



October 15, 2019

Ms. Grovetta Gardineer  
Senior Deputy Comptroller for Bank Supervision Policy  
400 7<sup>th</sup> Street, SW  
Washington, D.C. 20219

RE: Opportunity Zone Investments Under Current Community Reinvestment Act Law & Regulatory Framework

Dear Ms. Gardineer:

On behalf of the members of the Opportunity Zone (“OZ”) Working Group, we want to take this opportunity to comment on the current Community Reinvestment Act (CRA) law and regulations as it pertains to Opportunity Zones, a new tax incentive in the Tax Cuts and Jobs Act signed into law on Dec. 22, 2017 that contained new tax incentives for making investments in low-income communities.

Our group includes more than 600 professionals that are primarily investors, syndicators, lenders, community development entities (CDEs), community development financial institutions (CDFIs), for-profit and nonprofit developers, consultants, law firms, and other community development professionals who work together to suggest consensus solutions to technical OZ incentive issues and provide recommendations to make the OZ incentive more efficient in delivering benefits to low-income communities. We believe our comments and suggestions will provide further clarity that will allow for greater flexibility of the OZ incentive under current CRA law and regulations.

Under the OCC’s public welfare investment authority, national banks may make investments in community and economic development entities and projects that are designed primarily to promote the public welfare, as specified in 12 USC 24(Eleventh) and regulation 12 CFR 24 which requires a bank’s investment be designed primarily to promote the public welfare, such as by providing housing, services, or jobs. Specifically, under 12 CFR 24.3, a national bank or national bank subsidiary may make a public welfare investment directly or indirectly if at least one of the following applies to the bank’s investment:

- The investment primarily benefits low- and moderate-income (LMI) individuals;
- The investment primarily benefits LMI areas;
- The investment primarily benefits other areas targeted by a governmental entity for redevelopment, or
- The investment would receive consideration as a “qualified investment” under 12 CFR 25.23 of the Community Reinvestment Act (CRA).

We believe OZ investments qualify under the OCC’s public welfare investment authority because such investments primarily benefit LMI areas under 12 CFR 24.3 based on the Internal Revenue Service (IRS) procedure that provided guidance regarding the designation of Qualified Opportunity Zones (QOZ) for purposes of §§ 1400Z–1 and 1400Z–2 of the Internal Revenue Code (Code). More specifically, under §



1400Z-1(c)(1), a population census tract is eligible for designation as a QOZ if it satisfies the definition of “low-income community” (LIC) in § 45D(e) of the Code that governs the New Markets Tax Credit (NMTC).

The term “low-income community” under section 45D(e) of the Code means any population census tract if (a) the poverty rate for such tract is at least 20 percent, or (b) (i) in the case of a tract not located within a metropolitan area, the median family income for such tract does not exceed 80 percent of statewide median family income, or (ii) in the case of a tract located within a metropolitan area, the median family income for such tract does not exceed 80 percent of the greater of statewide median family income or the metropolitan area median family income. It is important to point out that the NMTC is considered a public welfare investment by the OCC.

While primarily benefiting LMI areas, we believe OZ are also areas that have been specifically targeted by a governmental entity for redevelopment. Per the OCC’s Common Part 24 Questions guidance, examples cited include federal empowerment zones and rural communities, state enterprise zones, or city tax incremental financing (TIF) districts. Per the Internal Revenue Service’s Opportunity Zones Frequently Asked Questions, localities qualify as Opportunity Zones if they have been nominated for that designation by the state and that nomination has been certified by the Secretary of the U.S. Treasury via his delegation of authority to the Internal Revenue Service.

Furthermore, per the OCC’s Common Part 24 Questions guidance, some 12 CFR 24 investments may not involve formal area designations, but still may be made in an area targeted for redevelopment by a governmental entity. For example, a local government agency may partner with a national bank, chamber of commerce, and community leaders to develop and operate an industrial park to help attract new small businesses and expand employment opportunities for residents. The local government may provide, for example, infrastructure improvements to the industrial park and offer tax abatements to the businesses that locate there.

