KILPATRICK TOWNSEND

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Opportunity Zones

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This white paper is designed to summarize the federal Opportunity Zone program to industry professionals and potential market participants. We summarize for readers the program's tax incentive structure, how investment vehicles must be structured to qualify for the program, the opportunities that the program is intended to create and the potential effects of recently proposed regulations.

A. Background

"Opportunity Zones" were established as a new community development program enacted, with bi-partisan support, as a part of the Tax Cuts and Jobs Act of 2017. The purpose of the Opportunity Zones program is to encourage long-term investment in low-income communities nationwide, to help foster economic development and job creation in those communities. The program provides certain tax incentives for investors to re-invest their capital gains into properties and businesses located in economically stagnant neighborhoods and submarkets across the United States that have been designated as "Opportunity Zones" (hereinafter "OZs") by the states and approved by the Internal Revenue Service ("IRS"). Maps showing the location of all current OZs are linked here.

Investors can take advantage of the tax incentives offered by the program by investing in qualified "Opportunity Funds." Generally speaking, a qualified Opportunity Fund (hereinafter "OF") is a private investment vehicle that invests at least 90% of its capital in "qualified OZ property" – which means investments in either OZ businesses or OZ tangible properties. As we describe in more detail below, we expect that even OFs that intend to focus on investments in tangible property (including real estate) will make such investments through OZ business subsidiaries rather than making direct investments in property.

B. Tax Incentives

The Opportunity Zone program provides for three potential tax incentives, the availability of which depends on the length of time an eligible OF investment is held: (1) temporary deferral of tax on recognized capital gains invested in an OF; (2) a partial basis step up in the deferred capital gain (resulting in up to 15% permanent exclusion of the recognized gain); and (3) permanent exclusion from taxable income of gains generated from the appreciation of a capital gains investment in an OF upon the disposition of the investor's interest in the OF. The program is designed to incentivize stable, long-term investment in OZs, and requires a 10-year hold period to realize all three incentives. However, investors may exit prior to the minimum 10-year hold if they are willing to forego one or two of the tax incentives discussed below.

1. Temporary Deferral of Tax On Capital Gains

The first available benefit is a temporary deferral on the realization of tax on capital gains. Capital gains that are reinvested into an OF are deferred (i.e., no tax is owed) until the earlier of the date on which the OF investment is sold or December 31, 2026. Note that investors will recognize the lesser of the original gain or the fair market value as of the date over the investor's basis in its investment in the QOF, which gives investors the benefit of any decline in the investment's value and allows an investor to take advantage of the partial basis step up (described below). To be eligible for this benefit, capital gains must be rolled into an OF within 180

Q: What happens when a deferred capital gain is recognized?

A: The Proposed Regulations clarify that all of the deferred gain's tax attributes are preserved through the deferral period and are taken into account when the gain is recognized. This means, for example, that if short term capital gains are rolled into an OF and deferred, when those gains are recognized they will still be treated as short term capital gains regardless of how long the OF investment is held.

days from the date the capital gain was recognized for federal income tax purposes (an "Eligible Investment").[1] (The 180 day period is discussed in more detail below.) Both short term and long term capital gains can be Eligible Investments. [2]

Proposed regulations[3] issued by the Department of Treasury and IRS on October 19, 2018 (the "Proposed Regulations") have clarified that any taxpayer that recognizes capital gains for federal income tax purposes is eligible to elect deferral for Eligible Investments, including individuals, C corporations (including registered investment companies (RICs) and real estate investment trusts (REITs)), partnerships, LLCs, and certain other pass through entities (such as common trust funds).

