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Section 1400Z-2 - Special Rules for Capital Gains Invested Opportunity Zones

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Tax Enlightenment
Section 1400Z-2 - Special Rules for Capital Gains Invested in Opportunity Zones

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Introduction

Occasionally, the U.S. government launches programs to stimulate the economy in high poverty, significant unemployment, and low-income areas through tax incentives. For example, the Omnibus Budget Reconciliation Act of 1993 introduced the Empowerment Zones and Enterprise Communities, and the Community Renewal Tax Relief Act of 2000 established the New Markets Tax Credit Program. A similar measure – The Opportunity Zone tax incentive – was introduced by the Tax Cut and Jobs Act of 2017 (TCJA) which added Sections 1400Z-1 and 1400Z-2. Section 1400Z-1 describes the designation of the opportunity zones while Section 1400Z-2 is the tax incentive rule, and it governs the treatment of the capital gains reinvested in the zones. The Opportunity Zone program provides benefit through the favorable treatment of capital gains. In general, if a taxpayer reinvests his capital gain in a business located in one of the specially designated economically-distressed areas, he may defer the recognition of that gain and eliminate a portion of that gain if a specific holding period requirement is met. Additionally, if the opportunity zone investment is held for more than ten years and then sold, the taxpayer can exclude the capital gain that represents the appreciation of the initial investment.

Although the general rule of Section 1400Z-2 can be summarized in a few sentences, it contains many details and nuances. As this paper is intended to summarize and explain the main rules related to the opportunity zone tax incentive, the Code sections and the proposed regulations will be used. However, note that the first set of proposed regulations were issued in 2018 and not yet finalized at the time this article was prepared.[1]

Explaining the General Rules and Definitions

As mentioned in the introduction, Section 1400Z-2 provides tax benefits through the favorable treatment of capital gains. Particularly, if a taxpayer has a capital gain (such as the gain from the sale of stock or real estate) and reinvests the proceeds within 180 days in a business located in special zones, she can defer the gain and exclude up to 15 percent of that capital gain (depending on the holding period). The election to defer the gain is made on Form 8949, Sales and Other Dispositions of Capital Assets, in the year the gain would otherwise be recognized. The deferred gain is eventually included in the income on either the date of the sale of interest or December 31, 2026, if not sold before that date. The reinvestment period is 180 days, the special zones are called qualified opportunity zones, and the qualified investment

[1] This article was written before the issuance of the second set of QOZ regulations on May 1, 2019 - REG-120186-18 (5/1/19).

is described as a qualified opportunity fund. These and other definitions are considered separately below.

- ***Eligible Taxpayer***: Section 1400Z-2 applies to individuals, C corporations, S corporations, partnerships, trusts, and estates. Prop. Reg. 1.1400Z2(a)-1 states that generally any taxpayer who can recognize a capital gain can use this special deferral rule.

- ***Eligible Gain***: Generally, any gain that is treated as capital gain for federal tax purposes is an eligible gain. However, there are three requirements. First, the gain would be recognized before January 1, 2027 in absence of Section 1400Z-2. Thus, the gain cannot be deferred under other sections on a date later than January 1, 2027 period.[2] Second, the eligible gain is not a gain generated by the transaction with a related party.[3] Under the rules of this section, related parties are the following: family members,[4] individual or corporation or individual and partnership with 20 percent interest in the corporation/partnership, two corporations which are members of the same controlled group, two partnerships in which the same persons directly or indirectly own more than 20 percent of the capital interest or profit, certain grantors and fiduciaries described in Section 267(a)(4)-(8), a person or organization to which Section 501 applies and which is controlled by this person or his family member, S corporation and S corporation (or S corporation and C corporation) with common ownership of more than 20 percent in value of outstanding stock, executor and beneficiary of the same estate.[5] The third requirement of the gain is that it should not have been already deferred under Sec.1400Z-2.[6] Thus, the same proceeds cannot be deferred twice. Also, in case the section was applied only to a portion of the qualified gain, only the remaining gain reinvested can be deferred.

