June 28, 2019

Internal Revenue Service
CC:PA:LPD:PR (REG-120186-18)
Room 5203
Post Office Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Comments to the Proposed Regulations under Section 1400Z-2 (Qualified Opportunity Zones)

Dear Sir or Madam:

I am pleased to submit The Florida Bar Tax Section's comments to the Proposed Regulations under Section 1400Z-2 (Qualified Opportunity Zones).

Principal authors for these comments were Michael Minton, Steven Hadjilogiou, Michael Bruno, Keith Hagan, Justin Wallace, Mitch Horowitz, Andrew Huber, James Schmidt and Abrahm Smith.

Although the members of The Florida Bar Tax Section who participated in preparing these comments may have clients who would be affected by the proposed regulations, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

Contact Persons:

Steve Hadjilogiou
McDermott, Will & Emery LLP
333 S.E. 2nd Ave., Suite 4500
Miami, FL 33133
Telephone: (305) 347-6521
Fax: (305) 938-0807
Email: steveh@mwe.com

Abrahm Smith
Baker & McKenzie LLP
1111 Brickell Ave., Suite 1700
Miami, FL 33131
Telephone: (305) 789 8972
Fax: (305) 789 8953
Email: Abrahm.smith@bakermckenzie.com

TAX SECTION

www.floridataxlawyers.org

The Florida Bar Tax Section is comprised of approximately 2,000 members.

As always, we will be pleased to provide additional commentary as requested. If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,

Michael D. Minton, Chair

Dear Ladies and Gentlemen,

On behalf of The Tax Section of the Florida Bar, we request the Treasury to implement the comments stated below with respect to the Code Section 1400Z-2 (Opportunity Zones) Proposed Regulations.

1. Agricultural Land "Original Use" and/or Substantial Improvement in Opportunity Zones

As we previously noted, the initial set of Proposed Regulations published October 29, 2018 and Revenue Ruling 2018-29 give some guidance as to how to determine "substantial improvement" for property that has been vertically improved (with a brick and mortar structure) there is no discussion of other types of improvement to real estate. The Revenue Ruling appears to dismiss the "original use" concept for real estate due to its permanence, but there are types of "improvements" to real estate (other than bricks and mortar improvements) that should qualify for "original use" and/or be taken into consideration for determining "substantial improvement." Revenue Ruling 2018-29 may promote an overly restrictive interpretation of "original use" as there are improvements to real property that are themselves part and parcel of the real property (i.e. property improved with vineyards, citrus trees and other perennial crops) that qualify as "other tangible property", are eligible for investment tax credit under Section 38, first year Section 179 expense and depreciation under Section 168, all of which would lend themselves well to the concept of "original use." [See Rev. Rul. 65-104 1965-1 C.B. 28(citrus groves) as clarified by Rev. Rul. 66-183, 1966-2 C.B. 47; Rev. Rul. 80-25, 1980-1 C.B. 65; *see also* Rev. Rul. 69-249, 1969-1 C.B. 31(also citrus groves). Rev. Rul. 67-51, 1967-1 C.B. 68 (trees of fruit & orchards); Rev. Rul. 71-488, 1971-2 C.B. 60 (macadamia nut trees); PLR 8108007 (avocado trees); PLR 8603081 (apple orchard); CCA 201234024].

The second set of Proposed Regulations issued April 18, 2019 failed to clarify the concerns raised regarding the first set of Proposed Regulations and further confuses the utility of agricultural improvements to qualify as qualified opportunity zone business property ("QOZBP") by including in the Supplemental Information ("Preamble") an example of an abusive scenario which utilized agricultural activities as merely a cover for a land banking real estate investment. The pertinent portions of the comments on the Preamble for the second set of Proposed Regulations are reproduced hereinbelow:

> As provided in Rev. Rul. 2018-29, 2018 I.R.B. 45, and these proposedregulations, if land that is within a qualified opportunity zone is acquired by purchase in accordance with section 1400Z-2(d)(2)(D)(i)(I), the requirement under section 1400Z-2(d)(2)(D)(i)(II) that the original use of tangible property in the qualified opportunity zone commence with a QOF is not applicable to the land, whether the land is improved or unimproved. [See p. 12 of the Proposed Regulations §1400Z-2 issued April 18, 2019 – emphasis added].