2. Partial Basis Step Up

The second available benefit is a partial step up in the taxpayer's basis. An investor's basis in an OF resulting from an Eligible Investment is originally zero. Investors in an OF may be eligible to step up the basis in their investment in the OF if certain holding period requirements are met. An investor's basis in the OF is stepped up by 10% of the amount of the Eligible Investment if the investment is held for at least 5 years, and an additional 5% of the amount of the Eligible Investment (for a total of 15%) if the investment is held for at least 7 years. In essence, this results in the permanent exclusion of up to 15% of the gain that the investor would otherwise have recognized. In order to maximize the benefit of this tax incentive (i.e., a full 15% exclusion of the deferred gain), Eligible Investments in OFs should be made no later than December 31, 2019.[4]

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[1] The Proposed Regulations added two additional requirements for a capital gain to be an Eligible Investment: (1) the gain to be deferred must be gain that would otherwise be recognized not later than December 31, 2026; and (2) the gain must not arise from a sale or exchange with a related person. In addition, the Proposed Regulations provide for special timing rules for purposes of determining the relevant 180-day period for investors in partnerships, RICs and REITs.

[2] The Proposed Regulations clarify that if only a part of an investor's investment in an OF is an Eligible Investment, the investment must be treated as two separate investments which will receive different treatment for federal income tax purposes. In the event that an investor makes a series of indistinguishable investments (e.g., an investor buys common stock of a OF corporation) at different times or with gains that have different characteristics (e.g., gains that have different holding periods) and sells less than all of its interests in the OF, the Proposed Regulations clarify that a first-in, first-out method will be applied to determine the character of the gains recognized. If the first-in, first-out method does not provide a complete answer, then a pro-rata method is used.

[3] Pursuant to the federal rulemaking process, these proposed regulations have not been adopted as final regulations. Consideration will be given to comments that are submitted to the IRS by the public in the next 60 days. Certain aspects of the proposed regulations allow for reliance in the interim period prior to the adoption of final rules.

4 Similarly, in order to qualify for the 10% exclusion of the deferred gain, Eligible Investments must be made no later than December 31, 2021. Eligible Investments made in an OF after December 31, 2021 will not be eligible to elect to step up the basis in the Eligible Investment.

3. Exclusion from Tax on Gains on Appreciation of Investment

The third available benefit is an exclusion from tax on capital gains from appreciation. If the OF investment is held for at least 10 years, the program allows investors to elect to recognize no gain on the appreciation of an Eligible Investment, meaning no capital gains or other tax will apply. This is accomplished by allowing investors to elect to have the basis of the investment stepped up to equal its fair market value as of the date of sale. The Proposed Regulations emphasized, for the avoidance of doubt, that only capital gains for which a deferral election has been made are eligible for this exclusion from tax on appreciation.

Q: Opportunity Zone designations will expire on December 31, 2028. Will investors still be able to make basis step up elections?

A: The Proposed Regulations allow investors to make the basis step up election for Eligible Investments held more than 10 years after the OZ designations have expired until December 31, 2047. This gives investors 20 ½ years after the last date on which an eligible investment could have been made, allowing an investor to hold the OF investment for the entire 10-year period plus allowing for an additional ten year period to permit disposition of the investment in a desirable manner.

4. Example

An example as to how the above three benefits work together, as published by the Economic Innovation Group[5], is set forth below[6]:

> Susie has $100 of recognized capital gains in her stock portfolio. She decides in 2018, within 180 days of recognizing such gain, to reinvest those gains into an OF that invests in distressed areas of her home state, and she disposes of her investment in the OF in 2029. Susie is (1) able to defer the tax she owes on her original $100 of capital gains until 2026; (2) able to elect to increase her basis in the OF by 15% (effectively reducing her $100 of taxable capital gains to $85) in 2026 (when the tax on the deferred capital gain is otherwise due); and (3) she can elect to exclude 100% of the gain (and pay zero capital gains tax) on the increase in the value of her interest in the OF. Assume Susie's OF investment grows 7% annually, the after-tax value of her original $100 investment in 2028 is $176. Therefore, Susie enjoys a 5.8% effective annual return, compared to the 2.8% in an equivalent non-Opportunity Fund investment.
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> If Susie sells her QOF investment after 7 years instead of 10 years, she will owe capital gains tax on the investment appreciation, but will still be able to (1) defer the tax she owes on her original $100 of capital gains for 7 years, (2) reduce her $100 of taxable deferred capital gains to $85, and (3) enjoy an effective annual return more than twice that of an equivalent non-Opportunity Fund investment.
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> If Susie sells her OF investment after 5 years instead of 7 years, she can defer the tax she owes on her original capital gains (the $100 noted above) for 5 years and reduce her $100 of taxable deferred capital gains to $90. And though she did not take full advantage of the program, her effective annual return is significantly higher than an equivalent investment in a non-Opportunity Fund.