  There is a special rule for Section 1256 contracts.[7] The eligible gain from these contracts is the net income amount calculated at the end of each tax year on an aggregate basis.[8] Thus, all gains and losses from Section 1256 contracts are netted at the end of the year, and the net amount is the eligible gain for deferral under Section 1400Z-2. The 180-day reinvestment period for Section 1256 contracts starts at the end of the tax year (The reinvestment period requirements will also be covered in a section below.) The gain from Section 1256 contracts is not eligible for deferral if during a taxable year any of the contracts were part of an offsetting-position transaction.[9] Under Prop. Reg. 1.1400Z2(a)-1(b)(2)(iv), "an offsetting-positions transaction is a transaction in which a taxpayer has substantially diminished the taxpayer's risk of loss from holding one position with respect to personal property by holding one or more other positions with respect to personal property (whether or not of the same kind)". For

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[2] Prop. Reg. 1.1400Z2(a)-1(b)(2).
[3] Section 1400Z-2(e)(2).
[4] Section 267(c)(4): The family of an individual shall include only his brothers and sisters (whether by the whole or half-blood), spouse, ancestors, and lineal descendants.
[5] Section 267(b) and Section 707(b)(1).
[6] Prop. Reg. 1.1400Z2(a)-1(b)(2)(ii).
[7] Sec. 1256 contracts are any regulated future contracts, foreign currency contracts, dealer equity and nonequity options, dealer securities futures contracts that are treated as sold at its fair market value at the end of the tax year.
[8] Prop. Reg. 1.1400Z2(a)-1(b)(2)(iii).
[9] Prop. Reg. 1.1400Z2(a)-1(b)(2)(iii)(B).

example, a straddle transaction is a type of offsetting-position transaction for which the deferral of gain under Section 1400Z-2 is unavailable.

- ***Qualified Opportunity Funds and Qualified Opportunity Zone Property*:** A Qualified Opportunity Fund (QOF) is a corporation or partnership organized for the purpose of investing in the qualified opportunity zone property (QOZP). An LLC may also be organized as a QOF if it chooses to be treated either as a partnership or corporation for federal tax purposes. To qualify as a QOF, the fund must contain 90 percent or more of its assets in QOZP calculated as an average percentage measured on the 6th and 12th months of the taxable year.[10] If a QOF fails to meet the 90 percent requirement, it will pay a penalty for each failed month in the amount equal to:

  [(90% of assets - the amount of QOZP held by the fund) ∗ underpayment rate for these months][11]

  If a QOF is a partnership, the penalty is distributed among partners in proportion to their interests in the partnership.[12] However, Section 1400Z-2(f)(3) forgives the penalty for companies if reasonable cause exists. Also, the proposed regulation requires that the entity must be organized in the United States to qualify as a QOF.[13] The entity, however, can be organized within any U.S. territory (thus, potentially outside of the 51 states), but in this case it must be organized as a company investing in QOZP that is located in the same U.S territory.

  There are three types of qualified opportunity zone property (QOZP): qualified opportunity zone stock, qualified opportunity zone partnership interest, and qualified opportunity zone business property.[14]

  a. *Qualified opportunity zone stock* is any stock in a domestic corporation that was acquired in exchange for cash by a QOF after December 31, 2017 at its original issue from a corporation which qualified as a QOZ business at the acquisition and during the entire holding period;
  b. *Qualified opportunity zone partnership* interest is any capital or profits interest in a domestic partnership that was acquired in exchange for cash by a QOF after December 31, 2017 at its original issue from a corporation which qualified as a QOZ business at the acquisition and during the entire holding period;
  c. *Qualified opportunity zone business property* (QOZBP) is any tangible property used in the trade or business of a QOF that was purchased after December 31, 2017 from an unrelated person. The newly acquired business property must be used in the trade or business of the QOF or the QOF must substantially improve the property during the entire holding period, and substantially all of the use of this property must be within a qualified

[10] Section 1400Z-2(d)(1).
[11] Section 1400Z-2(f)(1). Monthly underpayment rate is established by Sec. 6621(a)(2).
[12] Section 1400Z-2(f)(2).
[13] Prop. Reg. 1.1400Z2(d)-1(e).
[14] Section 1400Z-2(d)(2).

opportunity zone. For the property to be "substantially improved" for the purpose of Section 1400Z-2(d)(2)(D), the additions to the basis of the property must exceed its basis at the beginning of the 30-month period during any 30-month period beginning after the property was acquired That is, the improvement to the property must preponderate the asset's basis. If an asset that was previously claimed as a QOZBP fails to meet the definition of such property, it continues to be treated as a QOZBP for the lesser of (i) 5 years after the date the asset fails to meet the definition, or (ii) the date when the qualified opportunity zone business disposes of the asset.[15]