This statement seems inconsistent with how the Proposed Regulations treat tangible property which is repurposed for use in the Opportunity Zone Trade or Business. (See Prop. Reg. §1.1400Z2(d)-1(c)(4)(i)(B)(5)&(6) addressing the original use of property leased which allows property to be repurposed for a new function and provides a five (5) year "unused or vacant" rule and Prop. Reg. §1.1400Z2(d)-1(c)(7) addressing original use of tangible property acquired by purchase after 12/31/17 which likewise allows for repurposing used tangible property not "previously so used or placed in service in the qualified opportunity zone" and provides a five (5) year "unused or vacant" rule as well). Why shouldn't land be allowed to be repurposed or used in a new trade or business and qualify for "original use."?

The Comments in the Preamble continue with the following:

> Likewise, unimproved land that is within a qualified opportunity zone and acquired by purchase in accordance with section 1400Z-2(d)(2)(D)(i)(I) is not required to be substantially improved within the meaning of section 1400Z-2(d)(2)(D)(i)(II) and

> (d)(2)(D)(ii). Multiple public comments were received suggesting that not requiring the basis of land itself to be substantially improved within the meaning of section 1400Z-2(d)(2)(D)(i)(II) and (d)(2)(D)(ii) would lead to speculative land purchasing and potential abuse of section 1400Z-2.
>
> The Treasury Department and the IRS have considered these comments. Under section 1400Z-2(d)(2)(D)(i)(II) and these proposed regulations, land can be treated as qualified opportunity zone business property for purposes of section 1400Z-2 only if it is used in a trade or business of a QOF or qualified opportunity zone business. As described in part III.D. of this Explanation of Provisions, only activities giving rise to a trade or business within the meaning of section 162 may qualify as a trade or business for purposes of section 1400Z-2; the holding of land for investment does not give rise to a trade or business and such land could not be qualified opportunity zone business property. Moreover, land is a crucial business asset for numerous types of operating trades or businesses aside from real estate development, and the degree to which it is necessary or useful for taxpayers seeking to grow their businesses to improve the land that their businesses depend on will vary greatly by region, industry, and particular business. In many cases, regulations that imposed a requirement on all types of trades or businesses to substantially improve (within the meaning of section 1400Z-2(d)(2)(D)(i)(II) and (d)(2)(D)(ii)) land that is used by them may encourage noneconomic, tax-motivated business decisions, or otherwise effectively prevent many businesses from benefitting under the opportunity zone provisions. Such rules also would inject a significant degree of additional complexity into these proposed regulations. [See pp. 12-13 of the Proposed Regulations §1400Z-2 issued April 18, 2019 – emphasis added].

The foregoing appears to give the reader the impression that the value of land used in a trade or business even though unimproved will be included in both the numerator and the denominator of the equation to determine qualification of the QOF and the QOZBP regardless of not meeting the "original use" or "substantially improved" test, but then the Comments in the Preamble continues with:

