

May 4, 2020

Hon. Steven Mnuchin
Secretary of the Treasury
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

Secretary Mnuchin and Commissioner Rettig:

Thank you for your recent issuance of Notice 2020-23, which delivered badly needed relief to taxpayers investing into our nation's Opportunity Zones in light of the COVID-19 pandemic. As we work together to ensure the American economy recovers to the historic growth levels it was experiencing just months ago, we must also ensure that our low-income communities are not left behind as we return to business as usual. Our most recent financial crisis made clear that low-income communities are often the first hit during a recession and the last to recover. In light of this harsh reality, we must ensure that the federal government makes all possible efforts to continue to incentivize growth and investment into these corners of our economy and, in doing so, help mitigate the economic effects of this crisis on our most vulnerable populations.

The Opportunity Zones initiative created under 26 U.S. Code § 1400Z-2 provides us with a new federal tool allowing us to help deliver relief to America's most economically distressed zip codes by incentivizing critical, impactful investments into these neighborhoods. There has been unprecedented interest among stakeholders in the incentive, even in its infant stage, and projects and businesses are at various stages of the Opportunity Zone cycle. Many of these endeavors have been significantly affected by the COVID-19 pandemic and, due to circumstances beyond their control, are now experiencing difficulties in moving forward. Significant challenges arise from the inability to raise capital; decreased demand for space, products and services; a decline in the local economy; governmental delays; supply chain interruptions; and uncertainty regarding valuations and ability to secure loans and necessary funding apart from Opportunity Zone capital gain investments.

In order for our nation's Opportunity Zones to reach their full potential, it is critical that we provide the necessary flexibility to these entrepreneurs, community-based organizations, developers, and investors to cope with this pandemic and not wrongfully punish Opportunity Zone businesses and funds alike simply because of the obstacles COVID-19 has created. Relief focused on giving stakeholders, projects, and businesses additional time and flexibility to meet Opportunity Zone requirements, timelines, and thresholds will enable Opportunity Zone businesses to weather the storm and be part of the robust post-COVID economic recovery.

We therefore ask that, pursuant to your authority under 26 U.S.C. § 7508A(a) and the respective Opportunity Zone regulations, the following recommendations be considered to provide immediate relief and allow this tool to function in a fair and equitable manner during these unprecedented times:

1. Treasury and the Internal Revenue Service should provide relief to the 180-day investment period for a taxpayer's sale or exchange of capital gain property to be contributed to a Qualified Opportunity Fund under section 26 U.S.C. § 1400Z-2(a)(1)(A). This period should be extended by three months for all 180-day investment periods provided in the implementing regulations and underlying statute with respect to capital gains for which the 180-day period would end on or after March 13, 2020 and on or before December 31, 2020.
2. Treasury and the Internal Revenue Service should provide that the failure of a Qualified Opportunity Fund to meet the required 90-percent investment standard for any testing date taking place during the period beginning on March 13, 2020 and ending on July 15, 2020 automatically meets the standard for reasonable cause and subsequently avoids penalties under 26 U.S.C. § 1400Z-2(f)(3). Further, with respect to any failure of the 90-percent asset test by a Qualified Opportunity Fund taking place after July 15, 2020 and before January 1, 2021, where the fund can sufficiently demonstrate that the failure is a result of the effects of the COVID-19 pandemic, reasonable cause should be established and the penalties should not apply. Treasury and the Internal Revenue Service should also consider providing an additional 180 days for Qualified Opportunity Funds to disregard recently contributed property beyond the existing six-month period for the purposes of meeting the 90-percent asset test where appropriate throughout 2020.
3. Treasury and the Internal Revenue Service should make clear that the 24-month extension of the working capital safe harbor available to Qualified Opportunity Zone Businesses located within a federally declared disaster area pursuant to Treas. Reg. § 1.1400Z2(d)-1(d)(3)(v), automatically applies to all Qualified Opportunity Businesses nationwide under the President's Stafford Act Emergency Declaration for the COVID-19 pandemic. This period should begin on March 13, 2020 and extend until the earlier of the end of the Emergency Declaration or the period requested by the taxpayer and available under Treas. Reg. § 1.1400Z2(d)-1(d)(3)(v). This extension should also apply to the maximum 62-month period for working capital safe harbors, for a total of 86 months, where appropriate.
4. Treasury and the Internal Revenue Service should make clear that the 12-month extension available to Qualified Opportunity Funds to reinvest proceeds from the sale, disposition, or return of capital from Qualified Opportunity Zone property when reinvestment plans are delayed due to a federally declared disaster pursuant to Treas. Reg. § 1.1400Z2(f)-1(b)(2), automatically applies to all Qualified Opportunity Funds nationwide under the President's Stafford Act Emergency Declaration for the COVID-19 pandemic. This period should begin on March 13, 2020 and extend for the maximum 12-month period thereafter.
5. Treasury and the Internal Revenue Service should also ensure that redemptions of investment capital in excess of an entity's basis in a Qualified Opportunity Fund due to the effects of COVID-19 should automatically be considered an inclusion event pursuant to Treas. Reg. § 1.1400Z2(c)-1(b)(1)(v). This treatment should be provided throughout the duration of the President's Stafford Act Emergency Declaration for the COVID-19 pandemic, beginning on March 13, 2020.
6. Treasury and the Internal Revenue Service should also use its authority under 26 U.S.C. § 7508A(a) to provide a 12-month extension to the 30-month substantial improvement period allotted for Qualified Opportunity Zone property under 26 U.S.C. § 1400Z-2(d)(2)(D)(ii) that is undergoing or expected to begin or complete its substantial improvement period at any point during 2020, for a total of 42 months.
7. Treasury and the Internal Revenue Service should also make clear that Qualified Opportunity Zone Businesses using the regulatory safe harbor that takes into account the location in which services are