- ***Reinvestment Period***: In general, the 180-day period during which taxpayers have to reinvest their eligible capital gain in a qualified opportunity fund to qualify for Section 1400Z-2 treatment begins on the date of the sale (or exchange) that gives rise to that gain. Also, the proposed regulation adds that, "the 180-day period […] with respect to any eligible gain (180-day period) begins on the day on which the gain would be recognized for federal income tax purposes if the taxpayer did not elect under section 1400Z-2 to defer recognition of the gain".[16] For example, for sold stock, the 180-day period starts on the trade date, for dividends received by the RIC or REIT[17] shareholder the reinvestment period begins on the date the dividend is paid, and for deemed gains (such as undistributed capital gains that are required to be added in the shareholder's capital gains) the 180-day period starts on the last day of the taxable year of the company.[18] For partnership, S-corporation, trust, and estate, the 180-day period starts on the last day of the partnership's taxable year. However, if a partnership does not elect to defer its eligible gain, the partners may elect to defer their distributive share of that gain and treat their 180-day period the same as the period of the partnership. Alternatively, the partner's 180-day reinvestment period begins on the last day of the partnership's tax year.[19] For gains from Section 1256 contracts, the reinvestment period begins on the last day of the taxable year.[20] Additionally, under Prop. Reg. 1.1400Z2(a)-1(b)(4)(ii)(D), if a taxpayer defers a capital gain under Sec. 1400Z-2 but then later disposes of the entire interest, he may continue to defer the original gain if the new proceeds are reinvested in the same or another qualified opportunity fund during the 180-day period. Thus, the additional deferral of previously deferred gains is allowed.

- ***Basis Adjustments***: As mentioned above, the deferred gains are included in income on the earlier of December 31, 2026 or the date of the sale of the interest in a qualified opportunity fund. However, the law provides additional tax benefits related to the gain recognition in the case of an extended holding period of the interest. In particular, there are three possible tax incentives: interest's basis step-up for investments held for more than five years, more than seven years, or more than ten years.

[15] Section 1400Z-2(d)(3)(B).
[16] Prop. Reg. 1.1400Z2(a)-1(b)(4).
[17] RIC - Regulated Investment Company; REIT – Real Estate Investment Trust.
[18] Prop. Reg. 1.1400Z2(a)-1(b)(4)(ii), examples 1, 2 and 3.
[19] Prop. Reg. 1.1400Z-2(a)-1(c)(2)(iii).
[20] Prop. Reg. 1.1400Z2(a)-1(b)(2)(iii).

a. *For investments held for more than 5 years*, a taxpayer may adjust the basis of the interest by 10 percent.[21] This will reduce the gain of the taxpayer by 10 percent at the time the gain is included on the taxpayer's tax return. Note that due to the expiration of the opportunity fund tax incentive, to get the benefit of the 10 percent basis increase, the investment must be made no later than December 31, 2021.
b. *If the investment is held for more than 7 years,* the taxpayer may increase the basis in the investment by a total of 15 percent (thus, an additional 5 percent after the 5-year holding period adjustment).[22] Note that in order to be able to increase the basis by 15 percent, the qualified opportunity fund interest must be acquired no later than December 31, 2019.
c. *The basis of investment that is held for more than 10 years* is equal to the fair market value of the investment at the date it was sold (exchanged).[23] That is, if an investment is held for more than ten years, capital gain on the appreciation of the QOF investment is permanently excluded. For example, a taxpayer generates a capital gain but decides to defer its recognition under Section 1400Z-2. He reinvests the gain by acquiring the interest in a qualified opportunity fund within the 180-day period in 2019 and holds the interest for ten years. On December 31, 2026, despite still possessing the interest, the taxpayer recognizes the gain but may increase the basis in the interest by 15 percent as the holding period is seven years. However, if the taxpayer sells the interest in 2029 meeting the 10-year holding period requirement, he has no additional tax liability related to the sale (or exchange) of the interest. So, the appreciation in the value of the interest after 2026 becomes tax-free.