[5] Tech investor Sean Parker is credited with birthing the OZ idea through his upstart think tank, the Economic Innovation Group, based in Washington, D.C. Several governmental entities, including the NC Department of Commerce cites EIG as the primary source for additional information regarding OZs.

[6] https://eig.org/wp-content/uploads/2018/02/Opportunity-Zones-Fact-Sheet.pdf

C. Opportunity Funds

The statute provides that an Opportunity Fund (OF) is an investment vehicle organized as either a corporation or partnership for federal income tax purposes with the purpose[7] of investing in qualified opportunity zone property (other than another qualified opportunity fund) and that holds at least 90% of its assets in qualified opportunity zone property. The Proposed Regulations clarified that only equity investments (common or preferred equity) in an OF are eligible for the tax benefits described above (*i.e.*, stock in the corporation or a partnership interest in the partnership); interests that are treated as debt for federal income tax purposes are not eligible investments.[8] The Proposed Regulations also clarify that an OF must be domestic (*i.e.*, U.S.) corporation or partnership (or, in certain limited circumstances, an entity created under the laws of a U.S. possession), and that an OF may be organized as limited liability company (LLC) provided it is treated as a partnership for federal income tax purposes.

1. The 90% Test

As mentioned above, to qualify as an OF, the fund must hold at least 90% of its assets in qualified opportunity zone property (the "90% Test"). "Qualified opportunity zone property" is either equity interest (stock or partnership interest) in a qualified opportunity zone businesses (See "OZ Business Investments" below) or direct investments in qualified OZ business property (See "OZ Property Investments" below).

The 90% asset test is determined by the average of the percentage of qualified property held in the fund measured: (1) on the last day of the first 6-month period of the OF's taxable year[9]; and (2) on the last day of the OFs taxable year. The statute authorizes regulations to ensure than an OF has a reasonable period of time to reinvest returned capital and proceeds of a qualified investment without violating the 90% Test. While no such regulations have been proposed to-date, the Proposed Regulations note that it is anticipated that additional proposed regulations on this issue will be released soon.

a. Valuation

The Proposed Regulations state that an OF will be required to use the valuations reported in its qualifying annual financial statements[10] for purposes of calculating the 90% Test, or, if the OF does not have an applicable financial statement, use the cost of its assets. Additional comments are being sought by the Department of Treasury and IRS regarding the most appropriate methods of determining valuation.

b. Penalty for Non-Compliance

An OF that fails to comply with the 90% Test generally will be subject to a penalty for each month of non-compliance. The penalty is equal to the product of: (1) the excess of: (i) 90% of the OF's aggregate assets, over (ii) the aggregate amount of qualified OZ investments (i.e., OZ Property or OZBs) held by the OF, multiplied by (2) the specified underpayment rate established for such month (i.e., the interest rate applicable to

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[7] Form 8996 includes a requirement that an OF certify that its organizing documents include a statement of the entity's purpose of investing in qualified opportunity zone property and a description of the qualified opportunity zone business.

[8] The proposed regulations allow a taxpayer to use their interest in an OF as collateral for a loan without impairing the investment's eligibility.

[9] The Proposed Regulations clarify that this means the first 6-months period composed entirely of months which are within the taxable year and during which the entity is a qualified OF.

[10] Generally speaking, to be qualified, financial statements must be prepared in accordance with US GAAP and either: (a) be filed with the SEC or another federal agency (other than the IRS) or (b) be audited by a public accounting firm.

underpayments of federal taxes). Essentially, this applies a penalty rate to the amount by which the OF is out of compliance with the 90% test.

