



October 18, 2018

The Honorable David J. Kautter
Acting Commissioner of the Internal Revenue Service and
Assistant Secretary of the Treasury for Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Acting Commissioner Kautter:

On behalf of the nation's Housing Finance Agencies (HFAs), the National Council of State Housing Agencies (NCSHA) is writing to encourage timely and clear IRS guidance on the implementation of Opportunity Zone (OZ) provisions in the recently enacted Tax Cuts and Jobs Act of 2017.

NCSHA represents the HFAs of the 50 states, the District of Columbia, New York City, Puerto Rico, and the U.S. Virgin Islands. HFAs are governmental and quasi-governmental, nonprofit agencies created by their jurisdictions to address the full spectrum of housing need, from homelessness to homeownership. HFAs are dedicated to their common affordable housing mission, reinvest their earnings in the furtherance of that mission, and are publicly accountable.

HFAs have established over many decades a track record of outstanding performance in affordable housing finance, including issuance of tax-exempt private activity Housing Bonds and administration of the federal Low Income Housing Tax Credit (Housing Credit) program. A number of HFAs also administer programs that finance job-creating activities such as economic development, infrastructure, and small businesses. State HFA interest in OZs is strong and the agencies' capacity to make OZ incentives successful is far-ranging.

The distinguishing strength of the OZ law is its flexibility. OZ investments have the potential to generate new investment in stable as well as struggling areas, and to support a wide array of activities, including housing, small business startup and expansion, and new community infrastructure. The regulations should ensure the OZ incentives can and will realize this broad-based potential.

The investment capital and market discipline provided by the private sector necessitate clear guidance on program rules and expectations and the tax treatment of investments. This guidance must provide enough specificity to allow investors to fully evaluate the potential opportunities and risks associated with investments.

We are aware that the Office of Management and Budget is in the process of reviewing a proposed IRS regulation on Capital Gains Invested In Opportunity Zones. The HFAs suggest that this proposed regulation or future program guidance address the following key issues to enable successful implementation of the OZ program by the states:

1. Clarifying that Residential Rental Property Qualifies as OZ Property

The need for affordable rental housing in the country is significant, and is especially acute in the 8,762 census tracts designated as OZs. Our understanding of the statute and congressional intent is that residential real estate property qualifies as OZ property.

Given the importance of affordable housing to low-income communities, we encourage IRS to clarify this point in formal guidance. This clarification will provide the certainty needed by investors to target much needed capital for affordable housing in these areas.

2. Confirming that OZ Investments May Be Combined With Other Credits

To enable financial feasibility, most—if not all—OZ projects will require multiple subsidies. Our understanding of the statute and congressional intent is that OZ investments are not prohibited from qualifying for other federal tax incentives, including the Housing Credit, the Historic Rehabilitation Tax Credit, or the New Markets Tax Credit.

Leveraging one or more of these resources in an OZ investment will serve to maximize the results of the program, and we encourage IRS to confirm in formal guidance the ability to use these other tax credits in OZ project financing.

3. Addressing Appropriate Tax Questions to Provide Certainty to Investors

We appreciate that IRS and Treasury have received numerous letters from industry groups requesting clarification on a myriad of other tax questions related to OZ investments. We encourage IRS to consider these requests and provide appropriate guidance on tax treatment of OZ investments to create the certainty needed by investors to make informed tax decisions. We also urge IRS to provide appropriate flexibility in program definitions and timeframes to ensure the program works effectively in the diverse census tracts designated as OZs across the country.

In particular, we support the need for IRS guidance on the following tax issues:

- What constitutes a qualified opportunity fund (QOF), including legal organization of such funds and allowable taxpayer entities;
- Specificity on what types of gains are eligible for investment in QOFs;
- Clarification of the QOF holding period specified in the OZ statute;
- Rules for meeting the 90 percent asset test specified in the OZ statute;
- Qualification of an OZ business, including definition of the term “substantially all” included in the OZ statute;
- What constitutes original use of OZ property, including a safe harbor for land or property that has been vacant for at least one year; and
- Appropriate exceptions to the substantial improvement test to expand the pool of eligible investments in designated OZs.

4. Defining Abuse To Prevent Loss of Affordable Housing in OZs

The Tax Cuts and Jobs Act of 2017 directs IRS to “prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including ... (C) rules to prevent abuse.” We encourage IRS to define abuse as any investment that does not provide a direct and sustained community benefit to the residents living in the census tract.

In addition, we encourage IRS to specifically prohibit OZ investments that eliminate affordable housing units in a designated OZ without associated development of an equal number of replacement affordable units, unless a review of historic occupancy rates and a current market study support the elimination of such units.

5. Specifying Reporting Requirements for OZ Investments

To enable assessment of the impacts and outcomes of OZ investments, we encourage IRS to specify any reporting requirements in program guidance. To avoid unnecessary burden, we encourage limiting the collection of data—both at the point of project certification and at regular intervals thereafter—to that necessary to allow reasonable assessment of the impact OZ investments have on the communities in which they are located. We also encourage IRS to solicit public input on proposed data collection parameters.

6. Determining Whether OZ Investments Qualify for CRA Credit

The OZ statute does not address whether OZ investments qualify for credit under the Community Reinvestment Act (CRA). We encourage IRS to work with the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency to provide guidance regarding the extent to which OZ investments will satisfy requirements under the CRA.

NCSHA and our HFA members are excited to contribute to the implementation of the OZ program and to leverage OZ investments using HFA affordable housing and economic development tools. Thank you for considering our comments as you work to finalize this important program guidance.

Sincerely,



Stockton Williams
Executive Director

cc: Michael Novey, Office of Tax Policy, U.S. Department of the Treasury
Scott Dinwiddie, Income Tax & Accounting, Internal Revenue Service
Julie Hanlon-Bolton, Income Tax & Accounting, Internal Revenue Service
Kathleen Kraninger, Office of Management and Budget