Example: Jane has stock with basis of $20 and she sells it for $100 realizing an $80 gain. In June of 2019, within 180 days of selling the stock, she reinvests the $80 gain in a QOF and does not pay tax on the gain as she elects to defer it under the QOF rules. Her initial basis in the investment is $0. In June 2024, after holding the investment for five years, Jane's basis in the investment is increased to $8 (10% x $80 of the deferred gain). By June 2026, she has held the investment for at least seven years, so her basis in the investment is increased to $12 (additional 5 percent increase). On December 31, 2026 she still holds the investment, but she must recognize the gain at that time. Since her basis increased to $12, she recognizes a gain of $68 rather than $80, and her basis in the investment becomes $80. If Jane sells the investment in July 2029 for $200 after holding it for more than ten years, she owes no additional federal income tax.

- ***Gain recognition***: As mentioned above, previously deferred gain reinvested in a qualified opportunity fund must be recognized on the earlier of December 31, 2026 or the date of sale or exchange of the investment. The amount that must be included in the tax return at this point is governed by Section 1400Z-2(b)(2)(A). According to this section, if the amount of the gain deferred is more than the fair market value of the investment, a taxpayer recognizes the

[21] Section 1400Z-2(b)(2)(B)(iii).
[22] Section 1400Z-2(b)(2)(B)(iv).
[23] Section 1400Z-2(c). See also Prop. Reg. 1.1400Z2(c)-1: Investments held for at least 10 years.

gain equal to the difference between the fair market value of the investment and the adjusted basis of the investment. In the case the amount of the deferred gain is less than its fair market value, the amount to be recognized is equal to the amount of the deferred gain minus the adjusted basis of the investment (the adjusted basis of the investment is the subject to the step-up adjustment described earlier if the interest was held for more than five or seven years and acquired by the dates specified above to qualify for the 10 percent and 15 percent exclusions).

Special cases

- ***Rules for Partnerships***: Either the partnership or the partners may make an election to defer the qualified and re-invested gain in a qualified opportunity fund. The rules, however, are different for the two cases. If a partnership makes an election to defer, then the gain is not included in the partner's distributive share of the partnership income, and the partner's basis in the partnership is not increased. When the deferral period ends, the partnership includes the deferred gain in its gross income and in the partner's share of the income, and at this point, the partner's basis is increased accordingly.[24] If a partnership does not make an election to defer the eligible gain, it is included in the partner's distributive share of the partnership income. The partner can then make the election. In this situation, the 180-day period within which to make the election to defer starts on the last day of the partnership taxable year. Alternatively, the partner may treat his 180-day period the same as the period of the partnership.[25] For that to occur though, the partnership will need to provide that information to the partners in a timely manner.

- ***Mixed Funds Investment***: If a taxpayer re-invested the capital gain but added some other funds, this type of investment is considered as two separate investments. Thus, the first investment is the one made with the previously generated capital gain and for which the deferral election under Section 1400Z-2 is timely made. The second investment is the one that is made with the additional funds.[26] Also, if the investment is held for more than ten years, Section 1400Z-2(c) can only apply to the portion of the investment made with a qualified capital gain and for which the deferral was elected.[27]

- ***Selling a Portion of the Investment***: If a taxpayer acquired an interest in a QOF in several transactions but later, prior to December 31, 2026, sells a portion of his total interest, then the FIFO method is used to identify which interest was sold.[28] It is possible that what has been sold is a portion of one of several acquisition transactions that occurred on the same day, and attributes of the acquired interests are different (for example, one part of the interest acquired with a short-term gain while another is with a long-term gain). In this case, two transactions that occurred on the same date are treated as one, and the pro-rata method

[24] Prop. Reg. 1.1400Z2(a)-1(c)(1).
[25] Prop. Reg. 1.1400Z2(a)-1(c)(2).
[26] Section 1400Z-2(e)(1).
[27] Prop. Reg. 1.1400Z2(c)-1(a).
[28] Prop. Reg. 1.1400Z2(a)-1(b)(6).

should be applied to identify the attributes of the disposed interest. For example, in 2019 an investor generates and invests $1,000 of his short-term gain in a QOF in exchange for 1000 QOF shares. In 2020, he invests $400 of his long-term gain in exchange for 400 shares. He timely makes an election to defer the gain under Sec. 1400Z-2. In 2021, he sells 500 QOF shares. As per Prop. Reg. 1.1400Z2(a)-1(b)(6), the sold portion is half of the interest that was acquired in 2019 with the short-term gain. Since the attributes of the deferred gains are preserved (Prop. Reg. 1.1400Z2(a)-1(b)(5)), the investor must include in his income $500 of the short-term gain in 2021. A different example would be, if in 2019, the investor has $1,000 of the short-term gain and $500 of the long-term gain. One day in 2019, he invests in a QOF the total gain ($1,400) in exchange for 1,400 shares and makes the timely gain deferral election. In 2021, when he sells 700 of his 1,400 shares, he first applies the FIFO method to identify the interest that has been sold. Since two investments with different attributes were made on the same day, the pro-rata method must be used to identify the characteristics of the investment sold in 2021. Under the pro-rata method, in 2021 the investor must include in his income $500 of the short-term gain ((700/1,400) x $1,000) and $200 of the long-term gain ((700/1,400) x $400)).