For an OF that is a partnership, the statute calls for the penalty to be applied proportionately with respect to each partner's distributive share.

While the statute provides for an exception to the penalty in the event that an OF can show that there was reasonable cause for the failure to satisfy the 90% test, to-date no guidance has been provided regarding what would constitute "reasonable cause." We expect additional guidance soon.

2. Certification of an OF

Eligible entities (either a corporation, partnership or limited liability company treated as a partnership for federal tax purposes) must self-certify as qualified opportunity funds; no action or approval by the IRS is necessary. An OF will use an IRS Form, Form 8996, both for initial self-certification and ongoing annual reporting of compliance with the 90% Test. An early release draft of Form 8996 was released in connection with the Proposed Regulations and is linked here. The instructions to this form have not yet been released but are expected soon.

3. Logistics of Investment in an OF and Deferral Elections

a. 180 Days

In order for an investment to be eligible for the tax benefits described above, investors generally must make the investment in an OF with respect to an eligible gain within 180 days of the date of the sale or exchange giving rise to the capital gain. The Proposed Regulations indicate that the first day of the 180-day period is the date on which the gain would otherwise (i.e., without the OF deferral) be recognized for federal income tax purposes and include several examples that apply the rule to different situations to illustrate the rule's application.

b. Deferral Election

To be eligible for the temporary deferral of eligible capital gains, described above, investors in an OF must make a deferral election. It is anticipated that deferral elections will be made on Form 8949, which will be attached to the investor's tax returns for the year in which the gain would otherwise have been recognized. Instructions on how to use that form to elect deferral are expected to be released soon.

c. Gains of Partnerships and Other Pass-Through Entities

The Proposed Regulations clarify that deferral elections may be made by partnerships or other pass-through entities that generate capital gains and make a qualified investment in an OF. In the event a partnership does not make a deferral election with respect to an eligible gain, however, the Proposed Regulations permit each individual partner in the partnership to make its own deferral election. In such a situation, the 180-day period generally begins on the last day of the partnership's taxable year, since that is the date on which the partner would otherwise recognize the gain.[11]

[11] Similar rules apply for capital gains recognized by RICs and REITS (and related capital gain dividends).

Real Estate Investment Case

Described by Senator Cory Booker as "domestic emerging markets", the Opportunity Zones are likely to attract significant interest from investors across the country. Many OZs are already enjoying reinvestment and redevelopment. Still others are poised to be attractive to real estate developers because of their proximity to existing successful real estate projects and submarkets. Many counties and municipalities were clever in their designation of OZs with large cities selecting zones including their central business districts and rural areas selecting corridors with manufacturing development potential and/or proximity to thriving urban markets. Therefore, real estate developers and investors would be wise to quickly control or acquire the most attractive properties in their desired OZs as competition for such properties is likely to increase as the OZ program becomes more popular and familiar to the public at large. While a slowdown in the national economy is widely expected in the next eighteen to twenty-four months, the most desirable properties in OZs may actually gain market value during the same period due to the significant tax incentives afforded to them.

D. OZ Property Investments

As mentioned above, an OF must invest 90% of its assets in either qualified OZ businesses or in qualified OZ business property. Qualified OZ business property ("OZ Property") is tangible property used in a trade or business of the OF if (1) the property is purchased[12] after December 31, 2017 and (2) either the "original use" of the property in the OZ begins with the OF or the OF "substantially improves" the property; and (3) during substantially all of the OF's holding period for the property, substantially all of the use of the property was in an OZ. "Substantial improvement" and "original use" are discussed in more detail below.

1. Original Use

Contemporaneous with the issuance of the Proposed Regulations, the IRS issued Rev. Rul. 2018-29 which clarifies that with respect to real estate investments by an OF, that if a OF purchases an existing building on land located in an OZ, the original use of the land and building is not considered to have commenced with the OF. In other words, the OF must "substantially improve" the building for it to qualify as eligible OZ Property.

