of Gains for O Fund Investment Held for 10 Years

Another potentially very valuable provision for an investor is contained in §1400Z-2(c).[14] This provision provides that the basis in an O Fund investment held for at least 10 years is the fair market value of the investment on the date on which such investment is sold. Because the 10-year period will necessarily straddle December 31, 2026 (when the deferred gain is required to be taken into income), it appears that the

[6] §1400Z-2(e)(1).

[7] §1400Z-2(a)(1)(B) and §1400Z-2(b)(1).

[8] §1400Z-2(b)(2)(A).

[9] §1400Z-2(b)(2)(B)(i).

[10] §1400Z-2(b)(2)(B)(ii).

[11] I.e., under §1400Z-2(a)(2)(B).

[12] §1400Z-2(b)(2)(B)(iii).

[13] §1400Z-2(b)(2)(B)(iv).

[14] A taxpayer must elect for this provision to apply, in addition to the initial election to defer gains. Presumably the only reason that a taxpayer would not make an election is if that would eliminate a loss.

ISSN 8755-0628

effect of this provision is to forgive gain on appreciation of the O Fund interest. Therefore, a taxpayer presumably would retain his or her investment in the O Fund beyond December 31, 2026 and pay a tax on the phantom income triggered on such date, if he or she expected the appreciation in the O Fund interest to be significant.

Continuing the above example where the taxpayer sold his stock and made an O Fund investment on July 1, 2018, but held such investment until August 15, 2028,[15] when he sold it for $1.5 million , his basis would be stepped up from $800,000 to $1.5 million,[16] and he would recognize no gain on the sale. He previously included $680,000 in income on December 31, 2026 (because he met the 7-year holding period at that time), so the effect of the 10-year provision is to entirely exclude tax on appreciation.

If the December 31, 2026 ''phantom income'' date were extended by Congress, it is possible that an O Fund investor that held its interest for at least 10 years could have all gains — deferred and resulting from future appreciation—forgiven, which would be a very strong incentive for taxpayers to invest in an Opportunity Fund and would likely drive large amounts of capital to deserving low-income communities.

A ''qualified opportunity zone'' (Opportunity Zone or O Zone) is any population census tract that is a ''low-income community'' (qualified census tract) that is timely nominated as an Opportunity Zone by the governor of a state[17] (or the mayor of the District of Columbia) and certified and designated as an Opportunity Zone by the Secretary of the Treasury (Secretary).[18]

A ''low-income community'' has the same definition as in §45D(e) for purposes of the New Markets Tax Credit.[19] Generally, this is any census tract that has a poverty rate of at least 20% or that has a median income that does not exceed 80% of the higher of the median family income of the metropolitan area or the statewide median family income.[20]

Up to 25% of the qualified census tracts in a state may be nominated as an Opportunity Zone. If the state has less than 100 qualified census tracts, up to 25 of such tracts may be nominated.[21] A governor may include in his or her nomination census tracts that are not qualified census tracts if they are contiguous to a qualified census tract that is also nominated as an Opportunity Zone and the median family income of such tract does not exceed 125% of the median family income of the contiguous tract.[22] Not more than 5% of the population census tracts designated can include tracts designated under this provision.[23] This permits a governor to create more uniform districts, and also can allow more prosperous areas to be designated, which in turn permits businesses located in those areas to participate in the program.

The deadline for a governor to nominate one or more Opportunity Zones and notify the Secretary of such nomination is March 21, 2018 (the last day of a 90-day period beginning on the date of enactment of the statute);[24] a governor may request one 30-day extension from the Secretary.[25] The statute does not permit additional extensions; thus, if a governor does not nominate one or more Opportunity Zones (and notify the Secretary) by the initial or extended deadline, the opportunity may be lost forever.[26]

The Secretary must certify the nomination and designate the nominated tracts as Opportunity Zones within 30 days of receipt of a governor's nomination, which period can be extended by 30 days if the gov-

---

[15] It is not clear how the provision would be applied if the 10-year period extended beyond December 31, 2028, when designations of Opportunity Zones expire.

[16] §1400Z-2(c) provides that the basis is stepped up to fair market value, but a sale to an unrelated party would be strong evidence that the sales price was fair market value.

[17] For this purpose, §1400Z-1(c)(3) defines ''state'' to include any possession of the United States. For purposes of the New Markets Tax Credit program, a possession of the United States includes only American Samoa, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands. *See* H.R. Conf. Rep. No. 106-1033, 106th Cong., 2d Sess. 990 (2000). Section 7701(a)(10) also provides that the term ''state'' shall be construed to include the District of Columbia, where such construction is necessary to carry out the provisions of Title 26 of the U.S. Code.