> Nevertheless, the Treasury Department and the IRS recognize that, in certain instances, the treatment of unimproved land as qualified opportunity zone business property could lead to tax results that are inconsistent with the purposes of section 1400Z-2. For example, a QOF's acquisition of a parcel of land currently utilized entirely by a business for the production of an agricultural crop, whether active or fallow at that time, potentially could be treated as qualified opportunity zone business property without the QOF investing any new capital investment in, or increasing any economic activity or output of, that parcel. In such instances, the Treasury Department and the IRS have determined that the purposes of section 1400Z-2 would not be realized, and therefore the tax incentives otherwise provided under section 1400Z-2 should not be available. If a significant purpose for acquiring such unimproved land was to achieve that inappropriate tax result, the general anti-abuse rule set forth in proposed §1.1400Z2(f)-1(c) (and described further in part X of this Explanation of Provisions) would apply to treat the acquisition of the unimproved land as an acquisition of non-qualifying property for section 1400Z-2 purposes. The Treasury Department and the IRS request comments on whether anti-abuse rules under section 1400Z-2(e)(4)(c), in addition to the general anti-abuse rule, are needed to prevent such transactions or "land banking" by QOFs or qualified opportunity zone businesses, and on possible approaches to prevent such abuse. [See p. 14 of the Proposed Regulations §1400Z-2 issued April 18, 2019 – emphasis added].

Once again, one is left with the conclusion that there is no clear guidance as to what type of activity is necessary for agricultural projects to qualify as QOZBP. This "significant purpose" hindsight example above of an abusive situation gives no certainty as to how land will be treated. One can infer that if capital was invested or economic activity or output of the parcel was increased such land should qualify, but how much is sufficient?

Contrast this commentary in the Preamble to the example given in the new Proposed Regulations as the third safe harbor for determining if the gross income test in the qualified opportunity zone has been met: This example provides if a landscaper's headquarters are in a qualified opportunity zone, its officers and employees manage the daily operations of the business (occurring within and outside the qualified opportunity zone) from its headquarters, and all of its equipment and supplies are stored within the headquarters facilities or elsewhere in the qualified opportunity zone, then the management activity and the storage of equipment and supplies in the qualified opportunity zone are each necessary to generate 50 percent of the gross income of the trade or business. [See Prop. Reg. §1.1400Z2(d)-1(d)(5)(i)(E)].

Since growing ornamentals and installing landscaping are a form of agricultural activity, these are clearly activities that will qualify as a trade or business that will meet the requirements as a QOZBP. But would there be a different results if during the operation of the landscape business, the business owner also changed the real estate entitlement to the property on which the landscape business operated and a "significant" portion of the ultimate value of the entity that operates the business was related to the value of the underlying real estate and not the landscape business being operated thereon? At what point would the land value appreciation overwhelm the trade or business value under this analysis and become a "significant purpose" in hindsight? The hindsight approach taken above to treat "land banking" as an abusive use could have a significant chilling effect on the use of this tool in the very rural areas most needing the economic stimulus that this program was designed to encourage.

It would seem more reasonable for the Proposed Regulations to treat land used in agricultural endeavors the same as other tangible property is treated, such ; land which is repurposed for a new form of agricultural use after its acquisition post-December 31, 2017, or land that was unused or vacant for five (5) years could should qualify as original use if placed in service for a new agricultural endeavor or a different agricultural endeavor post-December 31, 2017, as noted hereinabove.

In addition, whereas Revenue Ruling 2018-29 distinguishes between the basis in the land vs. the basis in the improvements to the land to determine whether the improvement is substantially improved, it would also seem reasonable to develop some mechanism whereby land that has been used in an agricultural endeavor could be substantially improved to qualify for treatment as a QOZBP (i.e. improved by 30% of its basis, 40% of its basis, or 50% of its basis) thereby providing some measurable means and certainty to avoid the hindsight "significant purpose" approach noted above from having the chilling effect upon the improvement of land located in opportunity zones for agricultural endeavors. Perhaps this would be a fitting subject matter for a safe harbor to give guidance as to the parameters of how much capital improvement would be necessary for otherwise undeveloped land or repurposed land to be treated as qualifying for "original use" or "substantially improved."

