Opportunity Zones Give Big Law 'Pop-Up' Teams Plenty of Work.

- **2017 tax law provides tax incentives for investors in designated low-income zones**
- **Law firms use multidisciplinary teams to help current clients, and woo new ones**

The 2017 tax law created tax incentives for investors in certain economically distressed communities in the U.S., and it's keeping more than just tax lawyers busy.

A number of Big Law firms have created "pop up" working groups of tax, real estate, and private funds lawyers to advise clients looking to jump in on the investment action.

The law set 8,764 opportunity zones in mostly low-income tracts designated for tax breaks. The law allows investors, including banks and real estate developers, to delay or even reduce their taxes on profits from stocks and other assets if they invest in those areas.

As it turns out, these opportunity zones can be a boon for Big Law firms and smaller firms with a strong emphasis on multidisciplinary practices.

The opportunity zone teams are intended to exist only for limited time because investors must act by Dec. 31, 2026, and the pop-up teams tackle thorny issues relating to the new law, which attorneys call unusually broad.

For instance, there's no limitation on the amount of gain an investor can shelter, and there are very few restrictions on types of businesses that can operate in an opportunity zone, said Mark S. Edelstein, the chair of Morrison Foerster's global real estate group in New York. Edelstein is part of the firm's informal opportunity zone team of about 25 attorneys from their tax, real estate, and private funds practices that is trying to spin its varied expertise into new work and new clients.

The only businesses not allowed are "sin" businesses, he said, which traditionally include casinos, liquor stores, and massage parlors.

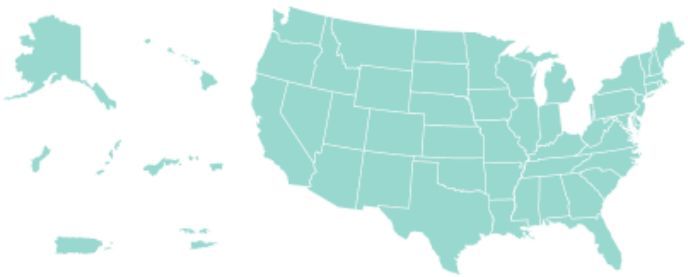
The teams are trying to capitalize on this new client service by figuring out how to advise clients on it and how to get hired, Edelstein said.

Clients include investors in opportunity zone funds, banks, real estate developers, business owners, and those who want to structure the funds.

"That's what law firms do. We provide services and get paid," he said.

Opportunity Zones

8,764 opportunity zones across U.S.
(50 states, D.C., five U.S. territories)



Big Law firms with opportunity zone teams include

Ballard Spahr LLP
K&L GATES
McGUIREWOODS
DuaneMorris®
Katten
Katten Muchin Rosenman LLP
Morgan Lewis
NIXON PEABODY
POLSINELLI
SEYFARTH SHAW
MORRISON FOERSTER

Key opportunity zone events

12/22/17
Tax Cuts and Jobs Act of 2017 signed into law

4/9/18
First set of opportunity zones designated in 18 states

10/29/18
IRS releases 1st tranche of opportunity zones guidance

4/17/19
IRS releases 2nd tranche of guidance

12/31/19
Last day to invest in opportunity zones fund to exclude 15% of gain invested from capital gains tax

12/31/26
Opportunity zones fund investment deadline

New Frontier

But opportunity zone teams aren't for every firm. The tax provisions are "broad," "complicated," and, of course, new. Firms need that tax expertise but also a broad bench of attorneys in other areas.

Those with strong real estate and capital markets groups with a "talented and entrepreneurial" tax group are "very-well positioned" to effectively guide their clients in navigating the opportunity zone rules, Seyfarth Shaw's Steven R. Meier said. Meier, who's located in Chicago, is chair of Seyfarth's corporate department and co-chair of the firm's tax practice, as well a member of the firm's opportunity zones team.

It's still a "new frontier" in investment, said Jay Blaivas, a partner with Morrison & Foerster's tax group in New York and Edelstein's colleague on the opportunity zone team.

Lawyers can add a lot of value because these aren't necessarily deals where investors have "tried and true" experience, like an M&A sponsor who's done 100 such deals before, said Adam J. Tejeda, a partner in K&L Gates' New York office and a member of its opportunity zones team.

"It's a new product and we need to be proactive, ahead of the curve," Morrison & Foerster's Edelstein said.

And for a number of firms with opportunity zone teams, the approach—using an ad hoc, multidisciplinary group to tackle an issue—is familiar territory.

McGuire Woods has groups working on projects like public private partnerships, new markets, and energy project development, said Douglas E. Lamb, a partner in the firm's Richmond office and a member of its opportunity zones team.

Seyfarth's multidisciplinary teams also work on EB-5 immigration issues for foreign investors, fintech, and cannabis challenges, Meier said.

Work Is Coming

Opportunity zone work has been steady since the IRS released its first set of clarifying regulations in October. Big Law partners who spoke with Bloomberg Law business has increased since the second set was released in mid-April and will continue to pick up steam until the end of the year.

"We see more activity starting to happen," Edelstein said. And with the newest set of regulations, there will be more deals, he said. The pop-up team will have to identify for clients the risks and benefits and how to navigate between them, he said.

As for investors, the moment is now, said Gregory A. Riegle, a partner with McGuire Woods' real estate practice in Tyson's Corner, Va., and a member of its opportunity zones team.

Those who invest any profits made on stocks or other assets in an opportunity zone fund within 180 days of the sale of the assets and before Dec. 31, 2019, can cut the profit subject to tax by 15 percent if they keep their money in that fund for seven years.

The percentage drops to 10 for investments made after 2019 and that are kept in the fund for at least five years. A qualified opportunity fund is an investment vehicle for investing in eligible property located in a qualified opportunity zone.

Although clients will get the maximum benefit by investing by the end of this year, opportunity zone work for law firms has a "longer shelf life than you'd think," said Mary Burke Baker, a government affairs counselor with K&L Gates in Washington and a member of the firm's opportunity zones team.

Investors can sink money into a fund until the end of 2026 and still get the biggest benefit: the tax-free treatment of capital gains that they have when they sell their interest in the opportunity fund, she said. To take advantage of this benefit, the money must remain in the fund for at least 10 years.

And while law firms anticipate an increase in work as deals accelerate, there's the potential for even more down the road—and it's work with which they're quite familiar.

"We suspect there are going to be a lot of lawsuits coming out of this," Edelstein said.

Bloomberg Tax

by Melissa Heelan Stanzione

Posted May 28, 2019, 1:50 AM

– With assistance from Lydia O'Neal

Opportunity Zones' Biggest Myths.

America's corporate tax rate is no longer the most controversial part of the Tax Cuts and Jobs Act of 2017. A then-little-known provision establishing tax incentives for investment in Opportunity Zones – legally designated, economically-distressed census tracts – has generated debate nationwide. Within many of the designated areas, the prospect of fresh capital has been greeted with enthusiasm. Opportunity Alabama CEO and Founder Alex Flachsbart, for example, attests that "this small part of a bipartisan tax act has done more in the last 15 months to mobilize investors and communities across the state than any other federal tax incentive in the last 15 years."

Opponents of the legislation, however, argue that Opportunity Zones will benefit investors more than communities and pour fuel on to the flames of gentrification. To resolve some of this discrepancy between local excitement and national concern, let's address some of the most common misconceptions about Opportunity Zones.

Continue reading.

Forbes

by Sorenson Impact
Contributor

May 29, 2019, 10:11am

Scott Turner: The White House's Vision for Opportunity Zones (Podcast Episode #31)

How can the resources of the Federal government be leveraged to help deliver generational impact to Opportunity Zone communities? Scott…

Read More »

May 29, 2019

Chris Loeffler: The OZ Fund that Raised $40 Million in 5 Months (Podcast Episode #32)

Are Opportunity Zone Funds actually raising any money yet? Chris Loeffler is co-founder and CEO of Caliber, an Arizona-based alternatives…

Read More »

June 3, 2019

TAX - NEW YORK

VCP One Park REIT LLC v. New York City Tax Appeals Tribunal

Supreme Court, Appellate Division, First Department, New York - April 25, 2019 - N.Y.S.3d - 171 A.D.3d 632 - 2019 WL 1798261 - 2019 N.Y. Slip Op. 03149

Article 78 proceeding was brought to review determination of the New York City Tax Appeals Tribunal that transfer of economic interest in real property was not entitled to the reduced New York City Real Property Transfer Tax (RPTT) rate applicable to real estate investment trust (REIT) transfers.

The Supreme Court, Appellate Division, held that Administrative Code provision making taxable consideration equal to estimated market value as determined for property tax purposes did not apply.

In determining whether transfer of an economic interest in real property was entitled to the reduced New York City Real Property Transfer Tax (RPTT) rate applicable to real estate investment trust (REIT) transfers, Administrative Code provision making taxable consideration equal to estimated market value as determined for property tax purposes did not supersede Code's 40% test, requiring that the value of the ownership interests in the REIT received by the grantor as consideration for the transfer be at least 40% of the value of the equity interest in the real property or economic interest therein.

TAX - OHIO

City of Upper Arlington v. McClain

Supreme Court of Ohio - May 9, 2019 - N.E.3d - 2019 WL 2034681 - 2019 -Ohio- 1726

Taxpayer appealed from decision of the Board of Tax Appeals denying its claim for property-tax exemption for several properties. City and city board of education moved to dismiss for lack of

jurisdiction.

The Supreme Court held that taxpayer was not required to initiate certified-mail service of notice of appeal within 30-day period for filing notice of appeal, and thus dismissal on that ground was not warranted.

Taxpayer was not required to initiate certified-mail service of notice of appeal within 30-day period for filing notice of appeal of decision by Board of Tax Appeals that denied its property-tax exemption for several properties, under statute requiring notice of appeal to be served upon all appellees by certified mail, and thus city and school board were not entitled to have appeal dismissed for lack of jurisdiction based on failure to timely perfect appeal; statute did not state timeline for certified-mail service of notice of appeal, and taxpayer served notice of appeal on city and school board by certified mail.

DEDICATION - LOUISIANA

Jefferson Parish School Board v. TimBrian LLC

Court of Appeal of Louisiana, Fifth Circuit - May 9, 2019 - So.3d - 2019 WL 2052336 - 18-349 (La.App. 5 Cir. 5/9/19)

School board filed action against business owner, seeking to annul tax sale of property business owner had acquired in tax sale, and filed supplemental and amending petition adding parish as defendant.

The District Court granted summary judgment to parish and denied business owner's motion for summary judgment. Following dismissal of initial appeal, business owner appealed.

The Court of Appeal held that:

- School board sufficiently alleged cause of action, and
- Genuine issues of material fact precluded summary judgment.

School board sufficiently alleged cause of action against business owners who purchased property adjacent to school in tax sale; although school board acknowledged it was not owner of property, it asserted various property interests including servitudes of use, passage, right of way and usufruct resulting from its actual possession of the property, and thus had a legal interest in the subject matter of the litigation.

Genuine issues of material fact as to whether property the school used as a playground had been donated for public use as "then North Metairie Road" by the original owner in 1837 precluded summary judgment in action brought by school district to invalidate purchase of property by business owners at tax sale; expert reports differed on whether "North Metairie Road" existed, or whether the 1837 Act of Deposit was a formal, statutory or implied dedication.

Los Angeles County Voters Passed a Parcel Tax to Fund Water Capture Projects - What You Should Know.

This past November, residents of the County of Los Angeles passed Measure W, a parcel tax of 2.5

cents per square foot of impermeable land meant to fund projects to improve stormwater capture, flood control, and prevent ocean pollution associated with large rain events in the Los Angeles River basin.

Measure W earned 69.45% of votes on November 6, needing 66.7% to pass. The tax will be assessed annually on all property owners throughout the Los Angeles Flood Control District, which includes most of the County of Los Angeles, with the exception of Catalina Island, Lancaster, and parts of Palmdale. The median annual tax will be approximately $83, for a homeowner with a 2100 square foot house on a 7500 square foot lot, and up to tens and perhaps hundreds of thousands of dollars for commercial and industrial landowners. Residents and businesses can calculate their proposed annual tax on the County's GIS tool, although users have reported that the tool is often unreliable for larger land areas. The tax will be imposed beginning in the County's next fiscal year, which starts July 1, 2019.

The debate over this parcel tax was not new in Los Angeles. The County had been considering such a levy since 2013 but had been faced with vocal opposition from school districts and business communities. Since then, however, serious droughts have exacerbated Los Angeles' water situation and dependency on imported water, which provided the County with further arguments for the measure. The County depends on imported water from the Eastern Sierra and the Colorado River for the majority of its water supply, costing residents and businesses three times as much as harvesting water from a local groundwater source. Only one-third of Los Angeles' water comes from within the County.

The stated purpose of the parcel tax is to clean stormwater falling on and passing through Los Angeles and inject it back underground, allowing the County to later rely on it for its water supply. This will be done through extensive new stormwater projects, from street medians and permeable pavement to a network of water storage catacombs located under local parks. There are large areas of the County covered with asphalt and concrete that could be redeveloped for better rainwater capture, such as parking lots, school yards, and sidewalks.

In a watershed where only 15% of the stormwater is captured, cleaned, and placed back into the water supply, County officials argue that improving groundwater retention and also preventing ocean pollution are key goals. When stormwater drains off of Los Angeles' impermeable landscape and gutters into the Pacific Ocean, it carries with it trash, bacteria, toxins, and harmful pollutants, to the tune of 100 billion gallons.

The County estimates that it will raise approximately $300 million annually through the imposition of the parcel tax, which will be reevaluated after 30 years. Though the tax will affect all County landowners, bills are likely to be largest for major landowners with land covered with impermeable surfacing, such as big box stores and manufacturing facilities. The owner of a commercial building with a large paved area will likely pay tens of thousands of dollars under the proposed parcel tax. Landlords and tenants will need to consult their leases to determine whether the parcel tax will passed through to the tenant or absorbed by the landlord.

Of the parcel tax's revenue, half will go to funding regional watershed projects, 40% to municipal and local priority projects, and 10% to the Los Angeles Flood Control District for administration and educational programs.

Landowners may either pay the cost of the parcel tax or replace their impermeable land with a permeable surface.

by Michael Jacob Steel, Justin Fisch and Adam N. Hopkins

May 28 2019

Morrison & Foerster LLP

TAX - TENNESSEE

Coffee County Board of Education v. City of Tullahoma

Supreme Court of Tennessee, at Nashville - May 8, 2019 - S.W.3d - 2019 WL 2022363

County brought action against city, claiming that city was statutorily required to distribute liquor-b--the-drink tax proceeds pro rata among all schools in the county based on average daily attendance.

The Chancery Court granted summary judgment in favor of city. County appealed. The Court of Appeals reversed. City was granted permission to appeal, and the case was consolidated with four similar cases for oral argument only.

The Supreme Court held that city was not required to share its liquor-by-the-drink tax proceeds with county.

City, which had approved liquor-by-the-drink sales, was not required to share its liquor-by-the-drink tax proceeds with county, which had not approved such sales, despite contention that statute required city to distribute tax proceeds pro rata among all schools in county based on average daily attendance; statute required distribution of proceeds in "same manner as the county property tax for schools is expended and distributed," and city had its own school system separate from county school system.

TAX - TENNESSEE

Washington County School System v. City of Johnson City

Supreme Court of Tennessee, at Knoxville - May 8, 2019 - S.W.3d - 2019 WL 2022368

County school district brought action against city alleging that county did not receive its allocated share of the tax revenue designated for education that was generated by liquor-by-the-drink (LBD) sales in the city. County intervened.

The Chancery Court granted summary judgment in favor of plaintiffs. City filed interlocutory appeal. The Court of Appeals reversed and granted summary judgment in favor of city. Plaintiffs appealed.

The Supreme Court held that local education provision of LBD sales tax distribution statute did not require city to share half of its LBD tax proceeds with the county pro rata.

Local education provision of liquor-by-the-drink (LBD) sales tax distribution statute, requiring municipalities to expend and distribute one-half of their LBD tax proceeds in the same manner as the county property tax for schools was expended and distributed by the county, did not require city to share half of its LBD tax proceeds with the county and other school systems in the county pro rata; rather, the provision directed city to expend and distribute the education portion of its LBD tax proceeds in support of its own municipal school system.

Legislation to Restore Tax-Exempt Advance Refundings Introduced.

The House Municipal Finance Caucus Co-Chairs Rep. Steve Stivers (R-OH) and Rep. Dutch Ruppersberger (D-MD) have introduced legislation with 10 co-sponsors, that would fully reinstate tax-exempt advance refundings. Since their elimination in the 2017 *Tax Cuts and Jobs Act*, reinstatement of tax-exempt advance refundings has been a top priority of the BDA. Working with our partners on Capitol Hill and within the issuer community, the BDA has been raising awareness and interest in the legislation, including assisting in the drafting of similar legislation in 2018. **The BDA is currently working with the House Municipal Finance Caucus to identify Senate offices to draft a companion bill, while also identifying House Members for co-sponsorship.** Building off the recent success of the "Dear Colleague," the group hopes to dramatically increase the number of co-sponsors from the previous high of 20.

Upcoming Events

- Advance Refunding Call – The BDA plans to hold a conference call in the coming weeks to brief members on BDA activity regarding the legislation and steps that members can take to help promote the bill.
- Municipal Bonds for America (MBFA) Coalition Fly-In: On June 13th – 14th, the MBFA Coalition will host its annual fly-in and municipal bonds seminar. During the fly-in, the MBFA Executive Committee and Coalition members will advocate for the tax-exemption, advance refundings, and bank-qualified bonds.
- If you are interested in participating in these events, please contact Justin Underwood at justin@munibondsforamerica.org.

Bond Dealers of America

May 20, 2019

Rockefeller Foundation Aims to Make Trump Tax Perk Work for Poor.

- **Charity promotes 'responsible' investment in opportunity zones**
- **Newark Mayor Baraka says it'll help guide where investments go**

Wall Street's obsession with a new tax break that rewards investment in low-income areas has raised doubts that the poor will benefit. Can a modest philanthropic effort change that?

The Rockefeller Foundation is set to announce Tuesday that it will hand out $5.5 million to help six U.S. cities promote "responsible" investment in areas designated as opportunity zones.

Prudential Financial Inc. is contributing to the first award, which will provide $920,000 to Newark, New Jersey. The money will allow a local nonprofit, the Newark Alliance, to hire a chief opportunity zone officer who will be embedded with the city, and two "community engagement specialists." The grant also comes with two years of technical assistance to help structure deals.

Opportunity zones have set off a fierce debate since they were tucked into President Donald Trump's 2017 federal tax overhaul. Backers say they'll draw investment to struggling communities. Critics argue the incentives may end up a handout to the wealthy or mainly benefit areas already on the upswing, potentially making it even costlier for poor people to live there. The law doesn't require

investors to promote social good with their dollars.

“We should have more public and philanthropic guardrails” to ensure the law helps low-income families and workers, said Rajiv J. Shah, president of the Rockefeller Foundation. “We know making grants in six cities is not going to change the trajectory of the law right away,” he said, but ultimately it’s possible to “avoid some of the concerns that have been raised.”

Read a QuickTake on the opportunity zone debate

Rockefeller’s grants are part of a broader effort by philanthropies, public officials and others to make sure the tax break has positive outcomes. The Kresge Foundation pledged $22 million this year to support fund managers who agree to report on their investments in opportunity zones. Jim Sorenson, a prominent impact investor, said this week he’s seeding a $150 million fund that will use a framework designed by U.S. Impact Investing Alliance and the Beeck Center at Georgetown University to measure the good it does in distressed areas.

Still, such endeavors may end up being the exception. Large asset managers like CIM Group and Starwood Capital Group have set out to raise hundreds of millions of dollars to deploy in the zones. Few have formally committed to measuring their impact. In fact, there’s no requirement for investors to publicly divulge whether they’re using the break.

“It’s difficult for municipalities to identify readily the kinds of funds that are coming in,” Newark Mayor Ras Baraka said in an interview. “We really need to figure out how to do that and direct the money in a very deliberate way so it’s not arbitrarily spread in places we don’t want it.”

Bloomberg Markets

By Noah Buhayar

May 21, 2019, 5:30 AM PDT

Blue States Warned of a SALT Apocalypse. It Hasn't Happened.

- **California, New York, Illinois income tax revenue rebounds**
- **Softer housing market in New York City suburbs may be warning**

To listen to New York Governor Andrew Cuomo, the 2017 Republican tax overhaul that limited state and local deductions to $10,000 was a devastating blow. The rich would flee, the middle class would suffer and blue state budgets would bleed.

Perhaps this will come to pass over time, but so far, there are almost no signs of it.

New York, in fact, saw revenue rise $3.7 billion in April from a year earlier, thanks to a shift in timing of taxpayer payments, a stock market that rallied through much of 2018 and a decade-long economic expansion that’s pushed national unemployment to a 50-year low. Similar windfalls arrived in New Jersey, California and Illinois — states that, like New York, had warned of dire consequences from the law.

