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OF THE
UNITED STATES OF AMERICA

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Office of Associate Chief Counsel (Income Tax and Accounting)
Attention: Erika C. Reigle and Kyle C. Griffin
Internal Revenue Service (I.R.S.)
1111 Constitution Avenue, NW
Washington, DC 20224

CC:PA:LPD:PR
(REG-115420-18)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Via Federal eRulemaking Portal

RE: Comments on REG-115420-18: Investing in Qualified Opportunity Funds (Guidance Under §1400Z-2[1])

Dear Ms. Reigle and Mr. Griffin:

The U.S. Chamber of Commerce appreciates the opportunity to provide feedback on REG-115420-18: Investing in Qualified Opportunity Funds, as published in the *Internal Revenue Bulletin* on October 29, 2018.

This letter identifies issues arising under REG-115420-18 and provides suggested solutions as well as any additional explanation the Chamber believes would be helpful in addressing the issue. This feedback is the product of extensive conversations with a very wide array of impacted Chamber members. These comments may be considered as representing some of the most serious issues, but are not all the issues concerning Chamber members on REG-115420-18.

Generally speaking, the Chamber is encouraged by these proposed rules and believe they are both taxpayer and investor friendly. We believe by addressing the issues enumerated below,

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[1] Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

Treasury and the I.R.S. could bring additional certainty to taxpayers and ensure the intended growth impact of this provision is achieved.

IN GENERAL

ISSUE: Overuse of the word "substantial/substantially/substantially all" throughout the proposed rules

The proposed rules have made significant strides in clarifying and defining the measurement of certain "tests" or "requirements" for qualifying an Opportunity Zone Fund and the assets it invests in (e.g., 90% rule; 70% qualifying test for property in designated area, etc.). However, the overuse of the word(s) "substantial/substantially/substantially all" throughout the rules still causes unnecessary consternation or potential confusion when setting up a fund and/or a target property. Since this is a self-certification process (i.e., no approval is required by the I.R.S.) more clarity would be helpful. Examples of this perceived "overuse" are:

- "Substantially" improves the property
- During "substantially" all the funds holding period
- Tangible property used in a qualifying fund is "substantially" all in an Opportunity Zone
- "Substantial" portion of intangible property

More specifically and by example, "substantially all" will raise questions about projects where there may need to be or desirable to have investment not just within the zone but partly outside of a zone as well. This could be the case for pipes, road improvements, and other needs of the property.

To address these concerns, the Chamber recommends that new terminology, additional tests (e.g., yes-no analysis, or percentage calculations), and additional mechanics to assist in evaluation would be a helpful clarification.

Addressing the specific example above, the Chamber suggests that the final regulations under Prop. Regs. §1.1400Z-2(d)-1(c)(4)(iii) and (6) clarify whether an asset that straddles a qualified Opportunity Zone (is located partly within and partly outside of a designated QO zone) is qualified Opportunity Zone business property for purposes of the 90% asset test. To deal with this issue, the regulations could provide that if the property has one of the following, it would still be able to meet the definition:

- Based on the registered address of the property, or
- Based on the street address of real estate, or
- A pro-rata approach – percentage inside/outside could also be utilized.

ISSUE: Lack of clarity for consolidated groups

Under the proposed rules, the term "eligible taxpayer" appears to mean a singular person or entity. In a consolidated group of entities, there could be multiple entities with "eligible gains" and another entity within the group that is best positioned strategically or operationally to make an investment in an Opportunity Zone. Such groups may be practically unable to redeploy gains into Opportunity Zones or may have to establish complex and inefficient ownership structures to effectuate a qualifying investment.

The Chamber recommends that the term "eligible taxpayer" be defined to treat a consolidated group of entities as a single entity, as Treasury has provided in other contexts (e.g., implementation of TCJA changes to §163(j)).

HOLDING PERIOD

ISSUE: Lack of clarity on what happens to the holding periods for the investment in the Opportunity Zone Fund if a taxpayer divests his/her interest in the fund and then reinvests it back in another fund

Under the current rules, you can continue to defer the gain, but it is unclear what happens to the holding period on investment. Taxpayers would benefit from clarity on whether the holding period of the original investment tacks to the reinvestment.

The Chamber recommends that the holding period should tack to the reinvestment.