We also bring to your attention the questions included in our previous comments and believe responses to these questions are still relevant for this discussion. We would like to know if the "original use" test could be satisfied if:

(i) an agricultural producer acquires land and improves the property (levels, beds, tiles, drains, irrigates, etc.) in order to plant crops on the property for the first time – and whether it makes a difference if the crop was an annual crop or a perennial crop;

(ii) if (i) above is coupled with an agricultural producer's investment in vertical integration (allowing it to wash, clean, pack or process crops for market in the Opportunity Zone) would that be sufficient to constitute an "original use"; and

(iii) could environmental enhancements – such as those required to be able to receive and (in turn) sell mitigation credits – be sufficient to constitute an "original use"?

The Comments in the Preamble continue with:

> Conversely, if real property, other than land, that is acquired by purchase in accordance with section 1400Z-2(d)(2)(D)(i)(I) had been placed in service in the qualified opportunity zone by a person other than the QOF or qualified opportunity zone business (or first used in a manner that would allow depreciation or amortization if that person were the property's owner), it must be substantially improved to be considered qualified opportunity zone business property. Substantial improvement by the QOF or qualified opportunity zone business for real property, other than land, is determined by applying the requirements for substantial improvement of tangible property acquired by purchase set forth in section 1400Z-2(d)(2)(D)(ii).
>
> The Treasury Department and the IRS request comments on these proposed rules regarding the original use requirement generally, including whether certain cases may warrant additional consideration. Comments are also requested as to whether the ability to treat such prior use as disregarded for purposes of the original use requirement should depend on whether the property has been fully depreciated for Federal income tax purposes, or whether other adjustments for any undepreciated or unamortized basis of such property would be appropriate. The Treasury Department and the IRS are also studying the circumstances under which tangible property that had not been purchased but has been overwhelmingly improved by a QOF or a qualified opportunity zone business may be considered as satisfying the original use requirement and request comment regarding possible approaches. [See pp. 14-15 of the Proposed Regulations §1400Z-2 issued April 18, 2019 – emphasis added].

The reference to "overwhelmingly improved" leaves one with the following questions:

(i) is there a willingness to adopt a more liberal "original use" test as described hereinabove; and

(ii) may "substantially improved" be met by a standard other than >2X improvement of the cost basis in the tangible property?

Many of the communities desperately needing the capital improvement and economic stimulus that may be afforded through utilization of the Opportunity Zone designation are rural and agricultural. Development and improvement would be the most likely source for such capital and economic stimulus. Not having clear guidelines of how land will be treated in determining the qualification of the QOF and the QOZBP has and will continue to have a chilling effect upon these potential projects. Introduction of the hindsight example of the potential appreciation of land during the term of the project disqualifying land from inclusion in the numerator of the tests to determine QOF and QOZBP compliance if it were determined that a "significant purpose" was "land banking" after the fact creates even greater uncertainty than there was before the issuance of the Proposed Regulations. It is therefore recommended that examples be provided and a safe harbor established to give guidance to taxpayers as to the activities and capital improvements that would qualify for inclusion in both the numerator and denominator of the test equation regardless of the fact that subsequent appreciation in the underlying real estate may ultimately overwhelm the value of the business being operated thereon. Such additional guidance would be welcomed and could stimulate further utilization of the Opportunity Zone economic incentives in the very communities where they are needed the most.

2. Sale of Property followed by Contribution of Proceeds

Prop. Reg. Section 1.1400Z-2(d)-1(c)(4) provides that purchased qualified opportunity zone business property ("QOZBP") must be purchased (as defined in Section 179) from an unrelated person, and for these purposes, certain familial relationships and common ownership of more than 20% are deemed related. Under Section 179(d)(2)(C)(i), however, property is not "purchased" if the basis of such property is determined in whole or in part by reference to the adjusted basis of such property in the hands of the transferor.

The combination of these two provisions indicates that a taxpayer may sell property to an unrelated qualified opportunity fund ("QOF") (or its qualified opportunity zone business subsidiary (a "QOZB")) and such property would constitute QOZBP. However, if instead of selling such property to the QOF, the taxpayer contributes property to a QOF taxed as a partnership for Federal income tax purposes under Section 721, then such contributed property is not QOZBP; in this case, under Code Section 723, the basis of such property in the hands of the QOF (or the QOZB subsidiary) is determined by reference to the basis in the hands of the transferor.