And it turns out that tax refunds across the U.S. in 2019 — those once-a-year checks from Uncle Sam that people use to pay credit card debt from Christmas or buy a washing machine — were roughly the same size as a year earlier. In all, about 64% of American households paid less in individual

income tax for 2018 than they would have had the Tax Cut and Jobs Act not become law, according to the Urban-Brookings Tax Policy Center.

“Any comment that says this is an economic civil war that would gut the middle class is overblown,” said Kim Rueben, the director of the State and Local Finance Initiative at the Tax Policy Center. “If there’s going to be any effect of the SALT limit on the ability of some states to have progressive taxes it’s too early to know that yet.”

Read more: SALT Cap Will Leave About 10.9 Million People Feeling Tax Pain

Taxable Income

In some ways, the $10,000 limit on state and local tax deductions — SALT — is saving states money by lowering their borrowing costs. That’s because investors seeking to reduce their tax bill are plowing a record-setting amount of cash into municipal bonds, driving interest rates lower. The extra yield that investors demand to compensate for the risk of holding Illinois general-obligation bonds, for instance, has fallen to the lowest since May 2015, according to data compiled by Bloomberg.

States are also benefiting from a broader tax base because the law eliminated some exemptions and limited deductions, like mortgage interest. Since states that levy income taxes use federal adjusted gross income or taxable income as the base, they have more income to tax.

Still, the nerves of Democratic governors and their budget officers frayed in December when income tax collections plunged by more than 30 percent from the prior December. Cuomo was quick to call the tax law “politically diabolical” and an act of “economic civil war” against the middle class.

Then April came.

New York collected $3.4 billion more in personal income tax revenue last month than a year earlier, a 57% increase, according to Comptroller Thomas DiNapoli. California took in $19.2 billion in April, exceeding Governor Gavin Newsom’s estimate by $4 billion.

New Jersey had a record April with tax collections up 57%, allowing it to boost forecasts for the year by $377 million and triggering a political battle over how to spend the windfall. Illinois individual and corporate tax revenue was $1.5 billion more than projected, allowing Governor J.B. Pritzker to scrap a plan to put off pension payments.

Timing Change

April personal income tax collections in 28 states and Washington increased by $16.3 billion, or 36.2% year-over-year to $61.4 billion, Bank of America Corp. said.

“SALT caps do not appear to be a broad system risk to state credit quality at this point,” S&P Global Ratings said recently.

A big reason for the sharp bounce-back after December’s deep revenue declines in New York and other high-tax states: The SALT limits caused some people to change when they paid their taxes. Wealthy taxpayers in December 2017 accelerated big tax payments to take advantage of the unlimited state and local tax deduction before it expired. Then, with the SALT deduction capped, that incentive evaporated and taxpayers waited until this April to pay their 2018 taxes.

Also, some individuals failed to adjust their W-4s after the passage of the tax law. So people who underwithheld received more in their paychecks since then but had to pay more tax in April or

received lower refunds.

Trending Inline

Still, there are some indications that residents in high-tax states are fretting about the law. Thirteen percent of house-hunters in both New York and California said they have started looking for homes in states with lower taxes, according to a recent survey by brokerage Redfin Corp.

In Westchester County, where a typical property tax bill for a single family home is more than $17,000, the average sales price declined 7.6% between the first quarter of 2018 and the same quarter this year. Sales prices for luxury homes (average price $2 million) plummeted 22% during the same period, according to appraiser Miller Samuel Inc. and brokerage Douglas Elliman Real Estate.

Almost half of income taxes paid to California, New York and New Jersey are from the wealthiest 1% of earners. If they were to move in large enough numbers, those states could be in trouble. New York, New Jersey, Connecticut and Maryland sued the Trump administration last year to invalidate the $10,000 cap, saying that it unfairly targets them. States have sought to pass loopholes around the limit and there's a push in Congress to reverse it.

But migration rates in high tax states most affected by SALT are below pre-recession levels, and generally in-line with U.S trends, Moody's Investors Service said in April. Jobs, housing and the weather influence migration more than taxes, according to Moody's analyst Marcia Van Wagner.

"Armageddon hasn't resulted from the changes to SALT, but it still may be too early to measure its impact," said Matt Dalton, chief executive officer of Rye Brook, New York-based Belle Haven Investments, which manages $9 billion of municipal bonds. "You see more mansions listed in New York. Manhattan real estate sales just had their worst quarter in a decade."

Read more: Trump SALT Change Isn't Causing People to Flee New York: Moody's

Bloomberg Politics

By Martin Z Braun

May 21, 2019, 3:00 AM PDT

— *With assistance by Patrick Clark*

Opportunity Zones Skip Over Hard-Hit Rural Places.

Shelterforce is right on the money in their article, "Pushing Opportunity Zones to Fulfill Their Promise." The piece urges urban leaders across the country to set guiding principles to make sure this new tax incentive, called the "most significant community development program to pass in a generation," leads to equitable development and not displacement of low-income residents and people of color.

Opportunity Zones were created by the federal tax overhaul in 2017 to entice private investors to underserved areas by eliminating capital gains taxes owed on prior investments if reinvested in Opportunity Zone communities for at least a decade. The new program has already attracted $28

billion in investment capacity.

Continue reading.

Nonprofit Quarterly

by Debby Warren

May 17, 2019

JMP Launches an Opportunity Zone Platform: Portfolio Products.

Also, RIA in a Box introduces a cybersecurity platform for advisors.

JMP OppZone Services has launched an opportunity zone platform. The administrative platform is designed for investors, project sponsors and entrepreneurs who want to get involved in this new type of tax-advantaged investment.

"Navigating the regulations, creating workable investment structures and dealing with the investment timing requirements [of opportunity zones] can be challenging," said Samuel Weiser, CEO of JMP OppZone Services, in a statement. "JMP's primary goal is to create efficiency, transparency and scalability for OZ investors and sponsors looking to capitalize on the new law."

The platform delivers due diligence, consulting, business support services, administration services and investor compliance for tax regulation.

It allows investors to identify opportunity zone investments and make direct investments across multiple zones, with options to self-direct investment or invest jointly with other families and individuals. Sponsors using the platform will have the ability to pool capital while reducing operational and compliance risk, according to Weiser.

RIA in a Box Launches Cybersecurity Platform

The new platform complements the firm's MyRIA Compliance solution, empowering RIAs to design, implement and document a cybersecurity program within a single interface.

The platform is designed for firms of all sizes and is focused on the human side of cybersecurity, providing security awareness training, email phishing attack simulation, technology inventory and risk assessment. It also offers firms the ability to build a customized information security policy and includes a vendor due diligence tool announced previously at this year's T3 conference.

"Helping firms strengthen their cybersecurity policies and awareness of vulnerabilities will not only help advisors sleep better at night but provide their clients added confidence that their personal information is security," said GJ King, president at RIA in a Box.

The new cybersecurity platform can be purchased as a standalone subscription or bundled as part of a firm's MyRIA Compliance subscription.

North Capital Introduces Evisor Platform

The Salt Lake City-based RIA, which provides financial planning and portfolio management to

individuals, families, businesses and nonprofits has introduced a free financial planning platform for individual investors to access online called evisor.com.

Uses can create a customized financial review that incorporates the firm's proprietary "Lifetime Financial Analysis" tool, but for a 0.25% annual fee the users can open an investment account for North Capital to manage and monitor. An additional fee is involved to access an investment advisor on planning questions not addressed by the online tool. All assets are custodied at Charles Schwab.

Long/Short ETF Debuts With Focus on Undervalued/Overvalued Stocks

The Acquirers Fund (ZIG) is marketing itself as a "true deep value" fund whose long positions are in stocks that "are much more than 'cheap' [but] "also have strong, liquid balance sheets, and a robust business capable of generating free cash flows, and more."

The ETF will hold long positions in companies it deems deeply, truly undervalued and fundamentally strong targets of buyout firms and activist investors who want to force a major corporate change. It will also hold short positions in companies it deems overvalued and financially weak.

The 130/30 long/short strategy tracks the performance of The Acquirer's Index, which consists of the 30 most deeply undervalued, fundamentally strong stocks and the 30 most overvalued and fundamentally weak stocks that are included in the rules-based index. The index chooses stocks from the largest 25% of U.S.-listed stocks by market cap. ZIG trades on the NYSE Arca and has an expense ratio of 0.94%.

VanEck Launches Muni ETF

The VanEck Vectors Municipal Bond ETF (MAAX) is the latest addition to the firm's suite of Guided Allocation Funds.

MAXX is an actively managed ETF that seeks to reduce duration and/or credit risk during appropriate times by adjusting allocations primarily among VanEck Vectors municipal exchange-traded products, including the firm's high-yield, short high-yield, AMT-free long, AMT-free intermediate and AMT-free short municipal index ETFs. Allocations are adjusted based on interest rate and credit opportunities.

The fund seeks maximum total return and income and has a total expense ratio of 0.36%.

ThinkAdvisor

By Bernice Napach | May 20, 2019 at 10:14 AM

IRS Notice 2019-39: Perpetuating the Gift of Targeted Bond Programs, but Creating Confusion about the Tax-Exempt Current Refunding of Build America Bonds.

To promote the provision of disaster relief and the development (or redevelopment) of economically distressed areas, Congress will at times enact targeted bond programs that authorize the issuance of specialized tax-exempt bonds. Tax-exempt targeted bond programs frequently contain both a cap on the amount of tax-exempt bonds that can be issued under the program and an expiration date. For example, in response to Hurricane Katrina, Congress permitted the issuance of tax-exempt Gulf

Opportunity Zone Bonds, which were subject to an aggregate volume cap of about $14.8 billion and which had to be issued before January 1, 2012.

Where a tax-exempt targeted bond program features volume cap limitations or issuance deadlines (or both) and is silent about whether bonds issued under the program can be currently refunded on a tax-exempt basis, uncertainty might exist as to whether program bonds can be currently refunded by tax-exempt bonds issued after the expiration of the program and, if such refunding bonds can be issued, whether they require additional volume cap. The IRS has previously rendered guidance on specific targeted bond programs to address these questions. To achieve efficiency and uniformity in this guidance for existing and future tax-exempt targeted bond programs that are silent regarding refunding matters, the IRS yesterday released Notice 2019-39. This Notice sets forth helpful guidance on the tax-exempt current refunding of bonds issued under a targeted bond program, but it also creates unwarranted confusion regarding the tax-exempt current refunding of Build America Bonds. For more on both of these aspects of the Notice, read on.

Continue reading.

The Public Finance Tax Blog

By Michael Cullers and Cynthia Mog on May 23, 2019

Squire Patton Boggs

John Lettieri: Opportunity Zones and Economic Dynamism (Podcast Episode #30)

How was the Opportunity Zones initiative created in the first place? And why is this program so radically different from…

Read More »

Opportunity Db

May 22, 2019

Puerto Rico Passes Opportunity Zones Regulatory Bill.

Puerto Rico Governor Ricardo Rosselló signed the Puerto Rico Opportunity Zones Development Act last week. The bill creates the regulatory framework for investing in Opportunity Zones on the island and establishes conformity with the federal tax incentive. Several additional incentives are also created by the new law, including:

1. 18.5 percent tax on the net income of an exempt business.
2. Exemption from dividend taxation.
3. 25 percent exemption on patents and property taxes.
4. 25 percent exemption on construction taxes.
5. Maximum investment credit of 25 percent, which is transferable.

6. A credit priority system for “Priority Projects” located in opportunity zones.
7. Deferral of capital gains invested in opportunity zones, similar to the federal incentive.
8. Tax exemption for interest earned on loans to exempt businesses.
9. An expedited permitting process for exempt businesses.

“I see this as the last piece to complete our economic offerings puzzle,” Maria de los Angeles Rivera, a San Juan-based CPA with Kevane Grant Thornton, said via email.

“It is expected that the combination of this law with the [Community Development Block Grant] funds that are coming to [Puerto Rico] for reconstruction and the current tax incentives program in place for many years now, will take [Puerto Rico] to the next level,” Rivera said.

Puerto Rico was granted a special exemption to the rule that capped each state’s opportunity zone designations at 25 percent of their low-income census tracts. Puerto Rico was able to designate 100 percent of their low-income census tracts as opportunity zones. And as a result, nearly the entire island lies in an opportunity zone. See the map of Puerto Rico’s opportunity zones.

The governor’s office projects that the new law will generate over $600 million in capital investment in Puerto Rico.

“[Puerto Rico] is now the most attractive destination to invest,” Rivera said.

Opportunity Db

By Jimmy Atkinson

May 22, 2019

Hawkins Advisory: New Current Refunding Guidelines for Bonds Issued Pursuant to Special Authorizations.

On May 22, 2019, the Internal Revenue Service released long-awaited guidance pursuant to which tax-Exempt bonds issued under authorizations directed to special and/or extraordinary circumstances, for which no authority to issue current refunding bonds existed, may now be currently refunded. Attached, please find a Hawkins Advisory describing this guidance.

Read the Advisory.

TAX - TENNESSEE

Blount County Board of Education v. City of Maryville

Supreme Court of Tennessee, at Knoxville - May 8, 2019 - S.W.3d - 2019 WL 2022364

County board of education brought action against cities for declaratory judgment and damages with respect to cities’ liquor-by-the-drink (LBD) tax proceeds, which board of education contended cities were required to share pro rata among all schools in county, rather than only among schools in cities’ separate municipal school systems.

The Chancery Court granted summary judgment to cities. Board of education appealed. Case was

consolidated with similar ones for oral argument only. The Court of Appeals affirmed. Board of education appealed by permission.

The Supreme Court held that:

- Local education provision of tax distribution statute directed cities to expend and distribute LBD tax proceeds in support of their own municipal school systems, and
- County was required to expend and distribute half of its LBD tax proceeds pro rata among all of the local school systems in the county, including cities with their own separate school systems.

Local education provision of distribution statute for liquor-by-the-drink (LBD) tax, which required municipalities with their own school systems to expend and distribute half of their LBD tax proceeds "in the same manner as the county property tax for schools [was] expended and distributed," did not require Commissioner of Tennessee Department of Revenue to remit LBD tax proceeds from cities with their own school systems directly to county trustee for pro rata distribution among county school system and other school systems in County, rather, provision directed cities to expend and distribute LBD tax proceeds in support of their own municipal school system in same way that county property tax for schools was expended and distributed in municipalities.

County that received liquor-by-the-drink (LBD) tax proceeds from private club LBD sales was required to expend and distribute half of its LBD tax proceeds "in the same manner as the county property tax for schools [was] expended and distributed" by the county, which was pro rata among all of the local school systems in the county, including cities located in the county which had their with their own separate school systems, although such cities were not required to do the same with their own LBD tax proceeds; disparity was understandable, and was within Legislature's prerogative, because cities' citizens were necessarily also county's citizens, but county citizens who lived outside cities were not cities' citizens.

TAX - TENNESSEE

Sullivan County v. City of Bristol

Supreme Court of Tennessee, at Knoxville - May 8, 2019 - S.W.3d - 2019 WL 2022367

County and county board of education brought separate actions against cities for declaratory judgment and damages with respect to cities' liquor-by-the-drink (LBD) tax proceeds, which county and board of education contended cities were required to share pro rata among all schools in county, rather than only among schools in cities' separate municipal school systems.

Actions were consolidated. The Chancery Court granted summary judgment to cities. County and board of education appealed. Case was consolidated with similar ones for oral argument only. The Court of Appeals affirmed. City and board of education appealed by permission.

The Supreme Court held that local education provision of tax distribution statute directed cities to expend and distribute LBD tax proceeds in support of their own municipal school systems.

Local education provision of distribution statute for liquor-by-the-drink (LBD) tax, which required municipalities with their own school systems to expend and distribute half of their LBD tax proceeds "in the same manner as the county property tax for schools [was] expended and distributed," did not require cities with their own school systems to share half of their LBD tax proceeds with county and other school systems in county pro rata, rather, provision directed cities to expend and distribute LBD tax proceeds in support of their own municipal school system in same way that county property

tax for schools was expended and distributed in municipalities.

HUD Announces New FHA Incentives for Multifamily OZ Properties.

Last Thursday, May 9 at the SALT Conference in Las Vegas, Department of Housing and Urban Development Secretary Ben Carson announced two new Federal Housing Administration incentives for multifamily properties located in Opportunity Zones.

Firstly, FHA has designated a team of senior underwriters who will ensure expedited review of applications for properties located in opportunity zones.

Secondly, FHA has significantly reduced the FHA mortgage insurance application fee for multifamily properties located in opportunity zones.

For broadly affordable housing located in opportunity zones, the fee may be reduced by as much as 67 percent, from $3 to $1 per thousand dollars of the requested mortgage amount. And for market rate and affordable housing located in opportunity zones, the fee may be reduced by as much as 33 percent, from $3 to $2 per thousand dollars of the requested mortgage amount.

OpportunityDb

By Jimmy Atkinson

May 14, 2019

Developing in Chicago's Opportunity Zones (Podcast Episode #28)

Chicago is home to 133 opportunity zones. But which neighborhoods on Chicago's West and South Sides have the greatest levels

Read More.

May 16, 2019

States Learn to Bet on Sports: The Prospects and Limitations of Taxing Legal Sports Gambling

Abstract

One year after the Supreme Court overturned the federal restriction on state authorization of legal sports gambling, seven states allow and tax sports wagers and several others are close to joining them. But despite sports betting's ostensible popularity, the resulting state tax revenue is and will always be relatively small and volatile because of how sports betting operates and is taxed. This brief explains why sports betting emerged as a state finance issue in 2018, how state taxes on sports betting work, which states allow legal sports betting (both online and in person), and how much

money states stand to gain from these taxes.

Read Full Report.

The Urban Institute

Richard C. Auxier

May 14, 2019

Do Tax Breaks Help or Hurt a State's Finances? New Study Digs Deep.

What's likely the most comprehensive research of its kind doesn't bode well for tax incentives.

The debate over tax incentives usually centers on whether they lead to job creation and other economic benefits. But governments must also pay attention to their own bottom lines. This begs the question: How do all the financial incentives that states offer actually influence fiscal health?

New research seeks to answer that question. Using data from the W.E. Upjohn Institute for Employment Research, researchers at North Carolina State University tallied all incentives offered by 32 states from 1990 to 2015, effectively covering 90 percent of incentives nationally. What they found doesn't portray incentives in a positive light. Most of the programs they looked at — investment tax credits, property tax abatements, and tax credits for research and development — were linked with worse overall fiscal health for the jurisdiction that enacted them.

"It's not that incentives are bad or that we shouldn't use incentives," says Bruce McDonald, an NC State associate professor who led the research team. "But if a state or local government is going to provide an incentive, there needs to be some kind of clarity on what the realistic expectations are for what they might get back."

Continue reading.

GOVERNING.COM

BY MIKE MACIAG | MAY 2019

S&P: Effective Management Continues To Enable Not-For-Profit Health Care To Adapt

The health care landscape in the U.S. has evolved significantly over the past two decades. And although it sometimes feels slow—especially in value-based care and reimbursement–the pace of change is accelerating. Momentum continues to build.

Continue Reading

May 13, 2019

New IRS Ruling on Port and Airport Leases: Orrick

In a private letter ruling (PLR 201918008) publicly released earlier this week, the IRS addressed the statutory safe harbor relating to the allowable term for leases of port and airport facilities financed with tax-exempt private activity bonds. For tax-exempt port and airport private activity bonds, one of the tax requirements is that the assets financed must be owned by a state or local governmental entity. Long-term leases can sometimes result in the lessee being treated as the owner for tax purposes, but Section 142(b)(1)(B) of the Internal Revenue Code of 1986 provides a safe harbor for leases and other possessory interest arrangements with private operators that allows ports and airports to be certain that the governmental ownership requirement is satisfied. The ruling specifically addresses the safe harbor requirement that the lease term cannot be longer than 80% of the economic life of the financed assets.

Basic Facts

The ruling describes a port that hoped to substantially extend the terms of three long-term leases of its maritime terminals to private terminal operators. The port had financed various terminal improvements with tax-exempt private activity bonds, and many of those improvements were now old. The ruling focuses on how 80% of the economic life of the financed assets is determined for each individual lease. For simplicity, the discussion below assumes the port was simply executing a single new lease rather than discussing the extensions of the three separate leases.

Conventional Approach Confirmed

Much of the ruling validates what we believe is a common approach taken by bond counsel when evaluating this safe harbor: (1) the lives of the bond-financed assets are determined based on the remaining lives determined as of the execution of the lease, (2) only the assets financed by outstanding bonds and subject to the lease are taken into account, and (3) land is taken into account and given a 30-year life, but only if land is more than 25% of the bond-financed assets that are leased. Based on those considerations, the weighted average remaining life of the bond-financed assets is then calculated and compared to the term of the lease.