We are supportive of the OCC’s guidance that states that a bank that uses “other areas targeted by a government entity for redevelopment” as the basis for making its 12 CFR 24 investment may consider keeping documentation that indicates: that the governmental entity or agency has designated the area; the redevelopment criteria for the area; how the public welfare investment is consistent with the governmental entity’s or agency’s plans; and the type of financing and other support that the governmental entity or agency provides to the area or project in which the bank invests.

With respect to CRA, it is important to bear in mind that local communities and their needs and reinvestment opportunities vary widely. Accordingly, we believe OZ investments should receive consideration as a “qualified investment” under 12 CFR 25.23 of the CRA provided the investments are particularly innovative, complex, or impactful on the bank’s community. For example, investments in businesses or farms that meet the size eligibility standards of the Small Business Administration’s Development Company or Small Business Investment Company programs (13 CFR 121.301) or have gross annual revenues of \$1 million. Another example would be investments that support permanent job creation, retention, and/or improvement through workforce development and/or job or career training programs that target unemployed or low- or moderate-income persons.

Furthermore, with respect to OZ investments that fall outside of the definition of “low-income community”<sup>1</sup>, we believe consideration as a “qualified investment” under 12 CFR 25.23 of the CRA should be given to the extent the investment:

1. Is combined with low-income housing tax credits or NMTC investments. These investment vehicles have a proven track record of being highly responsive to LMI needs, are difficult to obtain from other sources, and require banks to allocate higher levels of capital to support them;
2. Provides housing for low- or moderate-income individuals or is an activity that revitalizes or stabilizes a community including federally or state declared disaster areas;
3. Provides housing that is subject to a land use restriction agreement or similar deed restriction that primarily benefits low- or moderate-income individuals;
4. Is in an area that is currently the focus of mutually reinforcing state, local or private development initiatives to attract investment and foster startup activity; or
5. Is in an area that has recently experienced significant layoffs due to business closures or relocations.

We believe these examples are illustrative of the OCC’s Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; guidance that appeared in the Federal Register / Vol. 81, No. 142 / Monday, July 25, 2016 that contained the following question and answer:

Q. Must a community development activity occur inside a low- or moderate-income area, designated disaster area, or underserved or distressed nonmetropolitan middle-income area in order for an institution to receive CRA consideration for the activity?

A. Activities that stabilize or revitalize particular low- or moderate-income areas, designated disaster areas, or underserved or distressed nonmetropolitan middle-income areas (including by creating, retaining, or improving jobs for low- or moderate-income persons) also qualify as community development, even if the activities are not located in these areas. One example is financing a supermarket that serves as an anchor store in a small strip mall located at the edge of a middle-income area, if the mall stabilizes the adjacent low-income community by providing needed shopping services that are not otherwise available in the low-income community. While our comments thus far have focused on the investment test, we would also like to take this opportunity to suggest that banks receive “service” test credit for providing services to commercial/wealth management customers in the form of OZ information and education, etc. that would promote OZ investing to the benefit of low- and moderate-income communities.

In conclusion, a clear public statement by the OCC that OZ investments qualify under the OCC’s public welfare investment authority and are qualified investments under the CRA rule, if consistent with safety and soundness, would provide the certainty necessary to substantially increase economic development

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<sup>1</sup> Section 1400Z-1(e) also provides that a population census tract that does not qualify as a “low-income community” under the definition may also be designated as a qualified opportunity zone if 1) it is contiguous to a low-income community population census tract that has been designated as a qualified opportunity zone and 2) the median family income of the tract does not exceed 125 percent of the median family income of the low-income community with which the tract is contiguous.

**Novogradac Opportunity Zones Working Group  
Comments on Opportunity Zones Investments Under CRA**

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and job creation in the underserved and lower-income communities that have already been designated as OZs.

We hope that you find these comments, considerations and recommendations useful in considering OZ investment under current CRA law and regulations. Thank you in advance for your time and consideration. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,

Novogradac & Company LLP

A handwritten signature in blue ink, appearing to read "JS", with a horizontal line extending to the right.

By

John Sciarretti

Cc: Barry Wides, Deputy Comptroller