We request the Service confirm that upon the sale of property to an unrelated QOF (or QOZB subsidiary) (i) such property constitutes QOZBP to the QOF (or QOZB subsidiary) since the QOF (or QOZB subsidiary) purchased the property from an unrelated person, and (ii) the taxpayer may reinvest the proceeds from such sale into the QOF that purchased such property (or QOZB subsidiary). The Service has previously used a "circular cash flow" argument when a taxpayer sells property to an entity and then contributes cash received in such sale to that same entity. In these cases, the Service did not respect the sale and, instead, recharacterized the transaction as a contribution of property by the taxpayer to the related entity. See, e.g., PLR 200627022 and PLR 200234064.

Given the purpose of Code Section 1400Z-2, the Service should confirm that this "circular cash flow" principle does not apply under Code Section 1400Z-2 when a taxpayer sells property to an unrelated QOF (or QOZB subsidiary) and contributes the cash received in the sale to the QOF. One of the purposes of Code Section 1400Z-2 is to "encourage economic growth and investment in . . . qualified opportunity zones." Without clarification from the Service, a QOF (and QOZB subsidiary) may be reluctant to accept cash contributions from a taxpayer that previously sold property to such QOF or its QOZB.

3. Leased Property Comments

In the Section's comments to the first set of proposed regulations under IRC sec. 1400Z-2 dated November 16 2018, we noted certain concerns with how the language of the statute and proposed regulations would apply to leased property meeting the definition of "qualified opportunity zone business property" ("QOZBP"). We are pleased that some of the concerns raised in these comments were satisfied in the second set of proposed regulations. However, we note that the second set of proposed regulations make clear that the original use, and substantial improvement, requirements to QOZBP do not apply to leased property.

This raises some additional concerns, as the second set of proposed regulations do not explain to taxpayers what must be done with the funds representing deferred gain that are contributed to the qualified opportunity fund ("QOF"), in order to satisfy the 90/10 asset test. While it is clear that those funds must be invested in QOZBP to meet the asset test, there is no cross-reference that helps taxpayers know what is, or is not, a permissible usage of those funds. To wit, the substantial improvement regulations contain the language explaining the working capital exception, and how use of the funds will satisfy the exception. However, since substantial improvement is not a requirement for leased property, there are no stand-alone standards explaining to a taxpayer how the contributed funds must be used to satisfy the 90-10 test.

In an admittedly extreme example, assume that the QOZ (or qualified opportunity zone business) leases a completed building in an opportunity zone such that no leasehold improvements are required. There will likely be a need to outfit the leased premises with tangible personal property, such as desks, chairs, computers, storage cabinets, etc., but further assume the cost of those items are insignificant relevant to the amount of deferred gain that has been contributed to the QOF. On what else can the deferred gain be expended that will meet the requirements of using the funds on QOZBP?

We recommend that, in the final regulations, either an explicit provision, or clarifying cross-references, be included so that taxpayers know on what the funds representing the deferred gains can be expended to satisfy the 90/10 asset test. An example or two would also be helpful to illustrate these points so that taxpayers have greater clarity on these permissible expenditures.

4. Working Capital Safe Harbor

Section 8 of our November 16, 2018 comments discusses the working capital safe harbor under Prop. Reg. 1.1400Z-2(d)-1(d)(5)(iv) and asks the IRS to consider, among other things, tolling the 31-month period for severe weather events. While grateful for the exception to the 31-month rule in the event delay is caused by waiting for certain government action, we again ask you to revisit our request to allow additional tolling of 24 months following a natural disaster. We suggest that a declaration of a state of emergency in the jurisdiction in which the qualified opportunity zone property is located trigger the tolling period.