New Ground Broken

In addition, the ruling breaks some new ground in the manner in which the cost and the remaining life of the leased and bond-financed assets were determined. The cost of the assets was simply the amount of bond proceeds originally spent on the assets in connection with the initial financing of the assets. There was no change to the weighting of the asset costs based on amortization of principal or later refunding transactions.

Most interesting, the determination of remaining life was undertaken by looking at the remaining life of the larger asset classes that made up the leased maritime terminal. In this case, there were only five asset classes: (1) buildings, with the remaining life of each building determined separately; (2) yard improvements, such as paving, fencing and utilities; (3) wharves and pilings; (4) cranes; and (5) land (ignored if less than 25% of the cost of the leased and bond-financed assets is land). The actual bond-financed improvements were placed into one of the five asset classes, so that a total dollar amount could be assigned to the asset class, but the remaining life of any individual improvement was then not relevant. Instead, the port determined the remaining life of the asset class (or each building in the case of the buildings class) based on a current assessment of the actual asset class or building in question and taking into account actual wear and tear as well as

subsequent improvements and replacements. For example, if a specific yard improvement with an originally expected 20-year life was installed 15 years before the execution of the lease, the remaining life of that specific yard improvement from the original placed-in-service date was not relevant. What was relevant was the remaining life of the entire yard, based on its condition as of the date the lease was executed, treating the yard as a single asset with a single life!

Observations

A few interesting observations about the approach approved in this ruling are:

The number of bond issues that financed the leased assets is not meaningful. The normal, issue-b--issue approach for determining tax compliance is replaced by a lease-by-lease approach. This was true even if there are multiple leases with the same private party.

Due to the averaging of remaining lives and the use of the larger asset classes with a single life, a specific bond-financed improvement with a short remaining life does not cause a problem even though the remaining life of that specific improvement, determined on its own, might be substantially shorter than the lease term.

The ruling approves the use of the expected remaining economic lives, determined as of lease execution. As such, the economic lives are updated for wear and tear as well as subsequent improvements and replacements, whether or not bond-financed. It is not clear how this approach could or should apply to an issuer that uses safe harbor economic lives determined under the asset depreciation range class life.

Using the economic lives of larger asset classes, rather than individual, bond-financed improvements, and determining what larger assets classes are appropriate, appears to require some judgment based on all the facts and circumstances. The ruling is very helpful for maritime terminals but may require some further analysis to be applied to airports.

The “80% of the economic life” language of Section 142(b)(1)(B) is very similar to language found in IRS Revenue Procedure 2017-13 relating to qualified management contracts. Thus, the approach in the ruling is a strong analogy for interpreting the similar requirement in Revenue Procedure 2017-13. In contrast, the “120% of economic life” test under Section 147(b) provides that the economic life shall be determined based on the later of the date the bonds are issued or placed-in-service date, and therefore the approach described in this ruling does not appear to be relevant to that 120% requirement.

Importantly, the ruling describes only one way, and not the only way, for determining compliance with the government ownership safe harbor.

by Charles C. Cardall

Orrick Public Finance Alert | May.09.2019

TAX - FLORIDA

Crapo v. Gainesville Area Chamber of Commerce, Inc.

District Court of Appeal of Florida, First District - May 2, 2019 - So.3d - 2019 WL 1941241

City chamber of commerce sought relief after value adjustment board affirmed denial of chamber’s

exemption from ad valorem taxation of real property.

The Circuit Court determined that chamber's activities qualified as charitable purposes, and thus chamber was entitled to exemption. County appraiser and tax collector appealed.

The District Court of Appeal held that activities of chamber of commerce were for charitable purposes, and thus chamber was exempt from taxation.

Statute defining "charitable purposes" as functions that provide such community service that discontinuance could require allocation of public funds to continue them, for purpose of constitutional provision allowing portions of property used for such purposes to be exempt from taxation, applied to exempt city chamber of commerce from ad valorem taxation of its real property; chamber provided county with economic development and related functions that grew tax base, created jobs, and promoted general welfare of county and all its income was used for charitable purposes, and statute did not limit charitable purposes to services that provided relief for needy.

TAX - OHIO

Amazing Tickets, Inc. v. City of Cleveland

Court of Appeals of Ohio, Eighth District, Cuyahoga County - May 2, 2019 - N.E.3d - 2019 WL 1968103 - 2019 -Ohio- 1652

Ticket broker filed a complaint for declaratory judgment against city and commissioner of city's division of assessment and licenses, seeking a declaration that city ordinance imposing an admission tax upon every person who paid an admission charge to any one place within the city was unconstitutional as applied to ticket broker and as written, and that the ordinance was not applicable to ticket broker.

The Court of Common Pleas granted summary judgment in favor of city and commissioner. Ticket broker appealed.

The Court of Appeals held that:

- Ordinance was not unconstitutional as applied to ticket broker, and
- Ordinance was not void for vagueness.

City ordinance applying a tax upon every person who paid an admission charge to any one place within city was not unconstitutional as applied to ticket broker, even though ticket broker argued that ordinance was an arbitrary tax on the aftermarket business activities of ticket brokers, as opposed to a true tax on admissions to an event; tax was specifically imposed upon the person purchasing the admission ticket and was associated with the amount paid for admission notwithstanding the collection duties placed on ticket brokers, tax was limited to amounts paid for admission to places within the city, and ticket brokers did not pay the tax when one broker sold to another broker.

City ordinance applying a tax upon every person who paid an admission charge to any one place within city was not void for vagueness, even though ticket broker argued that ordinance had no standards to prevent arbitrary and discriminatory enforcement and was actually administered and enforced in an arbitrary and discriminatory manner; ordinance provided clear notice of its proscriptions and the conduct required for compliance, was specific enough to prevent arbitrariness or discrimination in enforcement, and was enforced against other entities selling admission tickets

in the secondary market.

IRS Releases Helpful Private Letter Ruling for Calculating the Weighted Average Economic Life of Bond-Financed Property (but Mind the Footnote).

On May 3, 2019, the Internal Revenue Service released Private Letter Ruling 201918008. The IRS concluded in that PLR that an issuer of exempt facility bonds used a reasonable method, under all the facts and circumstances, to determine whether the term of an operating agreement entered into with a private party exceeded 80% of the weighted average economic life of the bond-financed assets that are subject to that agreement. This PLR could have utility for certain exempt facility bonds and beyond.[1] For more detail, read on.

Continue Reading

The Public Finance Tax Blog

By Michael Cullers on May 11, 2019

Squire Patton Boggs

States That Struggled to Forecast SALT Changes See an April Tax Boon.

- **California's $3 billion pop seen as good sign for other states**
- **'It gives decision-makers cushion,' budget group official says**

States are enjoying windfalls after struggling to predict how President Donald Trump's federal tax law changes would ripple through their revenue.

All 15 of the states that have reported April tax collections so far have seen them come in better than expected, according to a list compiled by National Association of State Budget Officers. California, Illinois and Connecticut are among them, and New Jersey is expected to report its tally next week. Governor Phil Murphy said this week that tax collections will be more than $250 million above projections.

"It gives decision-makers cushion,'' said John Hicks, executive director of the Washington-based National Association of State Budget Officers. "Where states are debating or on the margins, this little extra revenue certainly makes this a little easier.''

The influx is providing extra cash for governments already benefiting from the nearly decade-long economic expansion and is coming just as many set their budgets for the coming fiscal year. In some cases, it's making up for shortfalls earlier in the budget year as tax revenue lagged official forecasts because of the difficulty in predicting how the U.S. tax changes, including the $10,000 cap on state and local deductions, would ripple down through the state capitals.

In California, for example, officials said that taxpayers procrastinated in filing their returns this year over concern that the new deduction limit would drive up what they owe. Then in April, the state collected about $3 billion more in personal-income taxes than Governor Gavin Newsom's forecast, making up for a shortfall earlier this year and adding to the government's swelling surplus fueled by

stock market gains.

Moody's Investors Service said California's experience bodes well for other high-tax states, and Mikhail Foux, head of municipal strategy at Barclays Plc, said most are likely to see revenue surpass expectations in April. Connecticut's personal-income taxes last month brought in $100 million more than forecast. While New York hasn't reported April's figures, its March tax receipts were higher than forecast.

Some are already laying out plans on how to use their extra cash. After Illinois's April tax collections topped forecasts by $1.5 billion, Governor J.B. Pritzker backed off his proposal to put off some of next year's pension payment, which critics had derided as a partial pension holiday. That was welcomed by investors, who bid up the price of the state's bonds, pushing down the yield penalty it pays to the smallest since July because it will help with the government's massive pension-fund debt.

New Jersey Governor Murphy said on May 6 that he'd put the $250 million of unexpected tax revenue toward homeowner relief from the nation's highest property taxes if lawmakers approve his proposed millionaire's tax for the fiscal year starting July 1. But the tax hike on the highest earners faces a challenge in the legislature, where the Senate leader opposes it.

Even so, the extra revenue is a welcome development for Murphy, who promised a more conservative approach to forecasting than the prior administration that was handed a slew of bond-rating downgrades.

Murphy's job was complicated by the difficulty of determining how the federal changes would affect Garden State residents. From July to January, New Jersey income-tax revenue was down 6%, while growth had been forecast at 5.4%. In February, S&P Global Ratings warned that even an April bump — on which the state is still counting — might not be enough to fill the hole.

It still remains to be seen how much of the higher-than-expected revenue across states will be recurring or if it's a one-time bounty, according to the National Association of State Budget Officers.

"We're seeing good signals and good signs in the economy at large, that always would tend to be correlated with revenue growth," said Matt Butler, a vice president and senior analyst at Moody's. "Clearly growing revenue, all else equal, tends to be credit positive for the states.''

Bloomberg Politics

By Elizabeth Campbell and Elise Young

May 10, 2019, 7:28 AM PDT

— With assistance by Romy Varghese

State Tax Revenues Are Higher Than Ever, But Good Times May Not Last.

Federal tax reform and the economy are boosting state coffers — for now.

SPEED READ:

- In 41 states, income tax revenues surpassed pre-recession peaks last year.
- The rise is largely due to federal tax reform and the strong economy.

- But so far this year, income tax revenues are lower than expected in 19 states.

States' purchasing power has never been better, but there are signs that the upswing is waning.

A record 41 states collected more revenue last year than they did before the 2008 recession, even when inflation is taken into account. And in many cases, the recovery is significant. In 16 states, tax revenue was at least 15 percent higher in the third quarter of 2018 than their last peaks.

The findings come from the latest analysis of state revenues by the Pew Charitable Trusts. Collectively, states during the third quarter of last year had the equivalent of 13.4 cents more in purchasing power for every $1 they collected at their recession-era peak.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | MAY 6, 2019 AT 4:00 AM

IRS Releases Even More Guidance to Facilitate Opportunity Zone Program.

The Opportunity Zone program was created by the 2017 Tax Cuts and Jobs Act (which we have previously written about here, here and here), to allow investors the "opportunity" to defer paying tax on gains from selling property by investing the proceeds from the sale into an Opportunity Zone Fund.

The IRS issued a first round of proposed regulations on October 19, 2018. The IRS has now issued a second, far lengthier, round of proposed regulations, which provide much needed additional guidance. These proposed regulations both describe and clarify the provisions of Code Section 1400Z-2, while also updating by partially withdrawing the previously proposed regulations.

These days, your inbox surely is besieged by superficial coverage of the Opportunity Zone program by various folks looking to drum up business. Care for a contrast?

Our colleague, Steve Mount, has been continuously following the Opportunity Zone program. He has written an analysis of these new regulations in Bloomberg's *Tax Management Real Estate Journal*. Click here to read the article. Steve's earlier studies of the program, which provide the insights behind these rules, can be read here, here and here.

Treasury will accept comments on the new set of proposed regulations until June 14, 2019 and topics will be discussed at a public hearing on the new proposed regs, which is scheduled for July 9, 2019 at 10 a.m.

The Public Finance Tax Blog

By Taylor Klavan on May 7, 2019

Squire Patton Boggs

Lawmakers Propose Transparency Requirements for Opportunity Zones.

But there are questions about whether they go far enough.

Information is hard to come by for anyone who wants to understand how much investment the Opportunity Zones program is attracting to struggling neighborhoods.

It's also unclear if disproportionate sums of money are going toward real estate deals in areas that are eligible for the economic development initiative but already primed for growth.

The program has been ramping up for nearly 17 months, since it was created as part of the 2017 federal tax overhaul.

But the U.S. Treasury Department has yet to clarify what data will have to be disclosed publicly about the investments taking place under the program. That means there currently isn't a systematic way for the public to determine where money is flowing to or from.

Lawmakers in the U.S. House and Senate this week took a step toward addressing this issue, proposing requirements for what information Treasury would have to collect about Opportunity Zones.

It's not clear, however, that the legislation they've put forward would shed light on some key elements of the program.

With Opportunity Zones, people and businesses can get federal tax breaks on capital gains they put into special funds that then invest these proceeds into economically distressed census tracts that have been designated as zones.

Many investors have stayed on the sidelines of the program as they've waited for regulations. But some funds have been making investments in zones and experts expect there will be more activity in the months ahead following Treasury's release of more proposed rules in April.

Sen. Cory Booker, a New Jersey Democrat, is the lead sponsor of the Senate legislation introduced this week. Booker has been a champion of Opportunity Zones in the Senate, along with South Carolina Republican Sen. Tim Scott, who is a co-sponsor of the new bill.

The guidelines in the bill were included in early Opportunity Zones legislation, according to Booker's office, but left out of the broader tax package that later ushered the program into law.

"This legislation will restore and strengthen transparency measures to ensure Opportunity Zones lives up to its original promise," Booker said in a statement.

U.S. Reps. Ron Kind, a Wisconsin Democrat, and Mike Kelly, a Pennsylvania Republican, are spearheading a House companion bill.

The legislation calls for Treasury to collect data on the number of Opportunity Funds, the amount of assets held by the funds, the composition of fund investments by asset class, such as real estate or equity in businesses, and the share of zones receiving investments.

It would also require the department to track metrics like job creation, poverty reduction and business activity in the zones.

And it would mandate that Treasury gather information on investments. This includes the amount of the investment and the date when it was made, and whether the investment is in a new or existing business or real estate, and where the business or property is located.

Some of the other investment information the department would have to collect includes the type of activity that is being supported—for instance, single family housing, apartment buildings, or commercial real estate, or the sector that businesses are operating in.

The bill says that information on investments would be made publicly available within one year after the legislation is enacted, with the caveat that any "personally identifiable data" is withheld. Annual reports of the investment information would then follow.

"It's an improvement over what the current state of affairs is," Brett Theodos, a senior fellow with the Urban Institute, who is tracking the Opportunity Zones initiative, said about the bill. "But it doesn't tell me everything I feel like I need to know about this program."

"I don't think this is sufficient to allow communities to really understand the occurrence and the effect of Opportunity Zones," he added.

The language in the bill is vague, Theodos says, when it comes to the processes for collecting data and the specific substance of what will ultimately be released publicly.

Theodos says it's important to know who is investing in the funds and the specific business ventures that capital from the funds is going to, as well as dollar amounts for not only how much money is in each opportunity fund, but also what sums are going toward projects.

The provision blocking the release of personally identifiable information, he said, injects a degree of uncertainty into the bill about what information will eventually be released.

It may be overkill to reveal every person depositing, say, $25,000 of gains into a sprawling fund.

But Theodos does make a case for disclosing investors who are bankrolling an entire fund on their own, or perhaps the top five investors in each fund, or those whose stakes in a fund surpass some set percentage threshold of a fund's total amount.

Other information Theodos says would be helpful for understanding how the program is working are the dates of investment transactions, as opposed to the year in which they took place, and the addresses for investments, instead of just the census tract where they are located.

In his view, the information should be collected in filings other than tax forms, since tax forms can be difficult for the public to access. Theodos notes that there's precedent for this type of reporting with federal tax credit programs, like the New Markets Tax Credit.

"Having transaction level data about where this program is investing is the difference between knowing whether it worked or didn't," he said. "Super important to get it right."

Treasury has now issued two rounds of proposed rules for the Opportunity Zones program without outlining a comprehensive reporting framework for funds.

Secretary Steven Mnuchin said during testimony before the House Ways and Means Committee in March that the department had not issued the reporting requirements because it did not want to rush them and invited lawmakers to offer input on what they wanted to see.

“Those aren’t critical for people starting investments,” Mnuchin said of the reporting standards. “So whether those come out next week or in six months, we have time to get it right.”

Route Fifty

By Bill Lucia,
Senior Reporter

MAY 9, 2019

P3 Investors: Are You In The Zone?

Last December we told you about favorable IRS guidance letting P3 contractors and investors keep full tax deductions for interest on debt.[1] The IRS kept a P3-friendly approach in last week’s proposed regulations on “qualified opportunity zones” – which, like the interest limitations in our December post, come from the 2017 Tax Cuts and Jobs Act (“TCJA”).[2] The qualified opportunity zone legislation promotes a broad range of real estate and business development in distressed areas, and these proposed regulations are particularly helpful to private parties contracting for and investing in P3s in these areas – for example, to build a city hall, school, courthouse, or convention center.

A qualified opportunity zone (“QOZ”) is an economically-depressed census tract, ripe for revitalization, recommended by state governors and designated by the Treasury Department.[3] Revitalization occurs through a “qualified opportunity fund” (“QOF”) whose assets must consist at least 90% (the “90% test”) of real estate and other tangible property used in a trade or business and located in a QOZ that the QOF owns (1) directly such as an apartment, office, commercial, or industrial building (“direct-owned assets”) and/or (2) indirectly as a shareholder, partner, or LLC member in an “active” trade or business such as a hotel, restaurant, factory, or technology start-up (‘indirect-owned assets”).

The TCJA encourages investment in a QOF (and, by extension, revitalization of the underlying QOZ) by letting a taxpayer roll gain from the sale of most investments into a QOF within 180 days after sale. The taxpayer must recognize the deferred gain from the original sale effective at the close of 2026, but up to 15% of the original gain escapes tax depending on how long the taxpayer held the QOF interest. Plus, if the taxpayer holds the QOF interest for more than 10 years, any appreciation in that interest above the gain rolled over from the original investment completely escapes tax. These tax benefits make it easier for a developer to attract private investors if a P3 project is inside a QOZ and a developer forms a QOF to build and operate it: Investors may forego higher returns in exchange for the tax benefits, and P3 developers’ (and by extension governments’) costs fall accordingly.

Congress left it to the IRS to build the infrastructure for how a developer operates a QOF and a taxpayer obtains benefits from investing in one. The IRS issued proposed regulations in mid-October 2018,[4] and a second round last week.[5] This second round benefits P3s as follows:

- Taking our city hall, school, courthouse, or convention center as an example, the tax-exempt government agency in the P3 typically owns the real estate and improvements – e., what would otherwise be a QOF’s direct-owned assets. The real value of the QOF would be in the P3 private business counter-party that performs labor, owns or leases equipment, and purchases supplies – and for these indirect-owned assets to count toward the 90% test that business must be “active”

within the QOZ even though throughout the project labor might be performed and equipment and supplies move in and out of the QOZ. The proposed regulations follow a common-sense approach by providing that substantial services may be performed and equipment located outside the QOZ from time to time (and establishing safe harbors in this regard); providing that supplies and inventory may be held temporarily outside the QOZ so long as they are destined for incorporation in the project inside the QOZ; and providing lenient treatment for equipment that the developer leases as opposed to owns (though the rules are more stringent for property leased from related parties).
- P3 projects must undergo months of bidding, permit, and preparatory work before the first shovel hits the ground; but a QOF in the meantime must gather and hold multiple tranches of investments as taxpayers try to roll over their gains into the QOF within the 180-day deadline. Working capital and other reserves are not direct- or indirect-owned assets and therefore could cause the QOF to violate the 90% test. The first round of proposed regulations had a "working capital" safe harbor to prevent this result, but commentators said this relief was inadequate. The more recent proposed regulations significantly expand these safe harbors; expand other circumstances under which a QOF need not consider a recent capital raise in applying the 90% test; and – perhaps most important – provide that a QOF will not be penalized for permitting and other governmental delays.

A developer and potential investor can rely on these proposed regulations if they apply the rules consistently and across-the-board. The IRS does not anticipate issuing more proposed regulations, but the last two rounds should give developers enough comfort to form QOFs and attract investors for qualified opportunity zone P3s.

[1] See "P3 Industry Gets an Early Holiday Present in IRS Guidance on Interest Deduction" (Dec. 11, 2018).

[2] The text of the TCJA, and accompanying Congressional reports, can be viewed here. The specific qualified opportunity zone statutes (Internal Revenue Code sections 1400Z-1 and -2) can be viewed here.

[3] To identify qualified opportunity zones, go to the Treasury Community Development Financial Institutions Fund web site and follow the instructions — you can view qualified opportunity zones as a list of census tracts, or as a map overlay.