Summary and Critics

As seen from the definitions and operating rules explained above, the overall rule of the gain deferral under Section 1400Z-2 is complex with many details and nuances. However, with the understanding and correct application of the law, and diligent analysis of potential investments prior to investing, it can be a powerful tax-planning tool in the hands of investors.

Indeed, the idea of stimulating struggling areas through the transfer of money from successful regions and projects to indigent areas is important. If this incentive is successful, it should be a win-win for everybody. Thus, investors, seeking significant tax planning, can get a significant deferral and even a permanent exclusion of a portion of their gains. On the other hand, low-income areas can get new businesses, infrastructure improvements, and local economic growth. But for now, since this law is relatively new, it is hard to estimate and conclude whether the program will bring a positive impact to the designated zones. In addition, the critics surrounding the law suggest that the program may not be as successful as was planned or expected.

First of all, it can be challenging to find the right investment. Since the designated zones are mapped as economically struggling, it might be difficult to find a business that would be profitable and alluring as an investment. The law, of course, can bring new businesses and property to the identified low-income communities. However, there are 8,764 opportunity zones in the United States,[29] and with this number of opportunities for the investors throughout the country, the impact to a particular community might be negligible.

[29] Notice 2018-48.

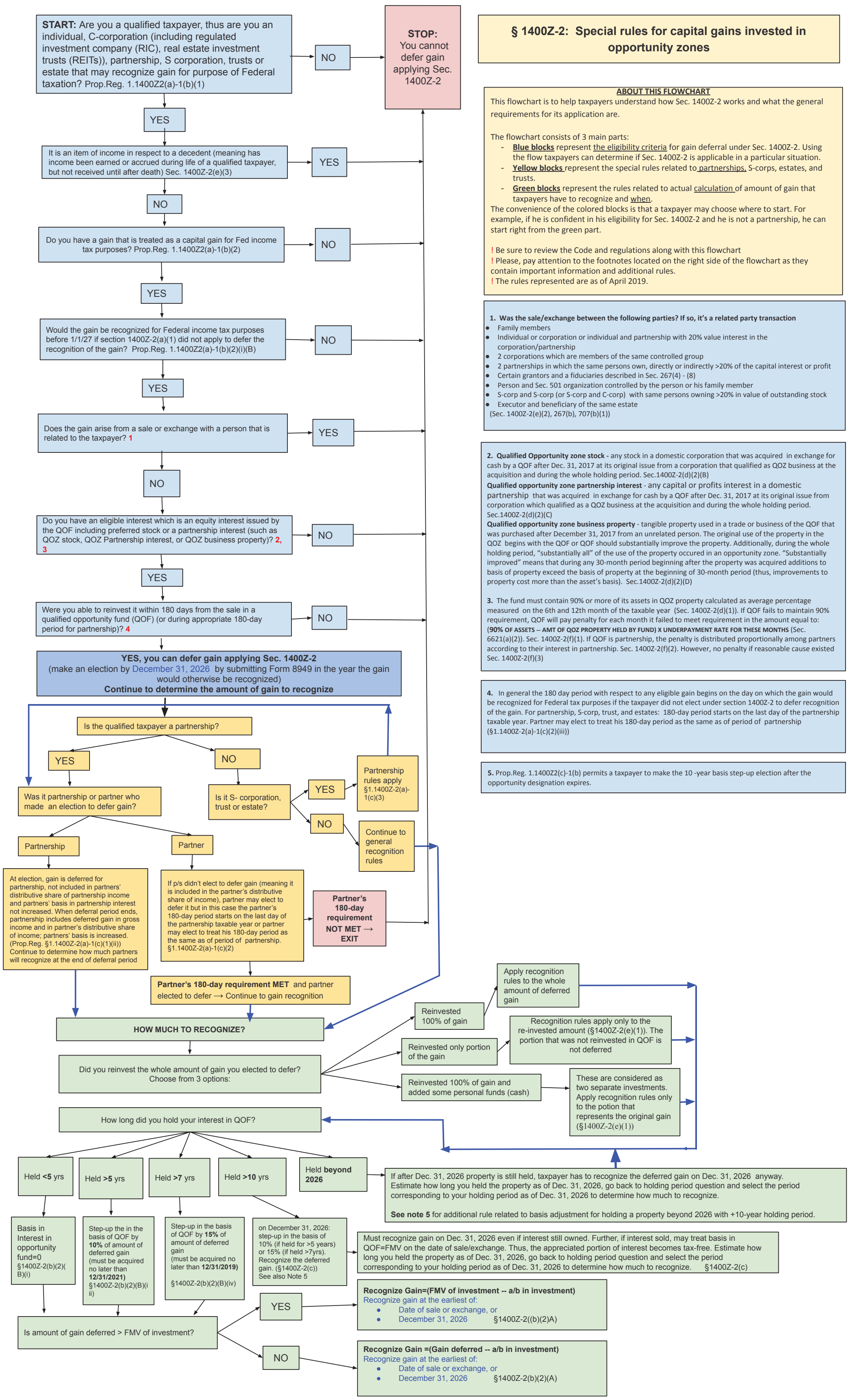
Secondly, the program might benefit the investors, not the communities. For example, there is a requirement for a QOF to hold at least 90 percent of the assets in a QOZ property. However, there is no requirement that this property or business should benefit the communities and somehow be evaluated by local government or businesses themselves. Thus, investors would likely pursue their own financial interests rather than focus on local infrastructure or the unemployment rate. That is, there is nothing in the law that could stop investors from abandoning the construction of an affordable housing project in an area after all anticipated tax benefits from an investment are received. In addition, Rebecca Lester, an accounting professor and researcher at Stanford University, stated in her analysis of opportunity zones implications,"… because Opportunity Zone investments are not required to demonstrate specific benefits to the existing local population, investors may select projects based solely on their financial return, with little local social impact. While this could result in an improvement of local economic conditions, it could raise prices such that existing residents would be forced to relocate".[30] Thus, the opportunity zones program may even bring adverse results to the communities.