The IRS is seeking further comment on the definition of "original use" and we expect that additional guidance may be forthcoming, possibly including its applicability following vacancy periods, and with regards to whether de minimis, incidental uses of property (e.g., renting the side of a building for a billboard) would be disregarded.

2. Substantial Improvement

According to the new law, property will be treated as substantially improved by the OF if within any 30-month period beginning after the date of acquisition of the asset, additions to the basis of the asset exceed an amount equal to the adjusted basis of the asset at the beginning of the 30-month period.

In Rev. Rul. 2018-29, the IRS applied the above rules to the acquisition of a building located on land within an OZ. The IRS clarifies that if a OF purchases property building located on land in an OZ, "substantial improvement" is measured by the OF's additions to the adjusted basis of the building only, not the land. In other words, there is no obligation to substantially improve the land upon which a building is located. For example, if an OF purchases a property for $1 million, and 80% ($800,000) of the value of that property is attributable to

[12] To be a qualified OZ property, the OF may not acquire the property in a "related person" transaction.

land and 20% ($200,000) is attributable to the value of the building, an improvement to the building of at least $200,000 (within 30 months of acquisition) would qualify as the OF's having substantially improved the property.

The IRS is seeking further comment on whether additional guidance on the definition of substantial improvement would be helpful and we expect that additional guidance may be forthcoming.

E. OZ Business Investments

As an alternative to investments in tangible qualified OZ Property, an OF may invest instead in the equity "Interests" of a "qualifying opportunity zone business" ("OZB").

1. Ownership Interest in OZB

An "Interest" (stock/partnership interest) in a domestic corporation or partnership ("Company") can be a qualifying investment if: (i) it is acquired by the OF after December 31, 2017, from the Company[13] solely in exchange for cash; and (ii) the Company was at the time the Interest was acquired[14], and during substantially all of the OF's holding period is, an OZB.

2. OZB Definition

An OZB is a business in which "substantially all" of the tangible property owned or leased is OZ Property and that also meets certain other requirements, including a significant limitation on the amount of nonqualified financial property that the business can hold.[15]

3. Working Capital

As noted above, to qualify as an OZB, a business cannot hold more than certain minimal levels of "nonqualified financial property." While the definition of that term excludes reasonable amounts of working capital held in cash, cash equivalents, or debt instruments with a term of 18 months or less, the Proposed Regulations acknowledge the need for additional clarity surrounding the ability of OZBs to hold working capital, particularly in light of the fact that (as discussed in more detail above), in most circumstances, an OF is required to "substantially improve" a property in order for it to be qualified OZ Property.

The Proposed Regulations acknowledge that a significant amount of time may be needed after acquiring an asset to substantially improve it, which would likely require an OZB to hold cash or cash equivalents. As a result, the Proposed Regulations include a working capital safe harbor for OF investments in an OZB that acquires, constructs, or rehabilitates tangible business property (including real estate). Generally speaking, the safe harbor would apply to working capital held by the business for up to 31 months, if: (1) there is a written plan identifying the property as held for such purposes, (2) there is a written schedule that provides for the property's use within 31 months; and (3) the business substantially complies with the schedule.

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[13] In the case of a corporation, at its original issue.

[14] Or, in the case of a new Company, was organized for purposes of being a OZB.

[15] Other requirements include that: (1) at least 50% of the total gross income is derived from the active conduct of such business; (2) a substantial portion of the intangible property of such entity is used in the active conduct of any such business; (3) less than 5% of the average of the aggregate unadjusted bases of the property of such entity is attributable to nonqualified financial property; and (4) the business is not 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.

4. Substantially All

As mentioned above, to qualify as an OZB, the statute requires that "substantially all" of the property owned or leased by the business be OZ Property. The Proposed Regulations define "substantially all" in this context to mean that 70% or more of the tangible property owned or leased by the business is OZ Property.

The Department of Treasury and IRS have invited additional comments from the public regarding the proposed meaning of "substantially all".