[4] These proposed regulations (and detailed preamble explanation) can be viewed here. Along with the proposed regulations, the IRS issued an interpretive revenue ruling and a draft Form 8996 QOF certification with instructions.

[5] The proposed regulations (and detailed preamble explanation) can be viewed here. Along with the proposed regulations the IRS issued a 7-page request for information to monitor economic activity in QOZs.

By Douglas Schwartz on May 6, 2019

Nossaman LLP

TAX - NEBRASKA

Glasson v. Board of Equalization of City of Omaha

Supreme Court of Nebraska - April 12, 2019 - 302 Neb. 869 - 925 N.W.2d 672

Taxpayer sought review, in separate cases, of board of equalization's proposed assessments.

The District Court dismissed. Taxpayer appealed, and the Supreme Court, on its own motion, consolidated cases and moved them to Supreme Court docket.

The Supreme Court held that:

- Statutory requirement that an appellant file appeal bond within 20 days of date of final order, when appealing a special assessment by metropolitan-class city, was mandatory, despite municipal code provision which omitted 20-day filing requirement when describing appeal process, and
- Taxpayer received adequate notice of city's ultimate decision concerning special assessments prior to expiration of 20-day period for filing an appeal bond in order to appeal such decision, and therefore taxpayer was subject to bond requirement.

Steve Schneider: Common OZ Legal Questions (Podcast Episode #26)

What are some of the most common Opportunity Zones legal questions and issues when it comes to starting or investing

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Opportunity Db

May 8, 2019

IRS Allows Multifamily Housing Bonds to Finance Projects with Group Preferences.

On April 3, 2019, the IRS published Rev. Proc. 2019-17, which provides that multifamily housing projects (or, for those of you who prefer Grey Poupon, "qualified residential rental projects") won't violate the general public use requirement even if the landlord offers units of the project to certain specific groups. Congress had made this point clear for low-income housing tax credits ("LIHTC"), which are often used in connection with tax-exempt multifamily housing bonds. Multifamily housing bonds have their own, separate general public use requirement, and there wasn't a similar provision allowing group preferences in those rules. This disconnect had stopped many of these deals cold. Rev. Proc. 2019-17 puts the two sets of rules in sync.

Continue Reading

By Alexis Baker on May 2, 2019

The Public Finance Tax Blog

Squire Patton Boggs

Elimination Of State And Local Tax Deductions Make Shorter Munis Attractive.

Every financial publication continues banging out columns about municipal bonds. Their popularity is summed up in one acronym—SALT. Yes, taxpayers continue to stampede into municipal bond funds because the State and Local Tax (SALT) deductions have evaporated.

Observe the weekly inflows of money into long term and intermediate muni bond funds. The inflows are intense. As with any financial tsunami, they are unsustainable.

A recent article in the financial media stated that municipal bond funds took in more cash during the first four months of 2019 than they usually do in an entire year.

Continue reading.

Forbes

by Marilyn Cohen

May 6, 2019, 09:46am

High Tax States Are a Sign of Inefficiency.

It's the government equivalent of a private sector firm raising prices when its products are already overpriced.

The U.S. Tax Cuts and Jobs Act enacted at the very end of 2017, which limited the deduction of state and local taxes to $10,000, has focused attention on the vast differences among municipal levies. It also provided an incentive for high earners to leave high-tax states such as New York for lower-tax climes including Florida and New Mexico in a trend that will only intensify.

From 2011 through 2015, New York was among the top three states exited by millennials, and more Americans are moving out than moving into the Empire State. New York faces a $2 billion tax shortfall and will, no doubt, speed the exodus with higher taxes on those remaining. Under Mayor Bill de Blasio, New York City's spending has risen 20 percent this fiscal year to $61.3 billion. Pension obligations are up $1.2 billion from four years ago to $9.5 billion annually, the Wall Street Journal reported, with more to come due to new municipal union contracts.

This strategy of tax increases that encourage taxpayers to leave is the government equivalent of a private-sector firm raising prices when its products are already overpriced. New Jersey incurred a major tax hole when a high-profile hedge fund manager decamped several years ago, and yet Governor Phil Murphy wants to raise taxes on millionaires.

In government, there is no bottom line watched by shareholders, so there is no incentive to run efficient organizations — as long as voters don't revolt and the disgruntled taxpayers simply leave for lower-tax venues. Former Indianapolis mayor Stephen Goldsmith said famously that politicians can go to jail for stealing money, but not for wasting it.

To be sure, state government leaders claim they strive for efficiency, but if they did, wealthy states with high incomes per capita would have low tax rates. Those tax rates applied to large incomes,

property values and retail sales would generate ample revenue to cover the costs of efficient operations.

Nevertheless, reality is quite the opposite. Connecticut, with the highest income per capita last year, had a state income tax burden of 10.6 percent, according to the Tax Foundation and Bureau of Economic Analysis. New York, third in income per capita, had the highest state income tax rate, 13.5 percent. New Jersey was fourth in per capita income and had a 9.2 percent income tax rate but a 2.4 percent property tax rate, the nation's highest, edging out Connecticut's 2.1 percent rate.

In contrast, Alabama ranked 46th in income per capita and had an income tax rate of 7.4 percent and 0.4 percent for property taxes. Kentucky was 47th in income per capita but taxed its citizens' incomes at a 4.1 percent rate and 0.9 percent on property.

Even if those very blue states where tax and spending is endemic suddenly turned red, taxes will continue to rise because of the tremendous albatross of pension fund obligations. New Jersey has a pension funding gap that equals 42 percent of state gross domestic product and Connecticut's is 31 percent, according to the Pew Charitable Trust. Many officials, back in the 1990s when the S&P 500 Index rose 20 percent for more for five consecutive years, assumed that rally would persist indefinitely and easily fund the generous pension fund benefits they were exacting.

By 2001, major police and firefighter pension plans nationwide had a median 101 percent of pension fund obligations set aside. Now, those first-responder pensions have median funding of just 71 percent and municipal pension funds in total have a median 78 cents for every dollar needed to cover future liabilities, Pew Charitable Trust figures show.

Furthermore, many state and local officials pushed costs into the future by promising pension benefits in lieu of present wage increases for public employees.

Now the chickens have come home to roost, and new Governmental Accounting Standards Board principles this year urge state and local officials to record all health care liabilities on their balance sheets. The nationwide $696 billion shortfall in retiree health benefits as of 2016, up from $589 billion in 2013, adds to the promised $1.1 trillion in pension benefits. States have just $47 billion in assets to cover $696 billion in health care liabilities.

New Jersey has unfunded pension liabilities of $90 billion, and a bipartisan commission recently recommended scaling back the health coverage and shifting many public employees to a hybrid pension plan in order to keep benefit costs at 15 percent of the annual budget. But that's very unlikely given the current makeup of the state's governing bodies. At the current trend, those costs will reach $10.7 billion in 2023, more than a quarter of the state budget.

So, if high state and local taxes are giving you the urge to move, pack your bags and call the movers sooner rather than later.

Bloomberg Politics & Policy

By A. Gary Shilling

April 29, 2019, 4:00 AM PDT

A. Gary Shilling is president of A. Gary Shilling & Co., a New Jersey consultancy, and author of "The Age of Deleveraging: Investment Strategies for a Decade of Slow Growth and Deflation." Some portfolios he manages invest in currencies and commodities.

This column does not necessarily reflect the opinion of the editorial board or Bloomberg LP and its owners.

New OZ Regs Post to Federal Register; Commenting Period is Now Open.

The second tranche of IRS regulatory guidance on Qualified Opportunity Funds was released last month. This morning, it was posted to the Federal Register.

Public comments on the proposed rules can be submitted at Regulations.gov.

Comments are due July 1. A public hearing is scheduled for **10:00 a.m. EDT on July 9** at the New Carrollton Federal Building in Lanham, MD.

The first tranche of regulatory guidance received over 150 comments, which led to a 5-hour hearing at the IRS Building that was packed to capacity on February 14, 2019.

OpportunityDb

By Jimmy Atkinson

May 1, 2019

Beth Van Duyne: HUD's Role in Opportunity Zones (Podcast Episode #25)

What can the public sector do to magnify the impact of private investment in Opportunity Zones? And specifically, what policy…

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May 1, 2019

How Philanthropies Leverage Opportunity Zones.

The Tax Cuts and Jobs Act of 2017 provides a new incentive — centered around the deferral, reduction, and elimination of capital gains taxes — to spur private investments in low-income areas designated by states as Opportunity Zones. Given the significant interest among investors, it is possible that this new tax incentive could attract hundreds of billions of dollars in private capital, making this one of the largest economic development initiatives in U.S. history. If successful, the tax incentive could create new mechanisms for both matching investment capital to market opportunities in neglected communities and ensuring that economic growth redounds to the benefit of people who live in or nearby disadvantaged places.

The broad objective of this new tax incentive — expanding economic opportunities for places and people left behind — cannot be achieved by the market and outside investors alone. Cities in the broadest sense — local governments, urban institutions, urban networks will need to act with

deliberate agency and purpose if Opportunity Zones are to spur growth that is inclusive, sustainable and truly transformative for each city's economy. The implementation of Opportunity Zones, therefore, will be as much about codifying local norms and models as promulgating federal rules and guidance.

Given this perspective, it is clear that philanthropies have a critical role in helping cities realize the full economic and social impact of Opportunity Zones. Foundations often possess the community legitimacy necessary to convene disparate urban stakeholders around hard challenges and intriguing possibilities. They have the discretionary capital necessary to make investments in community development enterprises and other local institutions so these organizations can leverage Opportunity Zones. They have the patient, risk-tolerant capital necessary to invest in Qualified Opportunity Funds, aligned funds or individual transactions. They have the respect for evidence-driven decision making that is conducive to catalyze, capture, codify and communicate new norms and models as they emerge.

The potential role of philanthropies is amplified for foundations like Knight that operate across multiple communities of disparate size, economic profile and market condition. In some respects, the Knight Foundation's engagement with 26 cities offers a natural lab for experimentation with different kinds of interventions, which will be described below.

This paper identifies seven distinct and complimentary roles for foundations to play:

- **They can play a stakeholder convening role** by helping cities organize for success by coordinating efforts within government and across key institutions and sectors.
- **They can play an asset mapping role** by supporting the design and marketing of Opportunity Zone Investment Prospectuses to enable cities, counties and states to communicate their competitive advantages, trigger local partnerships and identify sound projects that are ready for public, private and civic capital.
- **They can play a market making role** by supporting the collection of market data, the conduct of market research and the provision of patient capital.
- **They can play a community building role** by helping residents who live in or near Zones express their preferences, obtain skills, start businesses and help improve the quality of life in the neighborhood.
- **They can play an institution building role** by enhancing the capacity of existing public, private and civic organizations and by creating or supporting new institutions or intermediaries that can help cities design, finance and deliver transformative investments and initiatives.
- **They can play an innovation inducing role** by using challenge grants and other mechanisms to source pathbreaking ideas among urban stakeholders or push key players to coalesce around coordinated neighborhood investment strategies.
- **They can play an information sharing role** by speeding the process by which innovative strategies, practices and instruments are captured, codified and communicated.

READ THE FULL REPORT HERE.

THE KNIGHT FOUNDATION

PUBLICATION DATE APRIL 25, 2019

Update on Qualified Opportunity Zones: Second Set of Guidance Issued: Ballard Spahr

OVERVIEW OF QUALIFIED OPPORTUNITY ZONE PROGRAM

The Qualified Opportunity Zone (QOZ) program, introduced in 2017's Tax Cuts and Jobs Act, is a new incentive program for investments in over 8,700 QOZs located in all 50 states, the District of Columbia, and the five U.S. possessions.

The program's benefits include gain deferral and gain elimination for taxpayers who roll over capital gain into a Qualified Opportunity Fund (QOF). Specifically, if an investor (1) recognizes capital gain from the sale of an asset to an unrelated person, (2) invests an amount equal to all or part of the capital gain in a QOF within 180 days of the date the gain is recognized (with certain exceptions for pass-through entities), and (3) makes an election (on IRS Form 8949) to treat the investment as a QOZ investment, the investor is eligible for QOZ benefits.

QOZ benefits include:

- deferral of the rolled-over gain until the earlier of when the taxpayer sells its QOF interest or December 31, 2026;
- elimination of 10% of the investor's roll-over gain if the investor holds its QOF interest for at least five years on or before December 31, 2026, and elimination of another 5% of the investor's roll-over gain if the investor holds its QOF interest for at least seven years on or before December 31, 2026; and
- if the investor holds its interest in the QOF for at least 10 years, no gain recognized on its disposition of its QOF interest (or a QOF's disposition of certain property) provided the disposition occurs on or before December 31, 2047.

A fund, which is merely a partnership or corporation for federal income tax purposes (and not a disregarded entity), will qualify as a QOF provided that 90% or more of its assets (on average) are comprised of (1) Qualified Opportunity Zone Business Property (QOZBP) and/or (2) interests in a partnership or corporation (and not a disregarded entity) that qualifies as a Qualified Opportunity Zone Business (QOZB). QOZBP is tangible property (1) acquired after December 31, 2017, by purchase from an unrelated person; (2) (i) the original use of which in the QOZ commences with the QOF or QOZB or (ii) which the QOF or QOZB substantially improves; and (3) substantially all of the use of which is in a QOZ during substantially all the time it is held by the QOF or QOZB. The 90% test is an average of the entity's assets on two annual snapshot testing dates—the end of the entity's first six months and the last day of its taxable year (with exceptions provided for a short taxable year). Notably, cash and working capital are not "good assets" for purposes of the 90% test.

A QOZB must be a partnership or corporation for federal income tax purposes (and not a disregarded entity) that satisfies a variety of tests including:

- at least 70% of the tangible property it owns or leases is QOZBP;
- at least 50% of its gross income is from the active conduct of a trade or business in a QOZ;
- at least 40% of its intangible property is used in the active conduct of its business;
- no more than 5% of its assets are nonqualified financial property; and
- it is not a "sin business."

In contrast to a QOF, a QOZB is permitted to hold reasonable working capital. As Ballard Spahr explained in our webinars on this program, because of the interaction between the tests that must be satisfied for an entity to qualify as a QOF or QOZB, many QOFs are likely to be organized using a

two-tier structure whereby investors invest in a QOF, which in turn invests in an entity that is a QOZB.

Investors and promoters have been anxiously awaiting guidance from the U.S. Department of Treasury and the Internal Revenue Service (IRS) on the many issues raised by the statutory language creating the program. On October 19, 2018, Treasury issued the first package of proposed regulations (October 2018 Proposed Regulations) (see Ballard Spahr's previous e-Alert) and on April 17, 2019, Treasury issued the second package of proposed regulations (April 2019 Proposed Regulations). The October 2018 Proposed Regulations provided guidance on, among other things, the types of gain that an investor may roll over, which taxpayers may roll over gain, how a fund qualifies as a QOF, how a subsidiary entity qualifies as a QOZB, the definition of QOZBP, and a safe harbor for a QOZB's working capital. But many questions remained unanswered. The April 2019 Proposed Regulations offer guidance on many, but not all, of those previously unanswered questions.

The April 2019 Proposed Regulations propose guidance on, among other things:

- what counts as a good investment in a QOF by a QOF investor;
- the ability of a QOF to sell QOZBP after 10 years;
- whether debt is included in the tax basis for a QOF investor's interest in a QOF partnership;
- whether a carried interest is eligible for QOZ benefits;
- how Code Section 1231 gain is treated;
- events that end a QOF investor's gain deferral;
- reinvestment by a QOF of proceeds from a sale of QOZBP or an interest in an entity that is a QOZB;
- what constitutes original use of tangible property for purposes of the substantial improvement requirements;
- the treatment of land as QOZBP;
- the treatment of leased property;
- the valuation of QOZBP for purposes of the QOF's 90% test and the QOZB's 70% test;
- the definition of "substantially all" where not already defined;
- property that is not in a QOZ that straddles a QOZ;
- what constitutes the active conduct of a trade or business;
- sourcing of gross income of a QOZB to a QOZ; and
- anti-abuse rules.

Taxpayers now may rely on all of these rules other than those relating to a pass-through QOF's sale of assets after a QOF investor has held its QOF interest for at least 10 years.

QOF INVESTOR GUIDANCE

An investor is eligible for QOZ benefits if, within 180 days after recognizing capital gain from the sale of property to an unrelated person, the investor invests an amount equal to all or part of that capital gain in a QOF. Surprisingly, the April 2019 Proposed Regulations provide relaxed investment requirements for a QOF investor by permitting an investor to obtain QOZ benefits if it (1) acquires an interest in a QOF from a direct owner of the QOF, not just by acquisition of the QOF interest from the QOF itself, or (2) contributes property other than cash to a QOF. If a QOF investor either contributes property to a QOF or acquires a QOF interest from a direct owner of the QOF by paying with property as opposed to cash, only the QOF investor's adjusted basis for such property is treated as a qualifying investment, and the investor's holding period for its QOF interest begins on the date it acquires the QOF interest (without tacking of the holding period before the acquisition of the QOF interest). See "Mixed Funds" below.

> ***Ballard Spahr Tip:*** Notwithstanding that an investor may contribute property to a QOF as a qualified investment, such property is not QOZBP (because it is not acquired by purchase by the QOF) and, as such, satisfies neither the QOF's 90% asset test nor the QOZB's 70% asset test.

Reinvesting Gains Following the Sale of a QOF Interest

The April 2019 Proposed Regulations allow a QOF investor who disposes of its entire qualifying interest in a QOF (before December 31, 2026) to timely reinvest in another QOF (and make a new deferral election) without recognizing its deferred gain. However, the holding period for the second QOF interest begins on the date the second QOF interest is acquired; there is no tacking of the investor's holding period for its original QOF interest.

QOF Investment Unwind – 10 Year Benefit – Pass-Through Entity

The Code provides that, upon a QOF investor's sale or exchange of its QOF interest, the QOF investor will not recognize gain provided that the QOF investor held its interest in the QOF for at least 10 years and the QOF investor disposes of its QOF interest on or before December 31, 2047. As a technical matter, the gain is eliminated by allowing the QOF investor to elect to step up its tax basis for its QOF interest to its fair market value immediately before the sale.

These rules raised uncertainty as to whether a QOF investor in a partnership QOF (1) would be forced to recognize ordinary income on the sale of its QOF interest (e.g., from hot assets such as depreciation recapture or inventory held by the QOF or its QOZB), and (2) would be forced to recognize gain because it could not increase its tax basis for the QOF partnership interest by its share of the QOF's and QOZB's liabilities. The April 2019 Proposed Regulations provide taxpayer-friendly clarifications by providing that upon a sale of an interest in a QOF partnership that has been held for at least 10 years, the QOF investor will not recognize ordinary income and the basis step-up for the QOF partnership interest immediately before the sale is to the fair market value of the QOF interest plus the QOF investor's share of the QOF's and QOZB's liabilities.

Another issue raised by the statutory language is that the 10-year benefit is tied to the QOF investor's disposition of its QOF interest, as opposed to a QOF's or QOZB's disposition of its assets. This led to concerns that if the QOF or QOZB disposed of its assets after a QOF investor had held its QOF interest for at least 10 years, the QOF investor would be forced to recognize the gain, and created business issues that, among other things, led to the creation of many single-asset funds.

The April 2019 Proposed Regulations address some of these concerns by providing that if the QOF investor has held its qualifying investment in a pass-through QOF for at least 10 years, the pass-through QOF can dispose of its QOZBP or its interest in an entity that is a QOZB without interfering with the QOF investor's 10-year exclusion benefit. The QOF investor can make the election to exclude its allocable share of eligible gain from such a disposition reported on the Schedule K-1 of the pass-through QOF. (A similar election is available for a shareholder of a REIT QOF.)

This election applies only to a sale by a QOF of QOZBP or an interest in an entity that is a QOZB, and not to a sale by a QOF of property that is neither QOZBP nor an interest in an entity that is a QOZB. Also, this election applies only to net capital gain, not recapture (notwithstanding that if a QOF investor sells its QOF interest after holding such interest for at least 10 years, all gain, including depreciation recapture and amounts otherwise treated as ordinary income, would not be recognized). As a result, in certain cases, it may be more advantageous for an investor to dispose of its QOF interest than it would be for the QOF to dispose of its QOZBP and/or QOZB interests.

Also, disappointingly, it appears that the 2019 Proposed Regulations do not extend this relief to a sale by a QOZB of its assets; rather, this relief is applicable only to a sale by a pass-through QOF of its assets.

> ***Ballard Spahr Tip:*** Now that the QOF investor no longer is required to dispose of its interest in the QOF, some of the challenges that QOF sponsors foresaw in winding up the investment can be avoided. Given this added flexibility, we expect that more QOFs will invest in multiple assets, rather than be limited to one asset per QOF.