[18] §1400Z-1(a) and §1400Z-1(b).

[19] §1400Z-1(c)(1).

[20] §45D(e)(1).

[21] §1400Z-1(d). The Senate Amendment, but not the Conference Agreement, provided that governors are ''required to provide particular consideration to areas that: (1) are currently the focus of mutually reinforcing state, local, or private economic development initiatives to attract investment and foster startup activity; (2) have demonstrated success in geographically targeted development programs such as promise zones, the new markets tax credit, empowerment zones, and renewal communities; and (3) have recently experienced significant layoffs due to business closures or relocations.'' H.R. Conf. Rep. No. 115-466, 115th Cong., 1st Sess. 399 (2017). The statute does not contain any of these requirements, although such requirements were included in H.R. 828 (discussed in n. 26).

[22] §1400Z-1(e)(1).

[23] §1400Z-1(e)(2).

[24] §1400Z-1(b), §1400Z-1(c)(2)(B).

[25] §1400Z-1(b)(2).

[26] The direct antecedent of the Opportunity Zone provisions was the Investing in Opportunity Act, H.R. 828, 115th Cong. (2017). (A substantially identical bill was also introduced in the Senate.) H.R. 828 allowed the Secretary to designate Opportunity Zones in a state if the governor failed to take timely action, but that provision was not included in the statute. It is unclear if the Secretary would have that authority nonetheless or would choose to exercise it.

ISSN 8755-0628

ernor requests such extension. Curiously, it appears that the Secretary is the party who may grant himself an extension. The statute does not address what happens if the Secretary fails to certify the nomination within the prescribed period.[27]

Determining which qualified census tracts to nominate as Opportunity Zones will create challenging policy considerations. In addition to choosing tracts that would benefit from the investment, it will be important to designate locations that will attract Opportunity Zone businesses that are able to project financial success.

The designation of a qualified census tract as an Opportunity Zone will be effective until December 31, 2028.[28]

'Qualified Opportunity Fund'

A ''qualified opportunity fund'' (Opportunity Fund or O Fund) is any corporation or partnership organized for the purpose of investing in qualified opportunity zone property (as defined below) and that holds at least 90% of its assets in such property.[29] It appears that an O Fund cannot invest in another O Fund, even if that would otherwise meet the definition of qualified opportunity zone property.[30] The 90% requirement is determined by the average of the percentage of qualified opportunity zone property held by the O Fund as measured (a) on the last day of the first six-month period of the taxable year of the O Fund, and (b) on the last day of the taxable year.[31] For a calendar year taxpayer, these dates would be June 30 and December 31 on a going-forward basis, but may be a different date for the first taxable year if it is a short year. The statute does not specify whether the percentage is to be determined by reference to the adjusted tax basis or fair market value of the qualified opportunity zone property held by the O Fund, or on some other basis.[32]

If the O Fund fails the 90% test in any year, it is not disqualified as such, but is required to pay a penalty for each month in which it fails to meet the requirement in an amount equal to (a) the excess of (i) 90% of its aggregate assets, over (ii) the aggregate amount of qualified opportunity zone property held by the O Fund, multiplied by (b) the underpayment rate under §6621(a)(2).[33] If the O Fund is a partnership, it appears that each partner must pay his or her proportionate share of the penalty.[34] No penalty is imposed if the O Fund can demonstrate that its failure to meet the 90% test was due to reasonable cause.[35] The statute does not specify how assets are to be measured for this purpose (i.e., by adjusted tax basis, fair market value, or some other method), and does not provide how a penalty can be determined and applied on a monthly basis when the 90% test is determined on an annual basis.

The Secretary is required to promulgate regulations providing rules for certifying an Opportunity Fund.[36] The statute does not provide any requirements for certification, but the legislative history references the New Markets Tax Credit program,[37] so it seems likely that the certification process will be similar to certification of a ''community development entity'' (CDE) under that program, and may be managed by the Community Development Financial Institutions Fund, the agency within the U.S. Department of the Treasury that administers the New Markets Tax Credit program and other community development programs. The certifying agency should limit the certification process to determining compliance with the

---

[27] H.R. 828 deemed a governor's nominations to be designated (if they were eligible) if the Secretary failed to act.