PROPERTY USE

ISSUE: Lack of clarity on what constitutes using tangible property in a "trade or business of the qualified Opportunity Zone"

Where a taxpayer is ready to acquire property in an Opportunity Zone to be used for a plant/facility, but the zoning/permitting/impact studies/etc. could take several more years which would push construction and start-up out a number of years. As such, a question arises as to whether the acquisition of the property in the Opportunity Zone for the purpose of future plant construction constitutes tangible property used in a trade or business.

The Chamber recommends that, if the taxpayer has begun the zoning/permitting process, that should constitute use.

SECTION 1231 GAINS

ISSUE: First day of taxpayer's 180-day period with §1231 gains

Section 1400Z-2 allows for the deferral of "gain" if the gain is invested in a qualified opportunity fund. The proposed rules define "eligible gain" under §1400Z-2 as recognized gain "treated as capital gain for Federal income tax purposes." Under the proposed rules, the 180-day deferral period begins on the day on which the gain would be recognized for federal income tax purposes if the taxpayer did not elect under §1400Z-2 to defer recognition of that gain. To the extent that §1231 gains exceed §1231 losses, they are treated as long-term capital gains. In addition, a net §1231 gain is taxed as ordinary income up to the amount of non-recaptured §1231 losses from the previous five taxable years. However, this netting calculation cannot be complete until, at the earliest, the end of the taxpayer's taxable year when any potential §1231 losses are known.[2]

The Chamber recommends that, in the case of §1231 gains, the 180-day period for deferral and reinvestment of gain in a qualified opportunity fund should begin no earlier than the last day of the taxpayer's taxable year, rather than the day on which the gain is recognized.

<u>ISSUE</u>: Deferral of §1231 gains by partnerships

The proposed rules define "eligible gain" under §1400Z-2 as recognized gain "treated as capital gain for Federal income tax purposes." The treatment of §1231 gains as capital gain or ordinary is generally made at the partner, not partnership, level. Accordingly, it is unclear under the proposed rules whether a partnership-level §1231 gain may be deferred through a partnership-level Opportunity Zone investment. The preamble to the proposed rules contemplates that ("[p]artnerships are expected to be a significant source of funds invested in [qualified opportunity funds]."[3]

The Chamber recommends that gain eligible for deferral under §1400Z-2 be defined similarly to that of "qualified capital gain" in §1400B(e)(1) (regarding exclusion from taxable income of "qualified capital gain" from the sale or exchange of any DC Zone asset held for more than five years) to include any gain recognized on the sale or exchange of property used in the trade or business (as defined in §1231(b)). Adopting this definition would clarify that partnerships with §1231 gains can defer gains through a qualified opportunity zone investment, consistent with legislative intent. In addition, it would address the 180-day issue described above by not requiring taxpayers with §1231 gains to wait until year-end to calculate §1231 losses.

<u>REIT ISSUES</u>

<u>ISSUE</u>: First day of REIT shareholder's 180-day period with respect to REIT capital gain dividends

Under the proposed rules, a REIT shareholder's 180-day deferral period with respect to a capital gain dividend begins on the day on which the dividend is paid. However, the character of a REIT distribution typically will not be known when it is paid; rather it will be known when the shareholder receives a Form 1099-DIV (or specific designation of the distribution as a capital gain dividend) from the REIT up to 30 days after the end of the taxable year.

The Chamber recommends that, in the case of a REIT capital gain dividend, the 180-day period for deferral and reinvestment of gain in a qualified opportunity fund should begin 30 days after the last day of the REIT's taxable year, not the date the dividend is paid.

The Chamber appreciates the opportunity to provide this feedback on REG-115420-18.

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[2] Partners in partnerships with §1231 gains and losses may not be notified of their allocable shares of such gains and losses until receipt of Schedules K-1, as late as September 15 of (or 258 days into) the following year.

[3] 83 Fed. Reg., 54279, 54287.

The Chamber strongly urges Treasury and the I.R.S. to continue to work closely with the business community to implement the Opportunity Zone provisions to best motivate the business sector to invest in distressed communities, thereby ensuring they achieve maximum growth potential. The Chamber looks forward to working with you to address these and other issues as we work to implement our new, pro-growth tax code. Thank you for your time and attention.

Sincerely,

Caroline L. Harris

CC: Charles P. Rettig, Commissioner, Office of the Commissioner, Internal Revenue Service, U.S. Department of the Treasury

David J. Kautter, Assistant Secretary, Office of Tax Policy, U.S. Department of the Treasury

William M. Paul, Chief Counsel (Acting), Office of the Chief Counsel, Internal Revenue Service, U.S. Department of the Treasury