Partnership QOFs – Inclusion of Debt in the Tax Basis for a QOF Investor's Interest in a QOF and Debt-Financed Distributions

Typically, a partner in a partnership includes its share of the partnership's liabilities in its tax basis for its partnership interest in accordance with the rules under Code Section 752. The statutory language creating the QOZ program raises concerns as to whether the ordinary rules applicable to inclusion of partnership liabilities in a partner's basis for its partnership interest would apply to an investor's interest in a partnership QOF. The April 2019 Proposed Regulations make clear that a partner's basis for its qualifying interest in a QOF includes the partner's share of liabilities under Section 752 of the Code.

However, the April 2019 Proposed Regulations include special rules limiting the ability of a partner to receive debt-financed distributions and maintain its qualifying interest in a QOF by applying modified disguised sales rules to debt-financed distributions from a partnership QOF. In essence, it appears that a debt-financed distribution to a QOF investor within two years of the investor's qualifying contribution to the QOF will disqualify the investor's contribution from eligibility for QOZ benefits. (For our technical readers, see Prop. Reg. § 1.1400Z2(a)-1(b)(10)(ii)(B) on page 95 of the April 2019 Proposed Regulations.) Even after two years, consideration must be given to the partnership disguised sales rules to determine if a debt-financed distribution could impact a QOF investor's QOZ benefits.

The IRS and Treasury requested comments regarding additional rules that may be necessary to limit abusive transactions designed to take advantage of differences between outside and inside basis "to create non-economic gains and losses."

Carried Interests

The April 2019 Proposed Regulations make clear that a partnership interest received for services is not eligible for QOZ benefits; this is true whether the interest is a profits interest or a capital interest acquired for services. A carried interest or capital interest acquired for services is treated as an interest in a mixed fund. See "Mixed Funds" below. The amount treated as a mixed investment is the highest share of the residual profits the carried interest holder would receive with respect to the carried interest.

Mixed Funds

If not all of an investor's investment in a QOF is eligible for the deferral election, the investment is a a "mixed-funds" investment. A mixed-funds investment results from three situations: (1) if the QOF investor's investment in a QOF is more than the amount of the investor's eligible capital gains; (2) if the QOF investor contributes property (other than cash) to the QOF that has a fair market value that exceeds the investor's adjusted basis for such property; or (3) if the investor makes any other type of nonqualifying contribution to a QOF. Also, as noted above, a carried interest is treated as a

nonqualifying investment. A QOF investor can make the deferral election only on the portion of the investment that meets the QOF requirements.

If an investor has a mixed-funds investment in a QOF, the investor is treated as having two investments, one that qualifies for QOZ benefits and the other that does not qualify. The April 2019 Proposed Regulations include rules addressing how to allocate gains and other items among the qualifying and nonqualifying investments for a QOF investor with a mixed funds investment.

Rolling Over Section 1231 Gain

Code Section 1231 applies to depreciable property and real property used in a trade or business that is held for more than one year. Net Section 1231 gain is treated as long-term capital gain (subject to a recapture rule) and net Section 1231 loss is treated as an ordinary loss. Because a taxpayer will not know if it has net Section 1231 gain until the end of a tax year, the April 2019 Proposed Regulations treat net Section 1231 gain as recognized on the last day of the tax year and start the investor's 180-day period to roll over the gain on that date. This creates a less favorable result for net Section 1231 gain than for other capital gain because, unlike other capital gains, only the net amount, not the gross amount, may be rolled over into a QOF.

Whether a partner in a partnership has net Section 1231 gain is determined at the partner level, considering the partner's Section 1231 gains and losses from all sources. The October 2018 Proposed Regulations allow a partnership to roll over capital gains it recognizes into a QOF within 180 days of when that gain is recognized. Alternatively, a partner in a partnership that recognizes capital gain may roll over that gain either within 180 days of the date the partnership recognized such gain or 180 days from the end of the partnership's tax year. The April 2019 Proposed Regulations allow a partner in a partnership that recognizes Section 1231 gain to roll over its net Section 1231 gain within 180 days of the end of the partnership's tax year. Although it is not clear, it appears that these new rules applicable to Section 1231 gains also may allow a partnership to roll over its net Section 1231 gain within 180 days of the end of its taxable year.

The IRS and Treasury requested comments on the treatment of Section 1231 gain.

Transactions Causing Deferred Gain to be Recognized – Inclusion Events

Subject to the five- and seven-year holding period gain elimination rules, deferred gain must be recognized on the earlier of the date that the QOF investor sells or exchanges its QOF interest or December 31, 2026. The April 2019 Proposed Regulations include considerable detail addressing what transactions will be "inclusion events" that would require a QOF investor to recognize its deferred gain and terminate the QOF investor's ability to obtain the 10-year benefit with respect to the interest sold or exchanged.

Generally, any transaction that reduces a QOF investor's interest in a QOF is treated as an inclusion event. Examples of inclusion events include distributions from a QOF that result in the QOF investor recognizing gain (e.g., a distribution in excess of the QOF investor's adjusted basis for its QOF interest) and gifts. Helpfully, however, death is not an inclusion event; beneficiaries essentially step into the shoes of the deceased (but without a basis step-up for the deferred gain). Also, generally, a tax-free contribution of a QOF interest to a partnership is not an inclusion event.

QOF GUIDANCE

QOF 90% Asset Test – Temporary Investment Permitted for Six Months

At least 90% of a QOF's assets must be either QOZBP or interests in a QOZB, and notably cash and

working capital are not "good assets" for purposes of this 90% Asset Test. In response to commentators' concerns about the rigidity of the testing dates for the 90% Asset Test (see our October 2018 e-Alert), the April 2019 Proposed Regulations provide a six-month grace period for a QOF to invest capital contributions it receives. Provided that capital contributions received by a QOF are invested by the QOF in cash, cash equivalents, or debt instruments with a term of 18 months or less, such amounts will be ignored for six months from the QOF's receipt of such capital contributions for purposes of the QOF's 90% Asset Test.

> ***Ballard Spahr Tip:*** This rule alleviates the concern that a QOF may need to act quickly to spend contributed cash before a testing date to satisfy the 90% Asset Test and should greatly assist existing QOFs in managing the timing of the admission of new investors to the QOF in relation to the deployment of the funds into QOZBP or an entity that is a QOZB. For example, if a QOF receives cash as a capital contribution the first day after a testing date, since the investment would not be counted on the next six-month testing date, this grace period would allow the QOF, until the subsequent six-month testing date, to deploy the investment, which effectively results in 364 days for the QOF to deploy the funds.

QOF Reinvestment – Churning

As promised in the October 2018 Proposed Regulations, the April 2019 Proposed Regulations include the highly anticipated rules governing a QOF's reinvestment of (1) a return of capital from the QOF's investments in a QOZB, and (2) proceeds from the sale or disposition by the QOF of QOZBP. Pursuant to the April 2019 Proposed Regulations, a QOF may reinvest such amounts in QOZBP or into an entity that is a QOZB provided that such amounts are invested within 12 months from the date of the distribution or sale/disposition, and during such 12 month-period, the proceeds are continuously held by the QOF in cash, cash equivalents, and/or debt instruments with a term of 18 months or less. To the extent this 12-month period is not met because of a delay in government action the application for which is complete, the April 2019 Proposed Regulations allow for the 12-month period to be extended. Reinvestments that satisfy these rules (1) do not reset any QOF investor's applicable investment holding period, (2) do not impact the QOF's 90% Asset Test, and (3) are not limited to reinvestments into the same type of QOZBP or into the same QOZB as the first investment.

Unfortunately, the April 2019 Proposed Regulations provide that the QOF investor must nevertheless recognize the gain on the disposition of the QOZBP or of an interest in an entity that is a QOZB if the QOF is a pass-through entity (or the QOF must recognize the gain if the QOF is a corporation). Apparently, the Treasury Department and IRS could not find precedent to allow for nonrecognition. Notably, the April 2019 Proposed Regulations request comments on examples of tax regulations that exempt the recognition of realized gain under similar authority, and whether an analogous reinvestment rule would be beneficial for an entity that is a QOZB to be able to reinvest proceeds from the disposition of QOZBP.

> ***Ballard Spahr Tip:*** While the additional clarification on QOF reinvestment timeframes is helpful, the requirement that gain on the sale/disposition of assets be recognized limits the usefulness of this rule, because the resulting tax liability on interim sales/dispositions negatively impacts the QOF's return on investment. Tax liability on interim sales/dispositions also will potentially diminish the 10-year exclusion benefit since the exclusion of gain would apply only to the investment held by the QOF at the 10-

year mark.

QOZBP AND LEASED PROPERTY GUIDANCE

QOZBP is property (1) purchased by a QOF or an entity that is a QOZB from an unrelated person ("related" meaning more than 20% common ownership) after December 31, 2017, (2) (i) the original use of which in the QOZ commences with the QOF or the QOZB (the "original use test") or (ii) the QOF or QOZB substantially improves such property (the "substantial improvement test"), and (3) substantially all of the use of which is in a QOZ during substantially all of the time it is held by the QOF or the QOZB.

Property is substantially improved if, during any 30-month period that such property is held by a QOF or QOZB, the QOF or QOZB spends more than its tax basis for the property at the beginning of the 30-month period. If, however, the property is land and improvements all of which are located in a QOZ that was acquired after December 31, 2017, the QOF or QOZB only must spend more than its adjusted basis for the improvements at the beginning of such 30-month period.

Original Use Test Generally

The April 2019 Proposed Regulations define "original use" by reference to when the property first is placed in service by any taxpayer for depreciation purposes. As a result, if the property was ever placed in service by any person, it has been originally used, and if the original use was in a QOZ, that property must be substantially improved. Also, improvements made to leased property satisfy the original use test and are treated as acquired by purchase. The April 2019 Proposed Regulations provide relief from the original use requirement for property (including a building or other structure) that has been vacant or unused for at least five years before purchase by a QOF or QOZB by allowing the QOF or QOZB to satisfy the original use test by placing the unused or vacant asset into service in the QOZ without requiring that such property be substantially improved.

> ***Ballard Spahr Tip:*** While commentators had hoped for a shorter period of time for the vacancy exception, these clarifications of original use generally are advantageous to the taxpayer. Tying the definition of original use to whether the property has been placed in service provides clarification that a QOF or QOZB can invest in property during the construction process without having to meet the substantial improvement threshold.

Land

The April 2019 Proposed Regulations provide that if vacant land acquired or leased after December 31, 2017, is used in a trade or business, such land generally is treated as QOZBP and neither the original use test nor substantial improvement test must be satisfied with respect to such land. However, because leaving land fallow is inconsistent with the intent of the QOZ program, the April 2019 Proposed Regulations provide that vacant or minimally improved land purchased by a QOF or QOZB with no intention or expectation that the land will be materially improved does not constitute QOZBP. Also, Treasury and the IRS requested comments on whether additional rules are necessary to prohibit land banking.

> ***Ballard Spahr Tip:*** Land acquired or leased before January 1, 2018, is not eligible for the special rule that permits land not to be substantially improved, and is not a good asset for the QOF 90% asset test or the QOZB 70% asset test.

Substantial Improvement Test – Multiple Assets

In one of the few provisions likely to be considered unfriendly to taxpayers, the April 2019 Proposed Regulations make clear that the substantial improvement test must be applied on an asset-by-asset basis. For example, if a QOF or QOZB acquires two buildings (neither of which was vacant for five years) within a QOZ and substantially improves only one of the two, only the building that has been substantially improved would be QOZBP. Notwithstanding this conclusion, the IRS and Treasury noted that this requirement may be onerous for certain types of businesses and requested comments as to whether future guidance should apply an aggregate standard for determining compliance with the substantial improvement test, whether property not capable of being substantially improved should be exempted from the substantial improvement rule, and whether the purchase of non-original use property together with items of original use property should be aggregated to determine whether the test is satisfied.

> ***Ballard Spahr Tip:*** That the substantial improvement test must be applied on an asset-by-asset basis is particularly troubling for an operating business. For example, if a QOZB acquires all of the assets of a software business located in a QOZ, technically the QOZB would be required to substantially improve each desk, chair, computer, etc., for such property to qualify as QOZB. The asset-by-asset approach will likely be a roadbloack for existing businesses in a QOZ planning to expand the business when they must satisfy the QOZB 70% asset test.

Leased Property

The April 2019 Proposed Regulations include taxpayer-friendly rules for property leased by a QOF or QOZB. Leased property will qualify as QOZBP if (1) the property is leased pursuant to a lease entered into after December 31, 2017, (2) at the time the lease is entered into, the lease terms are arms-length, (3) during at least 90% of the QOF's or QOZB's (as the case may be) holding period for such leased property, 70% of the leased property's use is in a QOZ, and (4) if the lease is with a related party (20% common ownership), (i) the lessee cannot make any prepayments of rent for a period exceeding 12 months, (ii) if the leased property is tangible personal property and the original use of such property in a QOZ did not commence with the lessee, the lessee must become the owner of tangible property in an amount at least equal to the value of the property leased from a related person within the earlier of (a) 30 months after the lessee receives possession of the leased property or (b) the end of the lease term, and (iii) there must be substantial overlap in the QOZs where the leased property and the property acquired in (ii) is used. However, if there is a plan, intention, or expectation that leased real property is to be acquired by the QOF or QOZB for other than the fair market value of such land, the property never will be QOZBP.

As is true of land acquired after December 31, 2017, land leased after December 31, 2017, is not required to be substantially improved. The IRS and Treasury requested comments on all aspects of the leased property rules.

Valuation

As described in the October 2018 Proposed Regulations, there are two valuation methods for the QOF 90% asset test and the QOZB 70% asset test. The first is the applicable financial statement valuation method—valuation of tangible property is based on the book value (after depreciation and amortization) reported on an applicable financial statement—and the second is the alternative valuation method—valuation of tangible property is based on the original cost basis for the property.

The April 2019 Proposed Regulations allow a QOF or QOZB to choose which method to use annually and there is no consistency requirement year-to-year.

Special valuation rules are provided in the April 2019 Proposed Regulations for leased property. One valuation method is the applicable financial statement valuation method. The applicable financial statement method may be used only if the financial statement is prepared in accordance with GAAP and GAAP assigns a value to the leased property. Alternatively, the leased property may be valued by calculating the present value of the lease payments using the applicable federal rate as the discount rate. If the lease is valued on the present value method, the value is determined when the lease is entered into and used for all testing dates.

"Substantially All"

The October 2018 Proposed Regulations and the April 2019 Proposed Regulations provide safe harbors for what constitutes "substantially all" where that term is used in the provisions governing QOZ benefits: (1) substantially all of a QOZB's tangible property owned or leased must be QOZBP (at least 70%); (2) tangible property is QOZBP if, among other things, during substantially all of the QOF's or QOZB's (as the case may be) holding period for such property (at least 90%), substantially all of the use of such property is in a QOZ (at least 70%); and (3) for substantially all of the time a QOF owns an interest in a subsidiary (at least 90%), the subsidiary must be a QOZB.

QOZB GUIDANCE

The April 2019 Proposed Regulations address several of the issues raised in comments on the language in the Code and the October 2018 Proposed Regulations about what qualifies as a QOZB. To qualify as a QOZB, an entity must be a subsidiary of a QOF that is a partnership or corporation for federal income tax purposes and: (1) at least 70% of the tangible property the entity owns or leases is QOZBP; (2) at least 50% of the entity's gross income is from the active conduct of a trade or business in a QOZ; (3) at least 40% of the entity's intangible property is used in the active conduct of its business; (4) no more than 5% of the entity's assets are nonqualified financial property; and (5) the entity does not conduct a sin business. While the guidance in the April 2019 Proposed Regulations is helpful, unfortunately, many aspects, particularly those relating to operating businesses as opposed to real estate investments, are left to future guidance.

Property Straddling a QOZ

An entity that holds real property straddling multiple census tracts, not all of which are designated as QOZs, still may qualify as a QOZB. For purposes of determining whether at least 50% of the entity's gross income is from the active conduct of a trade or business in a QOZ or whether tangible property is located in a QOZ, real property is deemed to be located within a QOZ if the QOZB's real property located within the QOZ is "substantial" as compared to the amount of the QOZB's real property located outside of the QOZ. The April 2019 Proposed Regulations provide that real property located within the QOZ is considered substantial if (1) the square footage of the property located within a QOZ is substantial as compared to the square footage of the real property located outside of the QOZ and (2) the real property located outside of the QOZ is contiguous to all or part of the real property located in the QOZ. However, the preamble to the April 2019 Proposed Regulations provides that real property located within a QOZ should be considered substantial if the unadjusted cost of the real property inside the QOZ is greater than the unadjusted cost of the real property outside the QOZ. Presumably, the IRS and Treasury will reconcile these different tests. In addition, it is unclear whether real property located across the street from real property in a QOZ is contiguous to the real property in the QOZ.

Active Conduct of a Trade or Business

Consistent with Proposed Regulations addressing other provisions of the Tax Cuts and Jobs Act, the April 2019 Proposed Regulation provide little guidance as to what constitutes the "active conduct of a trade or business" for purposes of the requirement that at least 50% of the total gross income of a QOZB be derived from the active conduct of a trade or business within a QOZ. Instead, the April 2019 Proposed Regulations refer to the general rules under Section 162(a) of the Code, but notably allow for special rules for rental real estate.

The April 2019 Proposed Regulations provide that the ownership and operation (including leasing) of real property used in a trade or business is treated as the active conduct of a trade or business for purposes of the QOZB provisions. However, the April 2019 Proposed Regulations also provide that merely entering into a triple net lease is not the active conduct of a trade or business.

> ***Ballard Spahr Tip***: The special rules for real estate eliminate most of the uncertainty surrounding whether rental real estate is an active trade or business. Moreover, it seems that even triple net leased real estate could qualify as an active trade or business if services are provided by the landlord/owner.

The IRS and Treasury requested comments on, among other things, the proposed definition of trade or business, whether a trade or business is actively conducted, as well as whether the active trade or business requirement also should apply to QOFs.

Sourcing Gross Income to a QOZ

The April 2019 Proposed Regulations provide much-needed guidance on the sourcing of gross receipts to a QOZ. There are three proposed safe harbors to calculate whether at least 50% of a business's gross income is sourced to a QOZ:

- Hours Test – if at least 50% of the services are performed in the QOZ, determined by comparing the hours of work performed for the business by its employees and independent contractors (and employees of independent contractors) within the QOZ to the total hours of work performed for such business by its employees and independent contractors (and employees of independent contractors);
- Pay Test – if at least 50% of the services are performed in the QOZ, determined by comparing the amounts paid by a business to its employees and independent contractors (and employees of independent contractors) for services performed in the QOZ to the total amount paid by the business for employee and independent contractor (and employees of independent contractors) services performed during the taxable year; or
- Qualitative Test – a qualitative determination that the tangible property of the business that is in a QOZ and the management or operational functions performed for the business in the QOZ are each necessary to generate at least 50% of the gross income of the trade or business.

The inclusion of independent contractors and the employees of independent contractors may complicate the analysis for the first two safe harbors. In addition, a business could apply a facts-an--circumstances analysis if it failed to meet any of the three safe harbors. The IRS and Treasury have requested comments on additional safe harbors and modifications to those listed above.

> ***Ballard Spahr Tip:*** These safe harbors should allow substantial flexibility for QOZBs that plan accordingly. The location of the QOZB's customers is largely irrelevant, so a

QOZB can locate its activities in the QOZ even if its customer base is not within the QOZ.

Intangible Property

With respect to the use of intangibles by a business, the April 2019 Proposed Regulations provide that at least 40% of the intangible property of a QOZB must be used in the active conduct of a trade or business in the QOZ. No safe harbor method of measuring the percentage is provided.

Working Capital Safe Harbor

Pursuant to the Code, a QOZB may hold reasonable working capital. The October 2018 Proposed Regulations provide a safe harbor for what constitutes reasonable working capital: (1) the working capital is designated for the acquisition, construction and/or improvement of tangible property in a QOZ; (2) there is a written schedule consistent with the ordinary startup of a trade or business for the expenditure of the working capital; (3) the working capital is spent within 31 months of the receipt of the funds; and (4) the working capital is used substantially consistent with the foregoing.

In response to comments on the October 2018 Proposed Regulations, the April 2019 Proposed Regulations also permit an operating business to take advantage of the 31-month safe harbor. This expansion of the safe harbor puts operating businesses on parity with tangible property investments. The April 2019 Proposed Regulations also provide that a business will not fail to meet the working capital safe harbor if the 31-month period is exceeded if the delay is attributable to waiting for government action the application for which is completed during the 31-month period. This governmental delay exception applies to both tangible property owned by a QOZB and an investment by a QOF in a QOZB.

The April 2019 Proposed Regulations also clarify that a QOZB may have multiple sequential 31-month working capital safe harbor periods; a new 31-month safe harbor period begins each time the QOZB receives funds.