[28] Section1400Z-1(f) states that ''[a] designation as a qualified opportunity zone shall remain in effect for the period beginning on the date of the designation and ending at the close of the 10th calendar year beginning on or after such date of designation.'' All qualified opportunity zone designations must be made by March 21, 2018 (with a possible 30-day extension). §1400Z-1(c)(2)(B). Thus, because all designations must be made in 2018, the designations will be effective until December 31, 2028, i.e., the close of the 10th calendar year beginning on or after the date of such designation. It is unclear whether investments made on or before December 31, 2028, will continue to qualify once the Opportunity Zone designations expire.

[29] §1400Z-2(d)(1).

[30] §1400Z-2(d)(1).

[31] §1400Z-2(d)(1)(A), §1400Z-2(d)(1)(B).

[32] From a policy perspective, using fair market value would seem to be the better approach, but that would require periodic valuations. Thus, as a practical matter, using adjusted tax basis may be the most acceptable approach.

[33] §1400Z-2(f)(1). The underpayment rate in §6621(a)(2) is the federal short-term rate determined under §1274(d) plus three percentage points. The underpayment rate for January 1 through March 31, 2018, is 4%.

[34] §1400Z-2(f)(2).

[35] §1400Z-2(f)(3).

[36] §1400Z-2(e)(4)(A). The Secretary is also tasked with prescribing regulations concerning reinvestments by an Opportunity Fund and to prevent abuse. §1400Z-2(e)(4)(B) and §1400Z-2(e)(4)(C).

[37] The Conference Committee Report provides that the O Fund ''provision intends that the certification process for a qualified opportunity fund will be done in a manner similar to the process for allocating the new markets tax credit.'' H.R. Conf. Rep. No. 115-466, 115th Cong., 1st Sess. 399 (2017). As discussed in the sentence containing footnote 38, the reference to ''allocating'' the New Markets Tax Credit is an apparent misstatement, and the intent was to reference the certification process under the New Markets Tax Credit program instead.

ISSN 8755-0628

statute, and should not seek to impose substantive requirements limiting sponsorship of an O Fund or concerning the qualified opportunity zone property in which an Opportunity Fund may invest, as is now imposed on CDE's under the allocation process (and not the certification process) under the New Markets Tax Credit program.[38]

The statute does not specify who may sponsor or manage an O Fund, and thus any person may organize, manage, and promote an Opportunity Fund, although it is possible that the certifying agency will impose some restrictions in this regard. Persons who now manage a CDE or a ''community development financial institution,'' as well as bank and investment bank participants in the New Markets Tax Credit program, are likely to be participants in the Opportunity Fund program.

Definition of ''Qualified Opportunity Zone Property''

''Qualified opportunity zone property'' is property that is (i) qualified opportunity zone stock, (ii) qualified opportunity zone partnership interests, or (iii) qualified opportunity zone business property (all as defined below).[39]

''Qualified opportunity zone stock'' (O Zone Stock) is stock of any domestic corporation (i) acquired by the O Fund after December 31, 2017, at original issuance solely in exchange for cash, and (ii) which, at the time such stock is issued and during substantially all of the O Fund's holding period, is a qualified opportunity zone business (as defined below).[40] If the corporation is newly formed, it does not need to constitute a qualified opportunity zone business on the date the stock is issued, but the corporation must be organized for purposes of being a qualified opportunity zone business.[41] Stock does not qualify as O Zone Stock if the issuing corporation redeemed a significant amount of its stock within the two-year period beginning one year before the issuance to the O Fund, or redeemed any stock from the O Fund or a party related to the O Fund within a four-year period beginning two years before the issuance to the O Fund.[42]

A ''qualified opportunity zone business'' (Opportunity Zone Business or O Zone Business) is a trade or business (i) in which substantially all of the tangible property owned or leased by the entity is Opportunity Zone Business Property (as defined below), and (ii) which (a) derives at least 50% of its gross income from the active conduct of a trade or business, (b) uses a substantial portion of any intangible property in such trade or business, and (c) has less than 5% of its assets invested in nonqualified financial property.[43] Notwithstanding the preceding, a trade or business will not qualify as an O Zone Business if it is engaged in owning or operating any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.[44]

''Qualified opportunity zone business property'' (Opportunity Zone Business Property or O Zone Business Property) is tangible property used in a trade or business: (i) that is acquired by purchase (within the meaning of §179(d)(2)[45]) after December 31, 2017; (ii) the original use of which in the O Zone commences with the O Zone Business, or the O Zone Business substantially improves the property; and (iii) substantially all of the use of which is in the O Zone.[46] Property is substantially improved for this purpose if during any 30-month period following ac-

---

[38] Although there are many similarities between the Opportunity Zone program and the New Markets Tax Credit program, a crucial difference will be in underwriting the potential financial success of the low-income community businesses in which an Opportunity Fund invests. Under the New Markets Tax Credit program, the ultimate financial success of a qualified active low-income community business is not critical for an investor to be able to claim the tax credit available under that program. On the contrary, an investor in an Opportunity Fund may require safety and economic growth potential in the businesses owned by the Opportunity Fund, just as in any other economic investment the investor may consider.