5. Reinvestment Safe Harbor

Prop. Reg. 1.1400Z-2(f)-1(b) provides, in part, that a QOZ may reinvest proceeds from the return of capital or the sale or disposition of its qualified opportunity zone property by the last day of the 12-month period beginning on the date of the distribution, sale or disposition in order for the reinvested proceeds to be treated as qualified opportunity zone property for purposes of the 90% asset test in section 1400Z-2(d)(1). An exception to the 12-month rule is provided if the delay is caused by waiting for government action the application of which is complete.

Similar to our request for extended delay due to a natural disaster in connection with the Working Capital Safe Harbor, we ask that you allow for a delay of 24 months following the declaration of a state of emergency in the jurisdiction in which the qualified opportunity zone property is located.

6. Commencement of Holding Period

Under general tax principles, the holding period of a capital asset commences the day after acquisition. See Rev. Rul. 70-598. In some instances in the proposed regulations, it appears that the IRS takes the position that the holding period commences on the date of acquisition. See, for example, Prop. Reg. 1.1400Z-2(b)-1(f) (Examples 1 and 7). The facts of Example 1 provide, in part, that the taxpayer transfers an asset to a QOF on October 31, 2019. In the analysis to Example 1, the IRS states that the taxpayer's holding period in the QOF begins on October, 31, 2019. Under general tax principles, the holding period should commence on November, 1 2019. The facts and analysis of Example 7 are similar. Though the analysis in both examples is taxpayer favorable, further guidance would be helpful to avoid confusion.

7. Installment Sales

Please resolve the apparent contradiction between section 1400Z-2(a)(1)(B) and section 1.1400Z2(a)-1(b)(4)(i) by making explicit that capital gains that are accounted for under the installment sale method are gains that are recognized in tax years subsequent to the year in which the capital gain asset was sold. The opportunity zone rules allow an investor to contribute capital gains into a QOF within 180 days from the recognition of capital gain. So long as the gain is recognized from a sale to an unrelated party and is recognized in tax years 2018 through 2026, a taxpayer should be able to invest this gain in a QOF within 180 days of recognition, not 180 days from the original sale.

8. In-kind Contributions

Analogous to recent guidance allowing in-kind contributions to a QOF to qualify as an otherwise eligible investment under 1400Z-2(a)(1)(A), relax the for-cash requirement under sections 1400Z-2(d)(2)(B)(i)(I) and 1400Z-2(d)(2)(C)(i), to allow further in-kind contributions by a QOF to a corporation or partnership in exchange for QOZB stock or QOZB partnership interests. Consistent with the statute the new regulations should treat an in-kind contribution as a deemed circular cash transaction where the QOF is treated as first contributing an amount of cash equal to the basis of the in-kind property for QOZB stock or QOZB partnership interest and immediately thereafter, the QOF sells the in-kind property to the corporation or partnership for the cash so contributed. This recharacterization would apply solely for purposes of section 1400Z-2, and not any other section of the Code.

9. Basis Step Up after the 10-year Holding Period

Appropriately, recent guidance clarified that QOFs may sell assets at a stepped up basis after the 10-year holding period to preserve the intended tax benefits. New regulations should be provided that do similarly with respect to lower-tier QOZBs. Frequently, a QOF may not sell its QOZB stock or QOZB partnership interest, but the QOZB below may sell assets directly. If the QOF has held the QOZB stock or partnership interests for 10 years, then a QOZB asset sale should similarly be tax-free. Otherwise, this would result in an additional layer of tax and negate the purposes of the statute.

10. FIRPTA

Opportunity zone regulations are silent with respect to FIRPTA. When foreign persons sell US real estate, FIRPTA withholding tax applies. The IRS has procedures in place that allow taxpayers to apply to the IRS for a withholding certificate to reduce or waive the FIRPTA withholding. The IRS should provide guidance or a method to obtain a reduced FIRPTA withholding certificates for foreign taxpayers who intend to invest gains into opportunity zones.