CONSOLIDATED RETURN RULES GUIDANCE

The April 2019 Proposed Regulations provide special rules for consolidated groups, including clarifying that the member that recognizes capital gain must be the member that rolls over the gain to a QOF, and providing that stock of a corporation that is a QOF is not treated as stock for purposes of determining whether the corporation is a member of the consolidated group. Thus, although a corporate QOF can be the parent of a consolidated return group, a corporate QOF cannot otherwise be a member of a consolidated return group.

GENERAL ANTI-ABUSE RULE GUIDANCE

The April 2019 Proposed Regulations include a broad, generally applicable, anti-abuse rule that allows the IRS to recast a transaction or series of transactions as necessary to achieve the goals of the QOZ rules. Whether a transaction is inconsistent with the QOZ rules will be based on all relevant facts and circumstances. The preamble to the April 2019 Proposed Regulations illustrates that the anti-abuse rule could be used by the IRS to re-characterize agricultural land that otherwise would be treated as QOZBP as other than QOZBP if the taxpayer did not plan to make a material investment in the land and if a significant purpose of purchasing the land was to “achieve an inappropriate tax result.”

UNRESOLVED ISSUES AND QUESTIONS NOT YET ANSWERED

- Will any facts and circumstances allow an investor in a QOF partnership to treat debt-financed distributions received from a QOF partnership within two years after the investor's contribution to the QOF partnership as other than a disguised sale and therefore not disqualify the investor's contribution from QOZ benefits?
- Can a QOZB, as opposed to a QOF, reinvest proceeds from the disposition of QOZBP? Will Treasury/IRS find the authority to provide for the nonrecognition of gain in the context of QOF reinvestments/churning?
- What is reasonable cause if the 90% Asset Test is failed?
- How will the substantial improvement requirements apply in the context of the acquisition of the assets of an operating business by a QOZB?
- What additional information will the IRS require from a QOF concerning its investments?

If you have any questions about investing in or forming and operating a QOF or a QOZB, please contact any member of Ballard Spahr's QOZ team.

Members of Ballard Spahr's QOZ Team will be presenting a seminar/webinar on QOZs addressing the April 2019 Proposed Regulations on May 22, 2019, at 3:00 pm ET.

by the Qualified Opportunity Zones Team

May 1, 2019

Additional Takeaways From the Latest Qualified Opportunity Fund Regulations: Day Pitney

As a supplement to our alert published on April 22, this Day Pitney Advisory provides additional takeaways from the latest set of proposed regulations issued on April 17 (the 2019 regulations) regarding the qualified opportunity zone (QOZ) program under Section 1400Z.

1. Treasury defined the "original use" requirement. In order to qualify for the tax benefits afforded by Section 1400Z, an investor must invest in a QOZ through a qualified opportunity fund (QOF). To qualify as a QOF, at least 90 percent of a QOF's assets must consist of "qualified property," either directly or via ownership of an equity interest in a qualified opportunity zone business (QOZ business), which is an entity required to hold a substantial amount (70 percent or more of its assets) of qualified property. Tangible property acquired by purchase is qualified property if either (i) its "original use" in a QOZ commences with the QOF or QOZ business or (ii) the QOF or QOZ business "substantially improves" the property. The Treasury Department issued an initial set of proposed regulations in October 2018 (the 2018 regulations) that defined "substantial improvement" but reserved the definition of "original use." The 2019 regulations provide that the original use of tangible property acquired by purchase commences on the date when the purchaser (or a prior person) first places the property in service in the QOZ for purposes of depreciation or amortization, or could have done so had the person been the property's owner. While not clear, this definition appears to include situations where someone other than the property's owner (e.g., a lessee) previously used the property in the QOZ but was unable to depreciate it. This definition also makes it possible for used tangible property acquired by purchase to qualify as original use property, provided it was never used in that particular QOZ in a manner that would have allowed it to be depreciated or amortized by a taxpayer.

Any expansion of the original use standard can be viewed as a taxpayer-friendly result, because the alternative standard, substantial improvement, requires costly capital expenditures. That said, this definition may prove challenging to apply in situations where it may be unclear how and when used property was utilized by previous owners and what degree of use rises to the level of "use" in the QOZ. For example, it is unclear whether the use by a previous owner of an automobile in a QOZ 10 years ago constitutes prior use of a depreciable asset in that QOZ. Treasury may ultimately issue additional guidance to help taxpayers apply this new definition of "original use" to used property. Regardless, we view the fact that used property can qualify for original use in any situation as a positive development for taxpayers.

2. Vacant structures can qualify as original use property. The 2019 regulations introduce an additional layer to the "original use" definition with respect to vacant property. If a QOF or QOZ business purchases a building or other structure that has been unused or vacant for an uninterrupted period of at least five years prior to such purchase, the building or structure will satisfy the original use requirement. This new development should incentivize QOFs and QOZ businesses to acquire vacant buildings.

3. Land must be used in a trade or business of a QOF or QOZ business. The IRS issued Revenue Ruling 2018-29 in conjunction with the 2018 regulations to address instances where a QOF purchases an existing building located on land wholly within a QOZ. That ruling provides that the substantial improvement test is measured by additions to the adjusted basis in the building, not the building and the land. Thus, both a building and the land thereon satisfy the substantial improvement test if additions to the QOF's basis in the building during any 30-month period exceed an amount equal to the QOF's adjusted basis in the building at the beginning of such 30-month period. The 2019 regulations confirm this result by stating that unimproved land within a QOZ and acquired by purchase is not required to be substantially improved.

Commentators raised concerns that alleviating land of the substantial improvement requirement would lead to speculative land purchasing, land "banking" and similar taxpayer actions. In response, Treasury pointed out in the preamble to the 2019 regulations that qualified property must be used in a trade or business (as defined by Section 162 of the code) and holding land for investment does not give rise to a trade or business. Consequently, land not used in a QOF or QOZ business cannot constitute qualified property. That being said, Treasury expressed additional concern that merely relying on a general application of this use requirement was insufficient to deter abuse, as QOFs or QOZ businesses could purchase unimproved land already used in a trade or business (e.g., purchasing farmland) that would satisfy the "use in a trade or business" requirement without injecting any new capital into the land, largely defeating the purpose of Section 1400Z. In response, the 2019 regulations introduce an anti-abuse provision that prohibits a QOF from relying on the rule that excludes land from the substantial improvement requirement if the land is unimproved or minimally unimproved and the QOF or QOZ business purchased the land with an expectation, intention or view not to improve the land by more than an insubstantial amount within 30 months after the purchase date. The 2019 regulations also introduce an additional, general anti-abuse rule with respect to any activities under Section 1400Z, granting the IRS broad authority to recast transactions that the IRS determines were entered into with a significant purpose of achieving a tax result inconsistent with the purpose of Section 1400Z-2. We note that these rules place added pressure on the purchase price allocation between land and property, as the IRS could argue that a QOF over-allocated the purchase price to land in order to limit the amount of costs it must incur to substantially improve the property thereon. Prior to this development, taxpayers would generally prefer to allocate less purchase price to land because land is ineligible for depreciation deductions. Obtaining an independent, third-party appraisal at the time of purchase may emerge as a best practice in many transactions.

4. Real property located partially in a QOZ can be deemed entirely within the QOZ. The 2019 regulations also introduce new rules governing situations where real property straddles the border of a QOZ. If the amount of real property located within the QOZ is substantial in comparison to the amount of real property outside the QOZ, as determined by square footage, and all the real property outside the QOZ is contiguous to at least part of the real property located inside the QOZ, then all of the property is deemed to be located within a QOZ. While this rule is clearly a beneficial outcome for taxpayers, its application may be limited. The rule as written applies only in the context of determining whether 50 percent of a QOZ business' income is derived from the active conduct of a trade or business. This distinction may lead taxpayers seeking to take advantage of the straddling rule to structure their fund with a subsidiary QOZ business instead of owning land directly at the QOF level, as application of the straddling rule to QOFs appears uncertain. The fact that the IRS and Treasury requested comments as to whether this rule should apply to other requirements of Section 1400Z-2 suggests Treasury might be considering an expansion of this rule's application to QOFs. However, absent further guidance, if a QOF intends to invest in property located within and outside a QOZ, the safer approach appears to be to implement a QOZ business structure.

5. Leased property can constitute qualified property, despite not being acquired via purchase. Section 1400Z provides that in order to constitute qualified property, tangible property must be acquired via purchase by a QOF or QOZ business after December 31, 2017. However, the 90 percent asset test applicable to QOFs states that property held by the QOF, which can include property acquired via purchase or lease, can constitute qualified property for these purposes. Similarly, the 70 percent asset test applicable to QOZ businesses states that property used by a QOZ business can constitute qualified property. As originally drafted, these rules made it unclear whether leased property could constitute qualified property.

The 2019 regulations address this issue by providing that leased tangible property meeting certain criteria may be treated as qualified property for purposes of satisfying both the 90 percent and 70 percent tests. Analogous to the rules governing tangible property acquired by purchase, leased property must be acquired by the QOF or QOZ business under a lease entered into after December 31, 2017, and substantially all of the use of the leased tangible property must occur in a QOZ during substantially all of the lease period. Further, the lease must be a "market rate lease" and is subject to an anti-abuse rule that mirrors the anti-abuse rule described above in the context of unimproved land.

Importantly, the rules applicable to leased property have certain advantages over the rules applicable to purchased property. First, neither the original use nor the substantial improvement requirements applicable to purchased property apply to leased property. Also, unlike purchased property, leased property can be acquired from a related party-lessor without invoking the related party rule that limits the seller from owning 20 percent of the purchaser, provided that additional requirements are satisfied. The lessee may not make any prepayments to the lessor for a lease period exceeding 12 months. Additionally, the lessee must purchase tangible property valued at an amount that exceeds the fair market value of the leased personal property. Despite these added requirements, this new leasing rule affords QOFs and QOZ businesses the flexibility to lease property instead of buying it.

This development is especially relevant in the context of land that was acquired by a taxpayer prior to December 31, 2017, that is already situated within a QOZ. For example, if a landowner wanted to develop such land via a QOF or QOZ business, the only option prior to the 2019 regulations was to sell the property to the QOF or QOZ business and retain less than a 20 percent ownership interest in the QOF or QOZ business to avoid running afoul of the related party rule. While not explicitly addressed by the 2019 regulations, it appears that a ground lease entered into between a landowner

and a QOF or QOZ business could accomplish the landowner's objective of permitting the QOF or QOZ business to develop the land while also permitting the landowner to retain full ownership of the land and a greater than 20 percent ownership interest in the upside of the land via an ownership interest in the purchaser QOF or QOZ business. Nevertheless, investors considering this approach must bear in mind that the QOF or QOZ business would not legally own the land. Consequently, any appreciation of the land would not be subject to tax-free treatment afforded to an investor that holds the QOF interest for more than 10 years. However, appreciation of the structures built thereon, which in many instances would represent a majority of the total value of the parcel, would be owned by the QOF and would therefore stand to benefit from the 10-year rule.

Day Pitney will continue to stay apprised of developments in this complex area of the law and will issue future client alerts as further developments occur.

Day Pitney Advisory

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April 30, 2019

Opportunity Zone Rules Leave Out Data Reporting, Penalty Details.

- **Unclear if Treasury will provide a third set of regulations**
- **"Substantial improvement" likely to be re-litigated**

Proposed rules on opportunity zones left some holes—such as the breadth of data the government has the authority to collect on the funds and how the Internal Revenue Service will handle penalties.

The extent to which the IRS and Treasury Department will provide answers is unclear. Officials have said publicly that there will be three tranches of rules, with the April 17 batch being the second (REG-120186-18). But a Treasury official told reporters when the rules were released that the department doesn't have a set plan for a third round, and this latest batch could be the last "depending on the reactions of people invested in opportunity zones."

The 2017 tax law allowed those with profits from stock and other investments to defer tax on those gains if they invested the money in opportunity funds in select areas within 180 days of the sale of the stock or other asset, under tax code Section 1400Z-2. Investors can then shield part of the gain from tax if they hold onto the investment for long enough, and avoid capital gains tax on the appreciation of the opportunity fund investment altogether if they hold onto it for a decade.

Investors and think tanks are unlikely to keep their reactions quiet, particularly on the issue of data reporting, as people with capital gains to spend are rushing into a market with little to no required transparency. Whether the incentives get an extension from Congress may also depend on whether proponents can plausibly showcase the tax breaks' ability to lift low-income communities out of poverty.

Data Deep-Dive

The IRS issued a seven-page request for comments on how it should track the progress of the funds, or lack thereof. Comments can address areas like which sources and methods the government

should use to collect data and how often it should be collected, the IRS said.

Procedural rules in the Senate meant that in order to pass the tax law, Republicans had to remove from the legislation a requirement for Treasury to report on the incentives' effects to Congress. The original authors of the opportunity zones legislation, Sens. Cory Booker (D-N.J.) and Tim Scott (R-S.C.), are planning to introduce a bill to reinstate those requirements.

Fund managers will have to file a Form 8996, reporting the amount of assets in the fund and the portion of assets that qualify for the tax breaks. This should enable Treasury to report some statistics, such as the number of funds and the aggregate amount of their investment, the IRS said in the comment request. But that information "lacks sufficient granularity," the document said.

Lisa Zarlenga, a partner at Steptoe & Johnson LLP and former tax legislative counsel at Treasury, said she expects a third round of regulations to address this issue, although there are other ways to go about mandating disclosure of information.

"They could probably do this in forms—they could expand the self-certification form to include this information," Zarlenga said.

She added that while the IRS may want the protection of a regulation finalized after a proposal-an--comment process, they have released new forms and instructions before without that public input.

Cody Evans, a Stanford Graduate School of Business student who has researched the incentives and formed his own fund to invest in renewable energy in the Bay Area, called this issue "the elephant in the room."

"We're at a point where the legislation has been law for almost a year and a half and there are still no reporting requirements," he said.

Investors have set up more than 100 funds with $26 billion in investing capacity, according to a list compiled by accounting and consulting firm Novogradac & Co. LLP.

Treasury may have prioritized questions of fund formation and structuring first, simply because there would be nothing to track in the first place if no one knew how to use the incentives, Evans said.

Penalties

The same logic applies to calculating and imposing penalties, which the agency also has yet to address: You can't punish someone for breaking the rules if they don't have any rules to work with.

The law imposes a penalty on funds that fail a test of whether at least 90 percent of their assets are held in "qualified opportunity zone property," a classification that comes with its own percentage threshold tests.

The regulations said the IRS and Treasury expect to address rules under Section 1400Z-2(f)—the section describing the penalty, along with the information reporting requirements in separate regulations, forms, or publications.

"We don't really know what the computation would be with the 90 percent test," said Steve Kreinik, a partner at the accounting firm EisnerAmper in Miami, who focuses on tax and wealth advising. He added that if the IRS issues additional rules, penalties would likely be addressed.

Independent Contractors

The proposed rules provided three safe harbors for following a standard implemented by the first round of regulations—namely, that 50 percent of the fund's gross income stem from active business conduct within its opportunity zone.

Two of those safe harbors allow businesses to base that 50 percent standard on services performed by employees and independent contractors. One safe harbor relies on the number of hours worked, and the other uses money paid for those services.

The extent to which the term "independent contractors" should apply is somewhat murky, said Forrest Milder, a partner at Nixon Peabody in Boston who focuses on tax-advantaged projects.

"I'm not exactly sure how you should know," he said, suggesting that resellers could potentially fall into the definition, depending on the government's interpretation of the term. That could throw off the fund's ability to stay above the 50 percent threshold.

The rules did allow a "fact-and-circumstances" test to potentially catch anyone who didn't meet the safe harbor qualifications.

Substantially Improving a Business

An area likely to elicit blowback from businesses and investors is the way the proposed rules would apply to what is known as the "substantial improvement test" to operating businesses.

If a fund isn't just building a property or business from scratch, it has to "substantially improve" the business or property it buys by investing an amount at least equal to the price it paid in the acquisition. This is a relatively easier calculation to make when it comes to real estate as opposed to operating businesses, practitioners said.

The proposed rules would require funds to measure this improvement on an asset-by-asset basis, something the IRS acknowledged in the regulatory text would be difficult to quantify for operating businesses with diverse assets. The IRS asked for comments on the decision.

John Lettieri, president and CEO of the Economic Innovation Group, described this as a major footfall in otherwise very business-friendly regulations, given the accounting difficulties it creates. EIG helped create the incentives and has been lobbying Congress, Treasury, and the White House on them.

"Complexity is a subsidy to larger incumbents and advisers," he said. "The standard can be or should be the standard that Congress set, but the path to get there should be user-friendly."

Bloomberg Tax

by Lydia O'Neal

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Cottage Industry in Opportunity Zone Data Forms to Fill Vacuum.

- **Treasury, Congress slow to compensate for missing reporting requirements**

- **Voluntary reporting would hit the philanthropic tip of a self-interested iceberg of investors**

The 2017 tax law's opportunity zone tax breaks are supposed to provide incentives for investors to help lift low-income neighborhoods out of poverty. Critics say they'll accelerate gentrification while shielding wealthy people's stock profits from taxes.

Neither side has much to back up their view, because there's no federal requirement for the government to collect and share data on development spurred by the incentives. On a recent conference call with reporters, Chairman of the Council of Economic Advisers Kevin Hassett cited Bureau of Labor Statistics data indicating that wages grew in the census tracts chosen for the incentives, but later said it may be because "relatively high-skilled people" are moving in.

Investors have formed 112 funds with $26 billion in investing capacity, according to a list compiled by the San Francisco-based accounting and consulting firm Novogradac & Co. LLP. Yet for now they're largely operating in the dark.

"If opportunity zones fail, they won't be renewed. They shouldn't be renewed," said Michael Froman, MasterCard Inc.'s vice chairman and president of strategic growth and a former U.S. Trade Representative, at a March conference at Stanford University. "We're likely to get a better outcome if we start with better inputs, and that requires more information."

In the absence of a federal mandate, a cross-country patchwork of efforts—by nonprofits, academics, think tanks, companies, and local governments—is underway to collect data. Much of the scope of information collected is, at least for now, dependent on the willingness of investors and companies to share it. Some efforts are private, or predominantly concerned with helping investors find spots ripe for development rather than helping to track demographic and economic transformations.

"All of these efforts will be modest compared to what the actual activity" prompted by the the tax incentives will be, said Brett Theodos, a senior fellow at the Urban Institute who has asked the IRS to collect a list of specific data points. "We also need a robust federal reporting requirement."

Philanthropic, impact-investor types could represent just 5 percent or 10 percent of the market, while the remainder may be more self-interested, said Aaron Seybert, a social investment officer at the Troy, Mich.-based Kresge Foundation, which requires the opportunity funds it backs to report their effects on surrounding communities.

"We've got to be really careful about the things we hold up as examples, particularly for a market that's very difficult to quantify," Seybert said.

Under tax code Section 1400Z-2, investors can defer and even reduce the capital gains tax liabilities on their profits from stock and other investments by plugging the money into "opportunity funds" that invest in 8,764 predominantly low-income census tracts designated by state governments.

Funds only have until 2026 to get the program's tax deferral, and the chance to shield 15 percent of the investment from capital gains tax in return for holding the assets for seven years vanishes after 2019. Plenty of investors and tax professionals believe these tax breaks will eventually get an extension—but only if there's a data-backed reason to do so.

The Push for More

Lawmakers stripped from the legislation requirements for the Treasury Department to report to Congress on the extent to which investors improved the opportunity zones in which they invested.

The original authors of the legislation, Sens. Cory Booker (D-N.J.) and Tim Scott (R-S.C.), plan to introduce a bill in early May to reinstate and expand the federal reporting requirements. But those mandates don't go into as much detail as what many advocates for added transparency are now requesting from the Internal Revenue Service. Even if that legislation reaches the president's desk, passage may take quite a while, as Democrats intend to hold multiple hearings on the law before making any changes to it.

When it released a new batch of proposed regulations, the IRS issued a request for public input on what information it ought to collect, but those reporting guidelines are expected to be pretty modest, and are likely to appear in a third round of regulations—the release of which could be months away.

In the private sector, JPMorgan Chase & Co., Bank of America Merrill Lynch, the Federal Reserve Bank of New York, Morgan Stanley, and UBS Group AG are among those that have given their input on what a framework for transparency should look like.

That framework, from the U.S. Impact Investing Alliance and Georgetown University's Beeck Center for Social Impact and Innovation, has won the support of many socially-minded investors, nonprofits, and state and local governments. Among its adopters is the Kresge Foundation, which along with the Rockefeller Foundation has offered to guarantee millions in funds' losses if they meet certain qualifications and adhere to the organizations' covenants, which include reporting requirements.

It recommends that the IRS collect information like the demographics of a fund's general partners, whether or not it notified the public of its underlying business's development plans, the business's employment of disadvantaged groups, the number of jobs it created, and its net new affordable housing units.

