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<u>Submitted electronically at www.regulations.gov</u>
CC:PA:LPD:PR (REG–120186–18), Room 5203
Internal Revenue Service,
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments to REG–120186–18, "Investing in Qualified Opportunity Funds"

Dear Sir or Madam:

This letter responds to a request for comments by the Department of Treasury ("<u>Treasury</u>") on the second set of proposed regulations, Treasury Notice 84 Fed. Reg. 18652 (5/1/19) (the "<u>Proposed Regulations</u>"), which provided additional guidance with respect to Sections 1400Z-1 and 1400Z-2 (the "<u>OZ Legislation</u>") of the Code. [1] We respectfully submit these comments on behalf of our real estate developer clients and financial fund manager clients who have invested in qualified opportunity zones as a result of the OZ Legislation.

In particular, the Proposed Regulations clarified that "eligible gain" that is eligible for deferral under Section 1400Z-2(a) includes net gains from Section 1231 property.[2] The Proposed Regulations further provide that the 180-day period described in Section 1400Z-2(a)(1)(A) (the "<u>180 Day Period</u>") with respect to any capital gain net income from Section 1231 property for a taxable year begins on the last day of the taxable year.

While the clarification that net Section 1231 gains are indeed eligible for tax deferral treatment under the OZ Legislation has been widely appreciated by the real estate industry, the provisions as to when the 180 Day Period begins with respect to net Section 1231 gains have caused certain concerns.

First and foremost, we are concerned that the language in the Proposed Regulations governing the 180 Day Period for net Section 1231 gains is inconsistent with the statute. Section 1400Z-2(a)(1)(A) states that the 180 Day Period begins "on the date of such sale or exchange" of property.

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1 Unless otherwise indicated all references to "Section" or "Sections" refer to the Internal Revenue Code of 1986, as amended (the "<u>Code</u>"), and all references to "Treas. Reg. Section," "Temp. Reg. §," and "Prop. Reg. §," refer to the final, temporary and proposed regulations, respectively, promulgated thereunder (the "<u>Regulations</u>"), all as in effect as of the date of this memorandum.

2 Prop. Reg. § 1.1400Z2(a)-1(b)(2)(iii).

However, the Proposed Regulation states that for Section 1231 gains, the 180 Day Period begins "on the last day of taxable year," regardless of when the property was actually sold. In the preamble to the Proposed Regulations, Treasury cited back to the preamble to the proposed regulations released on October 29, 2018 (83 FR 54279) to state that the reason for using the end of the taxable year to begin the 180 Day Period was because in certain instances the statutory language providing capital gain treatment does not provide a "specific date for the deemed sale." However, in the case of the sale or exchange of Section 1231 property, there is no "deemed sale" in the language of Section 1231—rather, Section 1231 deals with the treatment of the gains or losses resulting from the actual sale of Section 1231 property.

More importantly, however, the language in the Proposed Regulations raise several policy concerns. First, the language in the Proposed Regulations forecloses the opportunity for net Section 1231 gains earned in 2019 to be eligible for the full 15 percent tax basis step up provided in Section 1400Z-2(b)(2)(B). In order to receive the full amount of the tax basis step up benefits in Section 1400Z-2(b)(2), investors need to invest into qualified opportunity funds no later than December 31, 2019, which is also the beginning of the 180 Day Period for those taxpayers with net Section 1231 gains in 2019. This timing makes it practically impossible for taxpayers with Section 1231 gains after 2018 to fully partake of the full tax benefits of the OZ Legislation as Congress intended them to. Indeed, commentators have already noted the impact of these rules on opportunity zone investment.[3]

Another concern is that we are aware that prior to the release of the Proposed Regulations, some taxpayers invested Section 1231 gains into qualified opportunity funds within 180 days of the actual sale of the Section 1231 property (as the Code plainly states). The Proposed Regulations have caused questions among those taxpayers as to whether their investments of their Section 1231 gains will indeed be eligible for the tax benefits under the OZ Legislation. We are aware and appreciate the additional guidance the Internal Revenue Service ("IRS") provided on its FAQ page stating that such taxpayers will be eligible for valid deferral elections, provided they did not go over their net amount of Section 1231 gain.[4] However, taxpayers need more reassurance than a single FAQ on the IRS website.

In light of these concerns, we ask that Treasury consider that for those taxpayers with Section 1231 gains, that they be allowed to begin 180 Day Period from the date of the sale or exchange of the Section 1231 property, provided that the amount of the gain invested into the qualified opportunity fund be less or equal to the amount of the net Section 1231 gain. Given that the IRS has already

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[3] *See* "Opportunity Zones Boost Real Estate Prices as Investors Rush In," Daily Tax Report, Bloomberg Law, Jun. 27, 2019, available at https://www.bloomberglaw.com/.

[4] IRS, "*Opportunity Zones Frequently Asked Questions*," available at https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions.

provided similar guidance with respect to those Section 1231 gains earned in 2018, it should not cause additional disruption to the administration of the OZ Legislation, and it would be consistent with the plain wording of Section 1400Z-2(a)(1)(A).

Sincerely,

Glenn S. Miller