11. Basis of QOF If Death Occurs Before December 31, 2026

The basis of a QOF investment in the hand of an estate or devisee is the fair market value at the date of death less the amount of income in respect of a decedent (IRD). The fair market value can be determined as of the date of death by way of an appropriate appraisal, but the amount of IRD cannot be determined until December 31, 2026 (or an earlier disposition of the QOF qualifying interest that triggers an inclusion event). Although there will be a **tentative amount** of IRD as of the date of death, it is not taxed as IRD until the deemed recognition on December 31, 2026 (or an earlier disposition that triggers an inclusion event). Because it is possible for IRD to decrease after the date of death, basis potentially cannot be determined until after date of death (assuming death occurs on or before December 31, 2026).

An example can illustrate the uncertainty.

Example:

Suppose that D has a $2,000,000 capital gain on April 1, 2019 and timely reinvests it in a QOF on July 1, 2019. D then dies four years later on July 1, 2023. At the time of death, D's interest in the QOF is worth $3,000,000. Based upon the application of the Section 1400Z-2 rules, the $2,000,000 deferred gain **potentially** constitutes IRD under section 691 and therefore, pursuant to Section 1014(c), would *not* be eligible for a step-up in basis upon death under Section 1014(a). The $2,000,000 ***is only potentially IRD;*** actual IRD would not be known until the earlier of December 31, 2026 or the disposition of the QOF interest. The value of the QOF interest could change between date of death and the date IRD is actually determined under Section 1400Z-2.

This uncertainty precludes D's estate (or heir) from determining the appropriate step-up in basis under Section 1014. See the examples below.

What is the basis of the QOF interest in D's Estate?

Post Death <u>Increase</u> in QOF Value - Assume the value of the QOF interest increased from date of death, and at December 31, 2026 was $4,000,000. The estate's basis should be:

Fair market value at date of death	$4,000,000	known at date of date: <u>July 1, 2023</u>
Less: IRD	<u>$1,700,000</u>	know at <u>December 31, 2026</u>

($2,000,000 – 300,000 = $1,700,000))

Deferred gain – 15% basis adjustment	$2,300,000	basis step-up: cannot be determined on July 1, 2023

After the IRD is included in the Estate's income in 2026, its total basis becomes $4 million ($2,300,000 + $1,700,000 of IRD).

Post Death <u>Decrease</u> in QOF Value - Assume the value of the QOF interest decreased from date of death, and at December 31, 2026 was $1,700,000. The estate's basis should be:

Fair market value at date of death	$4,000,000	known at date of death: July 1, 2023
Less: IRD	<u>$1,400,000</u>	known at December 31, 2026
($1,700,000 – 300,000 = $1,400,000)). FMV (since lower than deferred gain), Less 15% basis adjustment		
	$2,600,000	basis step-up: cannot be determined on July 1, 2023

After the IRD is included in the Estate's income in 2026, its total basis becomes $4 million ($2,600,000 + $1,400,000 of IRD).

After the IRD is recognized in 2026, the Estate will have a basis equal to the fair market value at death. **But before such date, the Estate cannot correctly determine its basis because the amount of IRD will not be known <u>until after</u> date of death.**

The correct basis would need to be known **as of date of death** for various reasons. For instance, suppose the Estate sold its QOF interest. Or, suppose distributions from the QOF were made to the Estate. Would those distributions be a return of capital or if in excess of basis would it be considered a taxable event or an inclusion event?

To avoid the uncertainty, Treasury could consider "setting" the IRD as of death of death, but still allowing deferral of that IRD until the earlier of December 31, 2026 or disposition. If such a modification were adopted, a basis adjustment could be determined on date of death. However, this would still result in a problem: a decline in the value of the QOF interest after death could reduce the actual IRD, which itself would affect the taxpayer's basis.