The Alabama Model

When asked who is doing the best job in terms of data collection, people involved in the opportunity zone market often point to Alabama, which has 158 opportunity zones.

Birmingham-based nonprofit Opportunity Alabama works as a liaison between the state government and investors to make sure the latter's gains get to tracts that need them. Its founder, Alex Flachsbart, is planning to trade expertise for information: In exchange for his organization's guidance on the best spots in the state to invest and develop, participating funds have to provide detailed information on how they're transforming their Alabama neighborhoods.

Flachsbart, a former attorney with Balch & Bingham LLP, said he plans to incorporate the USIIA/Beeck Center framework into a memorandum of understanding with investors and hire someone to collect and manage data. So far, he said, every fund he has worked with has agreed to disclose data.

Opportunity Alabama is a 501(c)(3) nonprofit, supported by the foundations of two Birmingham-based companies, Southern Co. subsidiary Alabama Power and insurer Protective Life Corp. In addition to offering services to opportunity funds, OPAL's website offers connections and assistance navigating the market to "partners"—read: financial backers—though Flachsbart said there aren't any paying partners yet. He's still working out how to monetize the nonprofit's work and keep it going long-term, which may involve charging the funds, though he plans to keep it free for now.

And he, too, conceded that drawing funds in with the promise of state-specific guidance in return for data disclosure could risk only capturing the activity of the do-gooders.

"I think any sort of voluntary reporting program is going to face those challenges," Flachsbart said.

“I don’t think that doesn’t make them worth doing.”

Maps, Exchanges, and a ‘Scorecard’

New York-based SMB Intelligence Inc. has built a map of new businesses across the country, categorizing them to show whether they’re located in a designated opportunity zone, and then listing whether they are minority- or women-owned, whether the area is gentrifying, and the tract’s median income, among other details.

The firm offers more thorough data reports—using public government statistics, media, and real estate sources through a methodology it won’t disclose publicly—on business activity in the census tracts to its clients, which include funds, nonprofits, and government agencies.

SMB’s founder and CEO Steve Waters said it might make the information public if got the support of an investor, but added that he worries that funds with less-than-noble intentions, such as predatory lending, might take advantage of the information.

Steve Glickman, a former economic adviser to President Barack Obama, helped craft the opportunity zones incentives. He was one of the founders of the Economic Innovation Group, which is among those leading the push for more transparency. To track changes in the zones over time, Glickman partnered with a data-mapping firm to grade nearly 8,000 opportunity zone census tracts based on high-level economic indicators, such as population growth and median income—and released the map publicly, on his opportunity zone advising company’s website.

“This is definitely an outcome analysis on whether these communities are improving over the next 10 years,” he said. “These are the objective indicators of how they’re doing now.”

MasterCard’s philanthropic arm is partnering with the nonprofit Accelerator for America to use the company’s own access to spending patterns to paint a detailed picture of what’s happening in designated zones. The corporation’s Center for Inclusive Growth is creating a “scorecard” to show consumer spending data in the census tracts at frequent time intervals, Arturo Franco, vice president at the center, said during the March conference. The specifics of what figures will be collected and how are still in development, he said.

The state of Maryland and a Cleveland-based startup called the Opportunity Exchange are working to essentially advertise designated tracts to investors through online platforms. Neither Maryland’s platform nor Opportunity Exchange has a disclosure requirement for investors who participate, but Opportunity Exchange founder Peter Truog said that if his exchange gains enough traction nationwide, it will serve as a useful sample for studying projects.

“That’s the ideal world we hope to build toward,” said Truog, another contributor to USIIA’s framework. “I’m optimistic that we’ll have a critical mass.”

No State Control

Maryland’s legislature has introduced bills (S.B. 756, H.B. 1162, and S.B. 174) that would impose some reporting requirements on funds and the state government by extending existing state incentives to businesses located in or expanding in opportunity zones and the establishment of a state fund to further entice investors, and it’s not the only state to make such proposals.

Jana Persky, Colorado’s Opportunity Zone Program director, said that plenty of state incentives that can be paired with the federal tax breaks require applications and reporting that could be useful for keeping track of opportunity zone developments at the state level. But outside of that, she said, state

governments are pretty limited.

“We don’t have any approval process or ability to stop a project,” Persky said, noting that while they have state-level ramifications, the tax breaks are federal ones. “We don’t control any of the money.”

Bloomberg Tax

by Lydia O’Neal

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IRS Releases Second Set of Proposed Regulations Regarding Qualified Opportunity Funds: Day Pitney

On April 17, the IRS issued proposed regulations that provide new guidance for investors seeking to invest in qualified opportunity funds (each, a QOF), a new investment program designed to incentivize long-term investment in economically distressed communities throughout the United States.

Under Section 1400Z of the Internal Revenue Code (the code), investors that invest in certain designated low-income census tracts known as “qualified opportunity zones” (each, a QOZ) through a QOF are eligible for a range of potential tax benefits, which can include both deferral and a 15 percent reduction of tax on capital gains as well as elimination of tax on appreciation upon selling one’s QOF investment. Despite these tax incentives, many believed that the IRS needed to promulgate more comprehensive guidance in order to enable the QOZ program to have wide participation and make its intended impact on economic development. Consequently, the IRS responded on October 18, 2018, by issuing proposed regulations that addressed many outstanding issues but also left several significant questions unanswered. Day Pitney previously published an article discussing the first set of proposed regulations, which can be found here. The latest IRS release containing the proposed regulations, which were issued on April 17, provides 169 pages of additional guidance for investors seeking to participate in the QOZ program.

Highlights of the Proposed Regulations

1. *Investors can benefit from the 10-year rule without disposing of their QOF investment.* One of the key benefits of the QOZ program is the “10-year rule,” which permits a taxpayer that holds a QOF investment for at least 10 years to elect to increase the investor’s basis in such investment to the fair market value of the investment on the date that the investment is sold or exchanged. This basis “step-up” enables investors to exit their QOF investment without paying tax on the investment’s appreciation, but the statutory language does not afford similar treatment to a QOF held for more than 10 years that sells appreciated qualified property. Rather, a QOF that sells its appreciated qualified property recognizes gain upon the sale, gain that is then allocated to the QOF’s owners via Schedule K-1 if the QOF is structured as a “pass-through” (partnership or S corporation). This distinction created an incentive to structure QOFs as “single asset” entities instead of placing multiple appreciable assets in a single QOF. The regulations lessen this distinction by providing that a taxpayer that invests in a QOF structured as a pass-through entity may elect to exclude from gross income capital gain from the disposition of qualified property reported on Schedule K-1 of such entity, provided that the disposition occurs after the taxpayer’s 10-year holding period. Notably, this rule does not extend to QOFs structured as C corporations, which must still pay entity-level tax on

the disposition of qualified property regardless of holding period.

2. *Previously undefined usages of a "substantially all" standard have been defined. In order for tangible property to constitute "QOZ business property,"* Section 1400Z states that "substantially all" of the QOF's use of the property must take place in a QOZ during "substantially all" of the QOF's holding period of such property. The same rule applies to qualified business property held by a QOZ business.

However, the phrase "substantially all" was previously undefined in this context, making it difficult for QOFs and QOZ businesses to assess how to satisfy their respective asset tests. The regulations clarify that "substantially all" of the use means at least 70 percent, and "substantially all" of the holding period means at least 90 percent.

3. *Rental real estate constitutes an active trade or business.* Section 1400Z provides that a QOZ business must satisfy various tests applied via cross-reference to Section 1397C. One such test requires that at least 50 percent of a QOZ business's gross income be derived from the active conduct of a trade or business in a QOZ. However, neither Section 1400Z nor the first set of proposed regulations define an "active"" trade or business in this context. Section 1397C(d)(2), which is not explicitly cross-referenced by Section 1400Z, excludes the rental of residential real property to others from the definition of a "qualified business." These uncertainties made it difficult for investors seeking to own and operate a residential real estate rental business in a QOZ to determine whether they could structure their ownership via a QOZ business or if only a QOF, which is not subject to a 50 percent active trade or business requirement, could own the property. The regulations alleviate this concern by stating that the ownership and operation (including leasing) of real property used in a trade or business is treated as the active conduct of a trade or business for purposes of the 50 percent active income requirement, which is clearly a taxpayer friendly result.

4. *QOZ businesses can satisfy one of three safe harbors to meet the 50 percent active income requirement.* Importantly, QOZ businesses not engaged in a real estate business were also unsure as to whether income derived from their activities would be considered derived from the active conduct of a trade or business in a QOZ. In response, the regulations provide three new safe harbors for the active trade or business test. These three safe harbors are met if

> i. at least 50 percent of the services performed (based on hours) for the QOZ business by its employees and independent contractors (and employees of independent contractors) are performed within the QOZ
>
> ii. at least 50 percent of the services performed (based on amounts paid) for the QOZ business by its employees and independent contractors (and employees of independent contractors) are performed within the QOZ; or
>
> iii. the tangible property of the QOZ business in the QOZ and the management or operational functions performed for the QOZ business in the QOZ are each necessary to generate 50 percent of the gross income of the QOZ business.

While a QOZ business should aim to meet one of these three safe-harbor tests, the regulations also provide that income might still be deemed to constitute active trade or business income absent meeting one of these safe harbors based on the particular facts and circumstances.

5. *Other key issues addressed.* The regulations provide other rules regarding a wide variety of issues. For example, the regulations discuss how certain estate planning considerations such as inter

vivos gifting, testamentary transfers, and the use of grantor trusts and single-member limited liability companies interplay with Section 1400Z. The regulations also reaffirm that QOF and QOZ business "recycling" strategies do not avail investors of the benefits of Section 1400Z, largely due to the Treasury Department's determination that implementing rules in favor of "investment churn" would exceed the authority granted to the Treasury Department and the IRS to issue proposed regulations. Notably, the regulations also set forth a variety of circumstances that would result in the inclusion of deferred gain, including common distributions and corporate restructuring techniques, that will materially impact QOFs and their investors. Finally, the regulations also provide QOFs with much-needed time to deploy contributed capital as well as to reinvest proceeds from the disposition of qualified property without violating the requirement that 90 percent of a QOF's assets constitute qualified property, which does not include cash, at various points during the QOF's taxable year.

Day Pitney anticipates releasing a second client alert shortly in order to address these and other new developments introduced by the regulations that will impact both investors and fund managers seeking to participate in the QOZ program.

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The Best OZ Regs Recaps From Around the Web.

It's been one week since the IRS released the second tranche of regulatory guidance on Qualified Opportunity Funds. This guidance is a huge step in the right direction in terms of clarifying the biggest questions that OZ participants had following the first tranche of proposed rules. And it goes a long way toward finally clearing

Continue reading.

April 24, 2019

IRS Publishes Second Round of Proposed OZ Guidance.

IRS Publishes Second Round of Proposed Opportunity Zones Guidance, Opening the Door for More and Diverse Investments in Distressed Communities

On April 17, 2019, the Treasury Department released a second set of proposed regulations relating to the operation of Qualified Opportunity Zones (QOZs) and Qualified Opportunity Funds (QOFs). While several key questions remain, the regulations remove many of the most significant hurdles that have held back investment since Opportunity Zones became law, especially for investment into new and expanding operating businesses in designated communities nationwide. With this second tranche of guidance, Treasury and the IRS made substantial progress in providing a more robust regulatory framework for investors, communities, and businesses (you can read EIG's statement on

the regulations here).

Next Steps: Stakeholders have 60 days from when the regulations post to the Federal Register to submit comments on the proposed regulations. Treasury and the IRS intend to hold a public hearing on July 9, 2019. In addition to the notice of proposed rulemaking, Treasury issued a Request for Information (RFI) on data collection and tracking for QOZs, and stakeholders will have 30 days to submit public comments on the RFI. We anticipate a third and final round of regulations later this year that will focus on anti-abuse policies and reporting requirements.

Key Issues Summary

Below you'll find highlights from the proposed regulations, including many of the priorities outlined in a December 2018 comment letter from the EIG Opportunity Zones Coalition.

Timing flexibility at the QOF level: QOFs need a reasonable amount of time to deploy capital raised from outside investors into QOZ investments before the QOF should be required to meet the 90-percent asset test. This is a top-priority issue for investors, and especially for those investing in operating businesses and building a diverse portfolio of investments.

- The proposed regulations provide that for the purposes of meeting the 90-percent asset test on a testing date, the QOF does not take into account any investments received within the last six months that are held in cash, cash equivalents, or debt instruments with a term of 18 months or less. This effectively gives QOFs a minimum of six months to make investments, a more reasonable period of time than originally proposed.
- The rules also note that failure to satisfy the 90-percent asset test on a testing date does not by itself cause an entity to fail to be a QOF but only gives rise to a penalty. The preamble states that Treasury and the IRS expect to address the penalty, including the reasonable cause exception, in future guidance.

Gross Income Test: The first tranche of proposed regulations included a requirement that 50 percent of the gross of the QOZ Business be derived from the active conduct of a trade or business in the qualified opportunity zone. The proposed regulations retain this requirement but adopt three safe harbors and a facts and circumstances test. The QOZ Business may meet the gross income test through satisfying one of the following safe harbors:

- At least 50 percent of the services performed by employees or independent contractors (based on hours) are performed in the QOZ;
- At least 50 percent of the amount paid for services are for services performed by employees or independent contractors in the QOZ; or
- The tangible property and management and operational functions needed to produce 50 percent of gross income are located in the QOZ.

Businesses that do not qualify for these safe harbors may meet the gross income requirement based on a "facts and circumstances" test if, based on all the facts and circumstances, at least 50 percent of the gross income of a trade or business is derived from the active conduct of a trade or business in the QOZ.

Interim gains: Congress linked the tax benefit to the duration of a taxpayer's investment in a QOF, not to the duration of a QOF's investment in any specific asset/business. Thus, if a QOF sells QOZ Property, the taxpayer's deferred gain should not be triggered, as long as the proceeds are invested in another qualified asset. Investors needed additional clarity on this issue, as well as the definition of the "reasonable period" mandated by the statute for reinvesting gains returned to the QOF from

the sale or disposition of an asset.

- The proposed regulations provide that proceeds received by the QOF from the sale or disposition of QOZ Business Property are treated as QOZ Property for purposes of the 90-percent asset test, so long as the QOF reinvests the proceeds within 12 months. These sale proceeds must be held in cash, cash equivalents, and debt instruments with a term of 18 months or less in order to qualify.
- The rules clarify that sales of assets by QOFs do not impact an investor's holding period in the QOF.
- However, the regulations state that investors in QOF partnerships will generally still recognize interim gains under the application of ordinary tax principles. Treasury and the IRS believe that they do not have authority to depart from the otherwise operative tax provisions requiring recognition of gain and request comment on examples of tax regulations that exempt gain that would otherwise be included in taxable income.

Substantial Improvement Test for Operating Businesses: In order to facilitate investments into existing businesses as intended by Congress, QOZ Businesses should be allowed to elect to treat all of the tangible property of a trade or business as a single property for purposes of the substantial improvement test.

- The preamble states that the substantial improvement requirement is applied on an asset-by-asset basis, which will be especially cumbersome and complex for operating businesses. However, Treasury is considering applying an aggregate standard for the substantial improvement requirement and requests comments on the advantages and disadvantages of such an approach.
- Thus, for the time being operating businesses will continue to face significant challenges in determining how to meet the substantial improvement test. However, the proposed regulations provide additional clarity regarding the original use test, providing that original use is satisfied if tangible property is placed in service in a QOZ and it has not yet been depreciated by a taxpayer other than the QOF.

Working Capital Safe Harbor: The first round of regulations provided a 31-month working capital safe harbor for "QOF investments in qualified opportunity zone businesses that acquire, construct, or rehabilitate tangible business property, which includes both real property and other tangible property." In order to better facilitate investments in operating businesses, investors and entrepreneurs needed additional clarity that the safe harbor would extend to assets necessary for the operation of a qualified business.

- The new proposed regulations provide that the working capital safe harbor now includes the development of a trade or business in the QOZ as well as acquisition, construction, and/or substantial improvement of tangible property, thus extending it to operating businesses.
- Exceeding the 31-month period does not violate the safe harbor if the delay is attributable to waiting for government action, such as permitting, if the application for that action is completed during the 31-month period.
- A single QOZ Business may benefit from multiple overlapping or sequential applications of the working capital safe harbor to different infusions of capital. The examples appear to suggest that a "cliff effect" still exists if no trade or business exists at the end of the first 31-month period.

Valuation Methods: The last tranche of proposed regulations provided that, for purposes of the 90-percent asset test for QOFs or the 70-percent tangible property test for QOZ Businesses, asset values are determined using either the values reported on an applicable financial statement (if the entity has such a financial statement), or the cost of the assets (if it has no applicable financial statement).

- The proposed regulations provide that taxpayers may use the unadjusted cost basis of property or, for leased property, the net present value of lease payments.

Original Use of Vacant Property: One of the intended outcomes of this incentive is to put vacant structural property back into productive use. EIG recommended that, if property is vacant for at least one year, it should qualify as original use and not be subject to the substantial improvement test.

- The proposed regulations provide that if property has been unused or vacant for an uninterrupted period of at least five years, use of that property in the QOZ qualifies as original use.
- Treasury and the IRS were concerned that owners could intentionally cease to occupy property for 12 months in order to increase its marketability to potential purchasers after 2017.

Substantially All: The first tranche of proposed regulations provided a 70-percent threshold for defining whether "substantially all" of a QOZ Business's tangible assets are located in a QOZ, providing essential flexibility for operating businesses whose assets may move or not fall neatly within a census tract. The term "substantially all" appears in the statute in several other contexts.

- The proposed regulations did not change the 70-percent threshold for the location of tangible assets.
- In addition, the proposed regulations defined the other references to "substantially all": 70 percent for purposes of the use in the QOZ requirement, and 90 percent for the holding period requirements for both the qualification as QOZ business property and the QOF's interest in the QOZ Business. Treasury and the IRS were concerned that applying a 70-percent threshold for the holding period requirement would result in much less than half of a QOZ Business' property being used in a QOZ. As it stands, these stacked "substantially all" requirements can result in 40 percent of a QOZ Business' tangible property being used in the QOZ.

Inventory in Transit: Many public comments requested clarity that inventory in transit or temporarily stored outside a QOZ will be considered used in the QOZ and not counted against the 90 percent asset test and proposed 70 percent substantially all test.

- The proposed regulations provide that inventory and raw materials do not fail to be QOZ Business Property because they are outside of the QOZ in transit to from a vendor or to customers.

Leased Property: The statute as written does not make it clear how leased property should be treated for the purposes of the 70 percent substantially all property test.

- The regulations provide that leased tangible property can be treated as QOZ Business Property for the 90-percent asset test and 70-percent substantially all requirement. This is particularly important for tribal communities whose land is often leased from the U.S. government.
- There is no original use requirement for leased property.
- The lease must be a "market rate lease" determined under arm's length principles.
- Leased property does not need to be acquired from an unrelated party. If the lessor and lessee are related:
- There cannot be prepayment of rent exceeding one year.
- Leased property is not treated as QOZ Business Property unless the lessee acquires through purchase QOZ Business Property with a total value of at least the value of the leased property.
- The regulations provide an anti-abuse rule to prevent the use of leases to circumvent the substantial improvement requirement for real property other than unimproved land. If there was a plan to purchase the property for an amount other than fair market value at the time of purchase,

the leased property is not QOZ Business Property.

Exiting/Winding-down QOFs: QOFs need a reasonable time to exit and sell off assets without violating the 90-percent asset test and triggering tax liability for QOF investors who have held their investments for 10 years or more. In addition, although the statute seems to permit the election to step up basis only upon sale of the interest in the QOF, typical investment funds sell off assets and redeem out investors.

- The proposed regulations do not provide a specific wind-down period, but they do provide flexibility to structure exits as sales at the QOF level. Specifically, the proposed regulations allow a QOF investor who has held its investment in the QOF for at least ten years to make an election to exclude from gross income capital gain from the disposition of QOZ Property reported on the investor's Schedule K-1 from the QOF.
- Unlike most of the guidance, the regulations state that the proposed rules covering this topic cannot be relied upon until the regulations are finalized.

Other Issues in the Proposed Regulations

Original use: Original use commences when property is first placed in service in the QOZ.

1231 gains: The regulations provided clarity that the 180-day period for 1231 gains begins on the last day of the taxable year. This issue is cause for concern, as it could create an artificial waiting period for investors who would otherwise invest their gains shortly after they are realized in order to maximize their benefit.

Land: Land can qualify as QOZ Business Property if it is used in the trade or business of the QOZ Business or QOF. Unimproved land is not required to be original use or substantially improved. However, Treasury and the IRS are concerned that treating unimproved land (such as agricultural land) as QOZ Business Property without any new capital investment or economic activity is inconsistent with the purposes of the statute and could be subject to the general anti-abuse rule.