Thirdly, it looks like the law does not provide enough time for investors to execute the full benefit of the basis step-up adjustment. In particular, in order to be able to increase the basis in the investment by 15 percent, the investment and appropriate election must be made no later than December 31, 2019. Currently, there are only a few months left to find a good investment and make the election. Given that time is needed to sufficiently evaluate possible investments, and, for a meticulous investor, it can take a long time to find the right one, it might be a good idea to start the process as soon as possible. Another challenge is that proposed regulations have not yet been finalized as of the end of June 2019.

Despite all the critics, the opportunity zone tax incentive program is still a powerful idea, and many areas that need an economic boost have been waiting for such an idea to bring funds to their area. The law is new, and the regulations have not yet been finalized. As for any new bold proposal, it will take some time to finalize the rules and guidance while taking into consideration the suggestions and critique from tax experts. In addition, the statistics and analytics should be available in a few years, so we can evaluate the effectiveness of the incentive. However, for now, along with the critics, there are people who are very optimistic about the new provision, and there are some already gaining the advantages of the program.

Attachment:
Flowchart on basics of the Qualified Opportunity Zone rules.

[30] R. Lester, C. Evans, and Hanna Tian, *Opportunity Zones: An Analysis of the Policy's Implications for Investors, Policymakers, and Constituents,* June 2018, available at http://opportunityzones.stanford.edu/docs/Opportunity-Zones-Analysis-of-Policy-Implications-6_29_18.pdf.


