



April 7, 2020

Hon. David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Request to Postpone Certain Deadlines and Provide Reasonable Cause Guidance under Opportunity Zones due to the COVID-19 Pandemic

Dear Assistant Secretary Kautter and Commissioner Rettig:

The Novogradac Opportunity Zones Working Group (“OZ Working Group”) is writing to request relief from certain provisions under the Internal Revenue Code (IRC) section 1400Z-2 and the regulations thereunder due to ongoing and future business impacts of the current COVID-19 pandemic.

The Secretary of the Treasury or his delegate (Secretary) has broad authority under IRC section 7508A to postpone certain deadlines for taxpayers affected by a federally declared disaster. We believe the issues listed below are within the scope of the agencies’ regulatory authority, as exercised by the Secretary in Revenue Procedure 2018-58, and other guidance. We believe this authority has been triggered by the President’s declaration of a national emergency on March 13, 2020, which includes his instruction to the Secretary to provide relief from tax deadlines under section 7508A.

In addition to our request for the disregarding of up to one year certain deadlines under section 7508A, we also recommend that the Treasury Department (Treasury) and the Internal Revenue Service (IRS) confirm that any delays or other deficiencies due to the COVID-19 pandemic be considered reasonable cause under IRC section 1400Z-2(f)(3) if the Qualified Opportunity Fund (QOF) would otherwise become subject to a penalty for failure to satisfy the 90-percent investment standard.

Finally, we ask that Treasury and the IRS make certain temporary modifications and clarifications to other regulatory guidance as more fully discussed below.

The OZ Working Group includes various participants in community development finance: investors; lenders; for-profit and nonprofit developers; community development financial institutions; trade organizations; and other related professionals. Our request represents collective input from these stakeholders as to how to make opportunity zone incentives more impactful to low-income communities.



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The OZ Working Group appreciates your consideration of issues related to opportunity zones compliance as investors, QOF sponsors, qualified opportunity zone businesses (QOZBs) and other organizations struggle with the national impact of the COVID-19 pandemic.

The OZ Working Group requests the following section 7508A relief:

- A 6-month extension to the end of the 180-day investment period for any capital gains in which the investment period otherwise would end during the Incident Period (defined by FEMA as beginning January 20, 2020 and continuing until further notice).
- A 6-month extension to the option for QOFs to disregard recently contributed property in determining compliance with the 90-percent investment standard by excluding (for up to 12-months) from both the numerator and denominator any contributions that are held continuously in cash, cash equivalents, or debt instruments with a term of 18 months or less that would otherwise be required to be included during 2020.
- A 12-month extension to the 30-month substantial improvement period for property that is undergoing substantial improvement during the Incident Period, such that QOFs and QOZBs have a 42-month period to substantially improve such property.

We also note that regulations under section 1400Z-2 provide the following relief in the event of a federally declared disaster.

1. Treasury regulation section 1.1400Z2(f)-1(b)(2) provides that QOFs may receive up to an additional 12 months, for a total of 24 months, to reinvest proceeds from the return of capital or the sale or disposition of some or all of its qualified opportunity zone property (QOZP) if the QOF's plan to reinvest some or all of the proceeds is delayed due to a Federally declared disaster.
2. Treasury regulation section 1.1400Z2(d)-1(d)(3)(v)(D) provides that a QOZB may receive up to an additional 24 months, for a total of 55 months, to consume its working capital assets under the working capital safe harbor if the QOZB is located in a qualified opportunity zone (QOZ) within a Federally declared disaster area. We believe this extension also extends the maximum 62-month period for multiple working capital safe harbors to 86 months.

We believe the authority for this regulatory relief has been triggered by the President's declaration of a national emergency on March 13, 2020, which includes his instruction to the Secretary to provide relief from tax deadlines under section 7508A and encourages requests for a declaration of a major disaster.

We also believe that this regulatory relief is automatic, meaning QOFs and QOZBs are not required to request such relief. It would be helpful for taxpayers for Treasury and the IRS to confirm this in published guidance.