performed for the purpose of satisfying the requirement that 50-percent of the business' gross income be derived from their active business conduct in the Qualified Opportunity Zone does not wrongfully punish employees who may be teleworking outside of their normal working locations within an Opportunity Zone due to the circumstances of the COVID-19 pandemic.

8. Similarly, Treasury and the Internal Revenue Service should also provide relief to the requirement that a substantial portion – defined as 40-percent – of a Qualified Opportunity Zone Business' intangible property be used in its active conduct within an Opportunity Zone. Specifically, the use of such intangible property outside of its normal utilization location within a Qualified Opportunity Zone during the conduct of such a business for the purpose of generating gross income as a result of the COVID-19 pandemic should be considered to have been used within a Qualified Opportunity Zone, provided that such use takes place during the period in which the President's Emergency Declaration under the Stafford Act for COVID-19 is in effect. Given the overwhelming amount of Americans working remotely during this crisis, this guidance would prevent the punishment of such employers for taking the necessary steps to comply with COVID-19 ordinances and promote the health and safety of our communities. Likewise, where a Qualified Opportunity Zone Business can sufficiently demonstrate that its failure to meet the 70-percent tangible property test in 2020 is due to delays caused by the COVID-19 pandemic, Treasury and the Internal Revenue Service should give such entities additional consideration when deliberating whether a reasonable cause exception applies.
9. In addition, we ask that you consider providing Qualified Opportunity Funds with an additional cure period equal to six months for each trade or business that causes a fund to fail the 90-percent asset test if the trade or business can demonstrate that its loss of qualification was caused or facilitated by the COVID-19 pandemic.
10. Lastly, any guidance provided with respect to the above requests should include strong anti-abuse language and require those taking advantage of the liberalized timelines to document the facts and circumstances to substantiate that their fund or business merits the beneficial treatment where appropriate and without creating undue or unnecessary burdens. We also recognize that the respective IRS forms and systems may need to be updated in order to facilitate the efficient and accurate enforcement of these recommendations and ensure that entities using these extensions are able to properly indicate such use.

Thank you for your timely consideration of this request. We look forward to hearing from you soon and appreciate your willingness to consider the critical needs of our nation's low-income communities as we work as one nation to recover from this historic pandemic.

Sincerely,



U.S. Senator Tim Scott (R-SC)



U.S. Senator Todd Young (R-IN)



U.S. Senator Pat Roberts (R-KS)



U.S. Senator Bill Cassidy (R-LA)



U.S. Senator James Lankford (R-OK)



U.S. Senator Steve Daines (R-MT)



U.S. Senator Ben Sasse (R-NE)



U.S. Senator Marsha Blackburn (R-TN)



U.S. Senator Martha McSally (R-AZ)