START: Are you a qualified taxpayer, thus are you an individual, C-corporation (including regulated investment company (RIC), real estate investment trusts (REITs)), partnership, S corporation, trusts or estate that may recognize gain for purpose of Federal taxation? Prop.Reg. 1.1400Z2(a)-1(b)(1)
NO
STOP: You cannot defer gain applying Sec. 1400Z-2
§ 1400Z-2: Special rules for capital gains invested in opportunity zones
ABOUT THIS FLOWCHART
This flowchart is to help taxpayers understand how Sec. 1400Z-2 works and what the general requirements for its application are.
The flowchart consists of 3 main parts:
- Blue blocks represent the eligibility criteria for gain deferral under Sec. 1400Z-2. Using the flow taxpayers can determine if Sec. 1400Z-2 is applicable in a particular situation.
- Yellow blocks represent the special rules related to partnerships, S-corps, estates, and trusts.
- Green blocks represent the rules related to actual calculation of amount of gain that taxpayers have to recognize and when.
The convenience of the colored blocks is that a taxpayer may choose where to start. For example, if he is confident in his eligibility for Sec. 1400Z-2 and he is not a partnership, he can start right from the green part.
! Be sure to review the Code and regulations along with this flowchart
! Please, pay attention to the footnotes located on the right side of the flowchart as they contain important information and additional rules.
! The rules represented are as of April 2019.
YES
It is an item of income in respect to a decedent (meaning has income been earned or accrued during life of a qualified taxpayer, but not received until after death) Sec. 1400Z-2(e)(3)
YES
NO
Do you have a gain that is treated as a capital gain for Fed income tax purposes? Prop.Reg. 1.1400Z2(a)-1(b)(2)
NO
YES
Would the gain be recognized for Federal income tax purposes before 1/1/27 if section 1400Z-2(a)(1) did not apply to defer the recognition of the gain? Prop.Reg. 1.1400Z2(a)-1(b)(2)(i)(B)
NO
YES
Does the gain arise from a sale or exchange with a person that is related to the taxpayer? 1
YES
NO
Do you have an eligible interest which is an equity interest issued by the QOF including preferred stock or a partnership interest (such as QOZ stock, QOZ Partnership interest, or QOZ business property)? 2, 3
NO
YES
Were you able to reinvest it within 180 days from the sale in a qualified opportunity fund (QOF) (or during appropriate 180-day period for partnership)? 4
NO
YES, you can defer gain applying Sec. 1400Z-2
(make an election by December 31, 2026 by submitting Form 8949 in the year the gain would otherwise be recognized)
Continue to determine the amount of gain to recognize
1. Was the sale/exchange between the following parties? If so, it's a related party transaction
• Family members
• Individual or corporation or individual and partnership with 20% value interest in the corporation/partnership
• 2 corporations which are members of the same controlled group
• 2 partnerships in which the same persons own, directly or indirectly >20% of the capital interest or profit
• Certain grantors and a fiduciaries described in Sec. 267(4) - (8)
• Person and Sec. 501 organization controlled by the person or his family member
• S-corp and S-corp (or S-corp and C-corp) with same persons owning >20% in value of outstanding stock
• Executor and beneficiary of the same estate
(Sec. 1400Z-2(e)(2), 267(b), 707(b)(1))
2. Qualified Opportunity zone stock - any stock in a domestic corporation that was acquired in exchange for cash by a QOF after Dec. 31, 2017 at its original issue from a corporation that qualified as QOZ business at the acquisition and during the whole holding period. Sec.1400Z-2(d)(2)(B)
Qualified opportunity zone partnership interest - any capital or profits interest in a domestic partnership that was acquired in exchange for cash by a QOF after Dec. 31, 2017 at its original issue from corporation which qualified as a QOZ business at the acquisition and during the whole holding period. Sec.1400Z-2(d)(2)(C)
Qualified opportunity zone business property - tangible property used in a trade or business of the QOF that was purchased after December 31, 2017 from an unrelated person. The original use of the property in the QOZ begins with the QOF or QOF should substantially improve the property. Additionally, during the whole holding period, "substantially all" of the use of the property occured in an opportunity zone. "Substantially improved" means that during any 30-month period beginning after the property was acquired additions to basis of property exceed the basis of property at the beginning of 30-month period (thus, improvements to property cost more than the asset's basis). Sec.1400Z-2(d)(2)(D)