5. Advantages of OZB Investments

The Proposed Regulations note that, by setting the threshold for "substantially all" at 70%, the regulations create an incentive for an OF to invest in OZBs instead of investing directly in OZ Property.

For example, for an OF with $10 million in assets that plans to invest 100% of its assets in real property: if it held the real property directly, then at least $9 million (90%) must be located in an OZ to satisfy the 90% Test. However, if instead the OF invests in a subsidiary (partnership or corporation) that then holds real property, only $7 million (70%) of the property must be located in an OZ. Further, if the OF only invested $9 million into the subsidiary, which then held 70% of its property in an OZ, the investors in the OF could receive the same tax benefits while investing only $6.3 million (63%) of its assets within an OZ. For this reason, we believe that most OFs will be structured to invest in OZBs, instead of making direct investments in OZ Property.

Current Status of the OZ Program

In the coming weeks and months the Treasury Department and the IRS are expected to provide further details, including additional legal guidance, on the OZ program and its tax incentives. Outstanding questions include: whether certain transactions may trigger the inclusion of gain that has been deferred; and the length of the "reasonable period" for an OF to reinvest proceeds from the sale of qualifying assets without paying a penalty; and whether taxpayers may utilize the OZ program in conjunction with certain other tax credits (e.g., the New Markets Tax Credit or Low-Income Housing Tax Credit).

Want to Learn More about Investing in Opportunity Zones?

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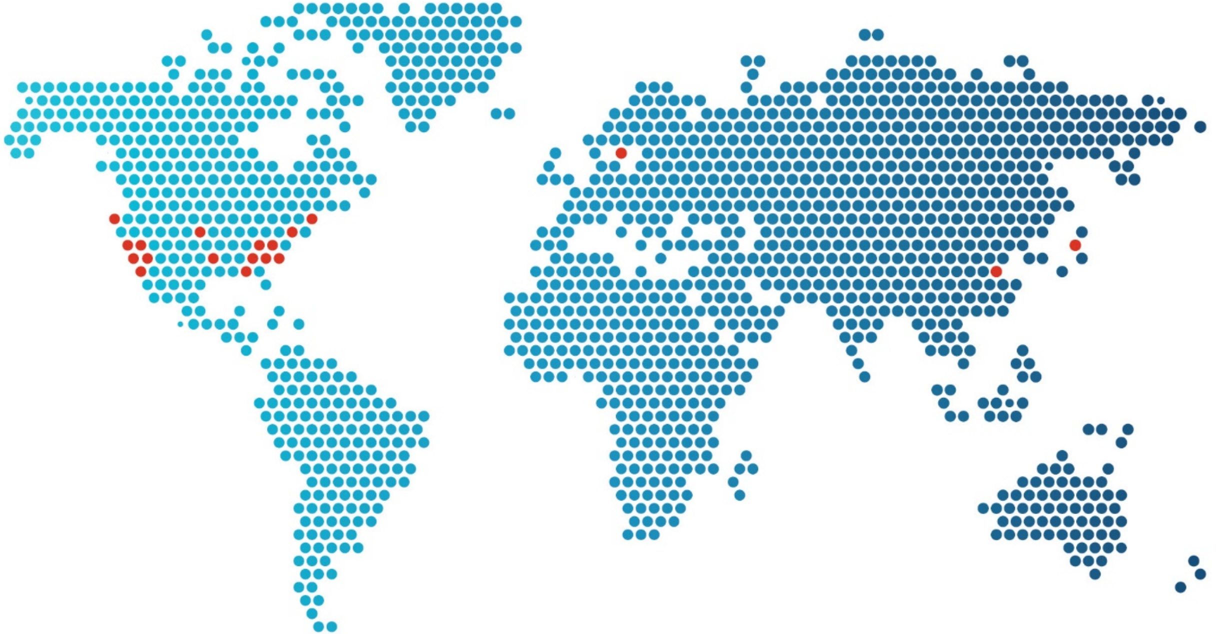

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