[39] §1400Z-2(d)(2).

[40] §1400Z-2(d)(2)(B).

[41] §1400Z-2(d)(2)(B)(i)(II).

[42] §1400Z-2(d)(2)(B)(ii). The rules of §1202(e)(3) are used for this purpose.

[43] §1400Z-2(d)(3)(A)(i) and §1400Z-2(d)(3)(A)(ii), in part by reference to §1397C(b)(2), §1397C(b)(4) and §1397C(b)(8). ''Nonqualified financial property'' is defined in §1397C(e) as: debt, stock, partnership interests, options, futures contracts, forward contracts, warrants, notional principal contracts, annuities and other similar property. This would include bank accounts, checking accounts, and other time and demand deposits. Although not specifically listed in the statute, it would seem that cash should also be treated as nonqualified financial property. Nonqualified financial property does not include reasonable amounts of working capital held in cash or cash items or in debt instruments with a term of 18 months or less, or debt instruments described in §1221(a)(4). *See* Mount, 585 T.M., *New Markets Tax Credit*, for a full discussion of nonqualified financial property and the challenges presented by this limitation in the New Markets Tax Credit area.

[44] §1400Z-2(d)(3)(A)(iii), by reference to §144(c)(6)(B).

[45] Section 1400Z-2(e)(2) modifies the related party test in §179(d)(2) by substituting ''20%'' for ''50%'' each place it appears in §267(b) and §707(b)(1).

[46] §1400Z-2(d)(2)(D)(i). A similar ''substantially all'' requirement in §1400N (relating to Gulf Opportunity Zone Property, also referred to as ''GO Zone Property'') was interpreted to mean 80%. Notice 2006-77, at §3.

ISSN 8755-0628

quisition of such property there are additions to basis that equal the adjusted basis as of the beginning of such 30-month period.[47]

Many of the requirements applicable to Opportunity Zone Business Property and an O Zone Business are similar to rules applicable to an ''enterprise zone business'' pursuant to §1397C and to ''qualified Gulf Opportunity Zone property'' pursuant to §1400N. Some requirements are also similar to those for a ''qualified active low-income community business'' in §45D.[48] Hopefully taxpayers will be permitted to rely on existing guidance in those areas in determining whether a business qualifies as an Opportunity Zone Business.

Qualified opportunity zone property also includes certain interests in a partnership, with requirements substantially identical to those applicable to O Zone Stock,[49] but which would apply when the business is organized as a partnership rather than a corporation. Last, qualified opportunity zone property also includes O Zone Business Property held directly by an O Fund[50]; it seems very unlikely that an O Fund would hold and operate business assets directly, except perhaps in a single-investor fund.

A special favorable rule applies in determining whether an O Zone Business qualifies (and continues to qualify) as an O Zone Business: If any tangible property owned or leased by an O Zone Business fails to qualify as O Zone Business Property, it shall continue to be treated as O Zone Business Property for the lesser of (i) five years after the date on which it ceased to qualify, or (ii) the date on which such property is no longer owned by the O Zone Business.[51] One example of when this rule could apply is if tangible property initially used by an O Zone Business in an O Zone is moved outside the O Zone but continues to be used by the O Zone Business.

CONCLUSION

The 2017 Tax Act has potentially created a valuable program to drive capital to and benefit low-income communities. Its ultimate success will depend on how quickly the certifying agency can organize the program and begin certifying O Funds, the limitations that the certifying agency may impose on O Funds and its permissible investments, and most importantly, whether Congress extends the current date of December 31, 2026, on which all deferred gains are automatically taxable.

---

[47] §1400Z-2(d)(2)(D)(ii).

[48] *See* Maule, 597 T.M., *Tax Incentives for Economically Distressed Areas*, for an overview of the provisions concerning an enterprise zone business and qualified Gulf Opportunity Zone property. *See* Mount, 585 T.M., *New Markets Tax Credit*, for a general discussion of the qualified active low-income community business requirements.

[49] §1400Z-2(d)(2)(C).

[50] §1400Z-2(d)(2)(D).

[51] §1400Z-2(d)(3)(B).

ISSN 8755-0628