3. The fund must contain 90% or more of its assets in QOZ property calculated as average percentage measured on the 6th and 12th month of the taxable year (Sec. 1400Z-2(d)(1)). If QOF fails to maintain 90% requirement, QOF will pay penalty for each month it failed to meet requirement in the amount equal to: (90% OF ASSETS -- AMT OF QOZ PROPERTY HELD BY FUND) X UNDERPAYMENT RATE FOR THESE MONTHS (Sec. 6621(a)(2)). Sec. 1400Z-2(f)(1). If QOF is partnership, the penalty is distributed proportionally among partners according to their interest in partnership. Sec. 1400Z-2(f)(2). However, no penalty if reasonable cause existed Sec. 1400Z-2(f)(3)
4. In general the 180 day period with respect to any eligible gain begins on the day on which the gain would be recognized for Federal tax purposes if the taxpayer did not elect under section 1400Z-2 to defer recognition of the gain. For partnership, S-corp, trust, and estates: 180-day period starts on the last day of the partnership taxable year. Partner may elect to treat his 180-day period as the same as of period of partnership (§1.1400Z-2(a)-1(c)(2)(iii))
5. Prop.Reg. 1.1400Z2(c)-1(b) permits a taxpayer to make the 10 -year basis step-up election after the opportunity designation expires.
Is the qualified taxpayer a partnership?
YES
NO
Was it partnership or partner who made an election to defer gain?
Is it S- corporation, trust or estate?
YES
Partnership rules apply §1.1400Z-2(a)-1(c)(3)
NO
Continue to general recognition rules
Partnership
Partner
At election, gain is deferred for partnership, not included in partners' distributive share of partnership income and partners' basis in partnership interest not increased. When deferral period ends, partnership includes deferred gain in gross income and in partner's distributive share of income; partners' basis is increased. (Prop.Reg. §1.1400Z-2(a)-1(c)(1)(ii)) Continue to determine how much partners will recognize at the end of deferral period
If p/s didn't elect to defer gain (meaning it is included in the partner's distributive share of income), partner may elect to defer it but in this case the partner's 180-day period starts on the last day of the partnership taxable year or partner may elect to treat his 180-day period as the same as of period of partnership. §1.1400Z-2(a)-1(c)(2)
Partner's 180-day requirement NOT MET → EXIT
Partner's 180-day requirement MET and partner elected to defer → Continue to gain recognition
HOW MUCH TO RECOGNIZE?
Did you reinvest the whole amount of gain you elected to defer? Choose from 3 options:
Reinvested 100% of gain
Apply recognition rules to the whole amount of deferred gain
Reinvested only portion of the gain
Recognition rules apply only to the re-invested amount (§1400Z-2(e)(1)). The portion that was not reinvested in QOF is not deferred
Reinvested 100% of gain and added some personal funds (cash)
These are considered as two separate investments. Apply recognition rules only to the potion that represents the original gain (§1400Z-2(e)(1))
How long did you hold your interest in QOF?
Held <5 yrs
Held >5 yrs
Held >7 yrs
Held >10 yrs
Held beyond 2026
If after Dec. 31, 2026 property is still held, taxpayer has to recognize the deferred gain on Dec. 31, 2026 anyway. Estimate how long you held the property as of Dec. 31, 2026, go back to holding period question and select the period corresponding to your holding period as of Dec. 31, 2026 to determine how much to recognize.
See note 5 for additional rule related to basis adjustment for holding a property beyond 2026 with +10-year holding period.
Basis in Interest in opportunity fund=0 §1400Z-2(b)(2)(B)(i)
Step-up the in the basis of QOF by 10% of amount of deferred gain (must be acquired no later than 12/31/2021) §1400Z-2(b)(2)(B)(iii)
Step-up in the basis of QOF by 15% of amount of deferred gain (must be acquired no later than 12/31/2019) §1400Z-2(b)(2)(B)(iv)
on December 31, 2026: step-up in the basis of 10% (if held for >5 years) or 15% (if held >7yrs). Recognize the deferred gain. (§1400Z-2(c)) See also Note 5
Must recognize gain on Dec. 31, 2026 even if interest still owned. Further, if interest sold, may treat basis in QOF=FMV on the date of sale/exchange. Thus, the appreciated portion of interest becomes tax-free. Estimate how long you held the property as of Dec. 31, 2026, go back to holding period question and select the period corresponding to your holding period as of Dec. 31, 2026 to determine how much to recognize. §1400Z-2(c)
Is amount of gain deferred > FMV of investment?
YES
Recognize Gain=(FMV of investment -- a/b in investment)
Recognize gain at the earliest of:
• Date of sale or exchange, or
• December 31, 2026 §1400Z-2((b)(2)A)
NO
Recognize Gain =(Gain deferred -- a/b in investment)
Recognize gain at the earliest of:
• Date of sale or exchange, or
• December 31, 2026 §1400Z-2(b)(2)(A)