If the above recommended section 7508A extension periods and the regulatory extensions available in the event of a Federally declared disaster discussed above are not sufficient to cover delays caused by the COVID-19 pandemic, we recommend that Treasury and the IRS deem a failure to meet the 90-percent investment standard by QOFs as a result of delays due to the COVID-19 pandemic to be reasonable cause

and not impose the associated penalty as provided for under IRC section 1400Z-2(f)(3). It would also be helpful for taxpayers for IRS and Treasury to confirm this position in published guidance.

Furthermore, we recommend that Treasury and the IRS make certain temporary modifications to regulations: (1) governing the gross income derived from the active business safe harbors (gross income safe harbors); (2) governing the use of intangible property requirement (intangible property requirement); (3) governing the cure period for QOZBs; and (4) to clarify that certain redemptions are inclusion events as discussed below.

Gross Income Safe Harbors

For purposes of the requirement that at least 50 percent of the gross income of a QOZB is derived from the active conduct of a trade or business in the QOZ, the regulations provide safe harbors that look to the location in which services are performed for the QOZB. Due to the COVID-19 pandemic and various shelter-in-place orders, employees and independent contractors may be forced to telework from their homes, which may be located outside of the QOZ. We recommend that Treasury and the IRS issue guidance clarifying that employees and independent contractors of QOZBs whose normal work location is within a QOZ will be deemed to be performing services within the QOZ notwithstanding a temporary work location outside of the QOZ as a result of the COVID-19 pandemic.

Intangible Property Requirements

The regulations require, with respect to any taxable year, that a substantial portion of the intangible property of a QOZB is used in the active conduct of a trade or business in a QOZ. The term substantial portion means at least 40 percent. The regulations also provide that intangible property of a QOZB is used in the active conduct of a trade or business in a QOZ if: (1) the use of the intangible property is normal, usual, or customary in the conduct of the trade or business; and (2) the intangible property is used in the QOZ in the performance of an activity of the trade or business that contributes to the generation of gross income for the trade or business. Due to the COVID-19 pandemic and various shelter-in-place orders, employees and independent contractors may be forced to use intangible property in the conduct of a trade or business to generate gross income for the trade or business from their homes, which may be located outside of the QOZ. We recommend that Treasury and the IRS issue guidance clarifying that employees and independent contractors of QOZB who normally use intangible property that contributes to the generation of gross income for the trade or business within a QOZ will be deemed to be using this intangible property within the QOZ notwithstanding a temporary work location outside of the QOZ as a result of the COVID-19 pandemic.

Cure Period for QOZBs

The regulations provide that if a trade or business causes the QOF to fail the 90-percent investment standard on a semiannual testing date, the QOF may treat the stock or partnership interest in that business as QOZP for that semiannual testing date provided the business corrects the failure within 6 months of the date on which the stock or partnership interest lost its qualification. Each QOF is permitted only one correction for a trade or business. We recommend that Treasury and the IRS provide QOFs with an additional cure period equal to 12 months for each trade or business that causes a QOF to fail the 90-percent investment standard as a result of deficiencies caused by the COVID-19 pandemic.

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Redemptions Causing Inclusion Events

Some QOFs are unable to find investments in time to comply with the 90-percent investment standard and, as a result, may be required to redeem the invested capital to their investors. We recommend that Treasury and the IRS clarify that a return of investment capital due to delays caused by the COVID-19 pandemic that are in excess of stock or partnership basis are considered an “inclusion event” pursuant to Treasury Regulation section 1.1400Z2(c)-1(b)(1)(v), resulting in a new 180-day investment period, instead of a disguised sale or a disregarded transfer, resulting in a loss of a new 180-day period to reinvest the return of capital.

Thank you for your consideration of these requests. Please contact us if you have any comments or questions regarding the matters discussed above.

Very truly yours,

Novogradac & Company LLP



By

Michael J. Novogradac, Managing Partner

Novogradac & Company LLP



By

John S. Sciarretti, Partner

cc: Hon. Michael J. Desmond, Chief Counsel, Internal Revenue Service
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