Active conduct: Trade or business is defined by reference to the standard for deducting business expenses. The proposed regulations reserve generally on the definition of active conduct, but they do clarify that it includes the ownership and operation (including leasing, except for triple-net leases) of real property.

Intangible property: For the requirement that a "substantial portion" of the intangible property of a QOZ Business must be used in the active conduct of a trade or business in the QOZ, "substantial portion" is defined as 40 percent.

Partner's basis: If a QOF is organized as a partnership, the partner's basis in the partnership interest starts at zero and is subject to adjustments under the partnership tax rules (including an increase for a partner's share of partnership debt). As a result, partnership debt (and other adjustments to basis) should generally allow for depreciation deductions and tax-free distributions. Any actual or deemed distributions in excess of basis would be an "inclusion event" that triggers deferred gain.

Inheritance: QOF interests received through inheritance and other transfers upon death retain the tax benefits under the statute.

Acquisition of QOF interests: Taxpayers may make a qualifying investment in a QOF through the contribution of property other than cash or through the purchase of a QOF interest from an investor in a QOF.

Carried interest: Interests in a QOF received in exchange for services (e.g., carried interest) do not qualify for the benefits of the statute.

Anti-abuse rule: The IRS can recast a transaction that otherwise qualifies under the statute if a significant purpose of a transaction is to achieve a result inconsistent with the purpose of the statute.

Request for Information

- Treasury also released a Request for Information (RFI) on reporting requirements.
- The RFI announced two anticipated changes to the Form 8996 to require reporting:
- Employer Identification Number (EIN) of the QOZ Business, and
- Amount invested located in particular census tracts.
- The RFI requests comments on additional information that would be helpful for tracking effectiveness of the incentive, ensuring investments in QOZs remain an attractive option, and the costs and benefits of various methods of collecting information.**Future Guidance**

The preamble notes that within a few months, Treasury and the IRS intend to issue rules addressing information reporting requirements and the penalty under section 1400Z-2(f) for failure to meet the 90-percent asset test.

Economic Innovation Group

4.23.2019

Tony Nitti: Takeaways from the New OZ Regulations (Podcast Episode #23)

The long-awaited second tranche of IRS regulatory guidance on Qualified Opportunity Funds has finally arrived. What are the biggest takeaways? Tony Nitti is an Aspen-based real estate tax law expert, CPA, and tax services partner at RubinBrown. Additionally, he serves on the editorial advisory board for The Tax Adviser. And he's also a regular contributor

Continue reading.

April 22, 2019

María de los Angeles Rivera: OZ Investing in Puerto Rico (Podcast Episode #24)

Nearly the entire island of Puerto Rico lies in an opportunity zone. But what are some additional taxpayer benefits to investing in Puerto Rico, now a year and a half removed from the destruction of Hurricane Maria? María de los Angeles Rivera is head of tax and international business center director at Kevane Grant Thornton

Continue reading.

April 24, 2019

Nine States Where Tax Revenues Have Been Slow to Recover Since the Great Recession.

Budgets remain off in some states nearly a decade after the downturn ended, a new analysis shows.

Tax revenues in 41 states have recovered to peak levels that fell sharply around the time of the Great Recession, according to a new analysis from The Pew Charitable Trusts.

That's good news for people concerned about state financial health and how well equipped states will be for the next downturn when it arrives. But there are still nine states where revenues continue to lag, even though the recession technically ended nearly a decade ago.

And there are also some caveats even for the states that have seen revenues rebound.

The Pew data is for state tax revenues in the third quarter of last year, and shows that in that time period, which ran through September, tax collections for all 50 states, after adjusting for inflation, were up 13.4% compared to their peak in 2008.

The nine states where revenues were still down from their recession era peaks include: Alaska (-83.7%), Wyoming (-37.7%), New Mexico (-11.8%), Florida (-9.0%), Ohio (-7.2%), Oklahoma (-6.0%), Louisiana (-4.7%), Mississippi (-1.4%), and New Jersey (-1.4%).

Pew's researchers note there are a variety of reasons that revenues remain off in each of these states, including volatile oil and gas prices, tax cuts, weak economic growth, or unusually high tax revenues prior to the onset of the recession.

In Alaska, where revenues were down the most, compared to a peak in 2008, payments that flow from the oil and gas industry make up a big chunk of the state budget.

In fiscal year 2018, the state's general fund "unrestricted" revenues totaled $2.4 billion, with oil and gas revenues accounting for about 80% of that amount, according to a state report.

But oil production in Alaska has been on a generally downward trajectory since the late 1980s and oil prices today are well below high flying levels reached in mid-2008.

It's still unclear what efforts by the Trump administration and congressional Republicans to pave the way for new drilling in the environmentally sensitive Arctic National Wildlife Refuge will mean for the state's financial outlook in the coming years.

Even for states where tax revenues have recovered, the Pew analysis contains notes of caution. It points out that one recent driver of the revenue gains is the sweeping federal tax code overhaul of 2017, which also creates uncertainty for future state tax revenue trends.

"The result is that some of states' recent tax revenue gains could be short-lived," the report says. "Preliminary figures for the final quarter of 2018, in fact, showed growth softening."

"Future growth is unlikely to be as strong as the temporary effects of the federal tax changes diminish, while economic growth is expected to slow," the report goes on to say.

"Stock market volatility along with a global economic slowdown and the impacts of U.S. trade

uncertainty will also threaten to dampen tax revenue growth in upcoming quarters," it adds.

Some of the states where tax revenues had recovered most strongly, according to the analysis, include North Dakota, which is one of the nation's top oil producing states, as well as Colorado, Oregon, California, Minnesota and Washington state.

The full Pew analysis can be found here.

Route Fifty

By Bill Lucia,
Senior Reporter

APRIL 25, 2019

TAX - HAWAII

Tax Foundation of Hawai'i v. State

Supreme Court of Hawai'i - March 21, 2019 - P.3d - 2019 WL 1292286

Non-profit corporation filed a class action on behalf of all taxpayers in certain city and county challenging implementation of legislation authorizing the State to be reimbursed for its costs in administering rail surcharge on state general excise and use taxes on behalf of city and county, and seeking declaratory, injunctive, and mandamus relief.

The Circuit Court granted State's motion to dismiss. Non-profit corporation appealed.

The Supreme Court held that:

- Tax appeal court did not have exclusive jurisdiction over the claim;
  Statute barring declaratory-relief in controversies with respect to taxes did not preclude corporation from asserting the claim;
- A party seeking declaratory relief need not satisfy three-part injury-in-fact test to have standing, abrogating *Mottl v. Miyahira*, 95 Hawai'i 381, 388, 23 P.3d 716, 723 (2001), *Cty. of Kaua'i ex rel. Nakazawa v. Baptiste*, 115 Hawai'i 15, 26, 165 P.3d 916, 927 (2007), and *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 235 P.3d 1103 (2010);
- Although state courts may consider standing even when not raised by the parties, they are not required to do so sua sponte, as they would be required to do if they perceive issues of subject-matter jurisdiction, abrogating *State v. Kam*, 69 Haw. 483, 488, 748 P.2d 372, 375-76 (1988), *Akinaka v. Disciplinary Board of the Hawai'i Supreme Court*, 91 Hawai'i 51, 979 P.2d 1077 (1999), *Hui Kako'o Aina Ho'opulapula v. Board of Land & Natural Resources*, 112 Hawai'i 28, 59, 143 P.3d 1230, 1261 (2006), *Kēahole Defense Coalition, Inc. v. Board of Land & Natural Resources*, 110 Hawai'i 419, 134 P.3d 585 (2006), and *McDermott v. Ige, 135 Hawai'i* 275, 283, 349 P.3d 382, 390 (2015).
- Corporation had standing to bring declaratory action;
- State's collection of 10% of gross proceeds of rail surcharge not violate equal-protection clauses of the Hawai'i or United States Constitutions; and
- Statute authorizing State's collection of 10% of gross proceeds of rail surcharge did not violate General Laws provision of State Constitution.

['Investors Are Hesitant': Rural America Might Miss Out on 'Opportunity Zones']

Tax breaks likely aren't enough to lure investors to low-income communities in rural areas. There are ways they can become more attractive.

This week, the federal government released new guidelines for the nation's more than 8,700 "opportunity zone" communities trying to attract venture capital investment and boost their struggling economies.

Rural areas account for 40 percent of the designated opportunity zones, which offer private companies and investors tax breaks in exchange for investing in certain low-income communities. But some warn that even with the tax incentives, many rural areas still likely won't benefit unless state and local governments intervene to make the investment less risky.

"A lot of investors are hesitant to work with rural communities," says Grey Dodge, who implemented Florida's Opportunity Zone program as the state's economic development policy director and now supports the program through Madison Street Strategies, a consulting firm. "In contrast to six or seven opportunity zone counties in Florida that don't have to do much — the investment is already flowing there — these other areas haven't seen investment in decades."

Continue reading.

GOVERNING.COM

BY LIZ FARMER | APRIL 19, 2019 AT 4:00 AM

Home Sale Prices in Opportunity Zone Jump 25%.

The federal tax incentive program has had an impact on its designated areas across the country

With government officials projecting that more than $10 billion in private capital will pour into federal Opportunity Zones, real estate values in those areas are expected to jump.

According to one study, so far they're right.

Home sale prices of residential properties in designated Opportunity Zones rose by more than 25 percent over the past year, according to the new Zillow report. Created as part of the 2017 tax overhaul, Opportunity Zones programs give developers and investors a tax benefit only if they build new construction or substantially rehabilitate existing properties. The 8,700 zones are in distressed areas where investment could help lift a community.

The Zillow findings are significant because they show the impact the program is already having on real estate prices.

Selling or building a new home would not qualify for the Opportunity Zone tax breaks under current regulations. But property that is purchased, demolished then redeveloped into new apartment or condo buildings would qualify.

In creating the Opportunity Zone programs, states governors were allowed to nominate 25 percent of eligible tracts from each of their states. The majority of these zones were required to have an average poverty rate of 20 percent and a median family income of no more than 80 percent of the statewide median income.

That means some sites met the requirements but were not selected. Of those eligible sites that were not selected as Opportunity Zones, residential sales only increased 8.4 percent in the last year, according to Zillow.

Investors and developers who hold assets in an Opportunity Zone for at least 10 years can forgo paying capital gains taxes on the appreciation of the asset, the program's biggest benefit.

Investors are raising massive funds but most are still waiting to deploy capital until more regulations are released from the U.S. Treasury Department and the IRS.

Critics of the program still worry it will only benefit wealthy developers in gentrifying and up-an--coming areas that happen to be in Opportunity Zones, and that the truly distressed communities will be ignored.

Recently, Secretary of Housing and Urban Development Ben Carson said the agency will give preference to developers who build affordable housing in the zones.

The Real Deal

By Keith Larsen | April 03, 2019 01:30PM

Treasury Releases Second Tranche of Proposed Regulations for Opportunity Zones

Read the Proposed Regulations.

U.S. Department of the Treasury | Apr. 18

States, Cities Add Sweeteners to Attract 'Opportunity Zone' Investors.

With 8,700 low-income communities competing for private investment, some places are topping on the incentives to make themselves stand out.

Opportunity, it is said, only knocks once. So when it comes to attracting private developers to invest in so-called opportunity zones, several states and cities are working hard to make themselves stand out.

The zones were created in the 2017 federal tax overhaul as a way to entice companies to invest in underdeveloped areas. A company can reduce the capital gains taxes it owes on previous investments if it invests in low-income communities that have been designated as opportunity zones. On Wednesday, the Trump administration released new guidelines for the program.

But with 8,700 opportunity zones across the country — many in big cities that already attract

considerable development dollars — some places are worried about distinguishing themselves. What would make an investment in, say, Oklahoma City any more attractive than one in Boston?

West Virginia lawmakers are looking at an income tax exemption for new opportunity zone investment. Florida is trying to align its opportunity zones with preexisting enterprise zones, which would give investors the benefits of both programs. In Connecticut, some legislators want to exempt historic preservation requirements in opportunity zones if the building has been vacant for more than five years. Maryland lawmakers are considering two bills — one that would offer tax credits to opportunity zone businesses that hire former inmates and another that would offer historic preservation tax credits to businesses that locate in opportunity zones.

“You’re seeing OZs prompt a number of common-sense reforms,” says John Lettieri, president and CEO of the Economic Innovation Group, the Washington, D.C.-based think tank that drafted the opportunity zone legislation.

At the local level, five mayors — of Erie, Pa.; Louisville, Ky.; Oklahoma City; South Bend, Ind., and Stockton, Calif. — have released an investment plan aimed at attracting opportunity zone investment.

Oklahoma City’s downtown opportunity zone also covers its tax increment financing district, allowing investors to benefit from both programs. And thanks to a 2017 ballot initiative in which voters approved $50 million for job creation, the city is able to negotiate additional tax incentives for businesses in return for an agreed-upon number of jobs to be created. Mayor David Holt says he plans to use all the tools available to attract opportunity zone businesses to his city.

“If you are looking for ways for cities to not just sit back and wait for people to invest in opportunity zones,” Holt says, “we have a little to play with.”

Still, attracting businesses to small and midsize cities remains a challenge. Oklahoma City, for all of its efforts, has not yet secured an investment in any of its 117 opportunity zones.

But Holt remains optimistic. He says the opportunity zone program has already put cities like his on the map and that investors are considering places they may not have looked at in the past.

“If nothing else, opportunity zones get people looking around at places around the country,” Holt says. “So maybe people look at the best deal in OKC and invest here instead of the 200th best deal in Los Angeles.”

GOVERNING.COM

BY J. BRIAN CHARLES | APRIL 17, 2019 AT 3:23 PM

Treasury Offers New Guidance on Opportunity Zones.

The Treasury Department on Wednesday released a second set of guidance on the “opportunity zone” program created by President Trump’s tax law, the same day the White House held an event to tout the program.

Under the program, individuals and businesses can receive capital gains tax breaks if they invest in economically distressed communities that have been designated as opportunity zones. The new

guidance is designed to provide flexibility for investors and funds that invest in the zones, as well as certainty for stakeholders, a senior Treasury official said.

“We are pleased to issue guidance that provides greater flexibility for communities and investors as we continue to encourage investment and development in Opportunity Zones,” Treasury Secretary Steven Mnuchin said in a statement. “This incentive will foster economic revitalization, create jobs and spur economic growth that will move these communities forward and create a brighter future.”

The opportunity zone portion of the 2017 GOP tax law is one of the pieces of the law that the White House has touted the most.

The White House held an event Wednesday on opportunity zones with state and local government officials where Trump, Mnuchin and Housing and Urban Development Secretary Ben Carson spoke. That event comes two days after Trump went to Minnesota to tout the opportunity zones and other portions of his 2017 tax law on the tax-filing deadline.

“It’s really a crucial part of our new tax law to help low-income Americans,” Trump said of opportunity zones on Wednesday.

The opportunity-zone program has bipartisan support from those who hope it will revitalize distressed areas, but has also drawn criticism from those who argue it will primarily benefit wealthy investors rather than residents of low-income neighborhoods.

Treasury released a first set of guidance on opportunity zones in October, aimed at providing investors with the information they needed to set up business arrangements in the zones. The guidance released Wednesday was designed to answer questions that stakeholders have raised and provide clarity.

A key portion of the second batch of proposed rules is designed to make it easier for funds to ensure that they are complying with a requirement that they have 90 percent of their assets invested in opportunity zones.

The rules provide that a fund doesn’t have to take assets into account for purposes of the requirement unless the assets have been in the fund for at least six months. They also provide that if a fund sells an asset, it has up to 12 months to reinvest in a new appropriate investment, according to senior Treasury officials.

The proposed rules also are designed to provide more clarity for individuals and businesses who invest in opportunity funds. They provide that someone can invest in an opportunity fund by either directly investing in the fund or by purchasing an interest in the fund from an existing investor. They also provide that if an investor has held an investment in an opportunity zone fund for at least 10 years and the fund sells an asset, the gain from the sale of the asset is tax-free to the investor, officials said.

In addition to offering more proposed rules on Wednesday, Treasury released a document asking for comments about how to best measure the economic impact taking place in the opportunity zones.

THE HILL

BY NAOMI JAGODA – 04/17/19 01:24 PM EDT

Latest Opportunity Zones Guidelines Offer More Clarity For Business Investments.

“This reg removes a lot of the most obvious impediments that have kept capital on the sidelines,” says one expert.

A new round of proposed Opportunity Zones regulations the U.S. Treasury Department rolled out Wednesday could help get more capital flowing to low-income areas under the program, particularly to start-up companies and other non-real estate business ventures.

The economic development initiative has been in a lengthy ramp-up phase since it was created as part of the 2017 federal tax overhaul. Treasury released an initial set of draft rules last fall that were seen as a big step forward, but left significant issues unaddressed.

“There’s sort of been this promise of Opportunity Zone capital, which a lot of places haven’t seen yet and I think far more places are going to see it now,” said Steve Glickman, founder and CEO of Develop LLC, an advisory firm for opportunity funds.

“Really up until this point you saw Opportunity Zone capital, because of the amount of regulatory uncertainty, going into deals that would have happened anyhow,” he added.

The Trump administration on Wednesday held an event in Washington, D.C. focused on the program, which state, local and tribal leaders attended. “Our goal is to rebuild homes, schools, businesses, and communities that need it the most,” President Trump said.

“We want to see loving homes, safe neighborhoods, and a gleaming Main Street,” he added during his remarks.

Mayor George Flaggs, Jr., of Vicksburg, Mississippi, said at the event that “as a mayor of a city and former legislator for 25 years, I’ve never seen any piece of legislation that allows more collaboration between federal, state, and local government.”

Opportunity Zones offer people and companies substantial tax breaks on capital gains they funnel into “qualified opportunity funds.” The funds are then supposed to invest the money into economically distressed census tracts that have been designated as zones.

The program is designed to reward those who keep their money in the zones longer, with tiered tax breaks unlocked at the five, seven and 10 year marks.

Some people tracking the initiative have raised concerns that it could mainly lead to money getting pumped into relatively safe real estate investments, while providing a pathway for wealthy investors to get off the hook for federal capital gains tax obligations.

That’s not the outcome that many state and local leaders would like to see. For them and others, a key part of the program’s success will be ensuring that capital also flows to “operating businesses” that will help generate new jobs and local wealth.

John Lettieri, president and CEO of the Economic Innovation Group, a think-tank that has played a role in shaping the program, said the latest regulations are positive step on this front.

“This reg removes a lot of the most obvious impediments that have kept capital on the sidelines to

date, particularly on the operating business side," he said. "I think it's going to free up a lot of capital."

A detailed summary of the regulations published by Michael Novogradac, managing partner of Novogradac, a firm that provides accounting and consulting services, echoes that view. It says one of the biggest takeaways is that the guidance "addresses gating issues" that were limiting investment in operating businesses.

"The second tranche of guidance provides answers to many questions and includes information that will help guide investors, fund managers and others," Novogradac adds.

Glickman and Lettieri described broadly some of the ways the 169-page draft regulations promise to lay new groundwork for business investment in the zones.

For one, the rules provide additional flexibility and clarity about the timeframe for funds to make investments and how they can go about reinvesting gains generated from within the zones.

Glickman explained that one of the reasons the reinvestment guidelines are important is that, compared to a real estate deal, investors tend to have less control over the timing of when they will exit out of an investment in an operating business.

For example, they may have limited sway over the business' decisions, or when a company goes public or gets acquired.

Treasury has set requirements for how much of a fund's assets must be invested in zones. The new guidance makes clear that the proceeds from the sale of an Opportunity Zone investment would not run afoul of this requirement so long as the money is reinvested within a year.

Likewise, investors would be shielded from losing their capital gains tax breaks under these circumstances.

"That allows investors and funds to deal with reality that there may be exits from their business investments before 10 years that won't blow up the tax incentive," Glickman said.

Another concern with the initial set of rules had to do with a mandate that at least 50 percent of the gross income of a business that is eligible for investment must come from commercial activity in a zone.

Treasury in its latest guidance provides several "safe harbor" options to comply with this guideline.

For instance, one of these safe harbors allows a business to qualify if at least half of the work performed by its employees, based on hours, occurs in a zone—even if it's selling goods or services outside the area.

Lettieri also flagged a part of the regulations that deals with buildings that have been vacant for at least five years, and said it should create more of a "glide path" for redeveloping this type of property.

Other notable parts of the draft guidance have to do with how opportunity funds would be wound down as they near their end, and how a 31-month time window for recipients of capital to put the funds to use would apply to operating businesses.

Glickman predicted that by the end of June far more money will have flowed into the Opportunity

Zones marketplace.

“I think you’ll start seeing the changes on the ground,” he said. “More capital going to more places, across a bigger set of assets. And this really starts to be the true test of the market.”

Route Fifty

By Bill Lucia,
Senior Reporter

APRIL 17, 2019

[High-Tech Start-Ups Get Relief From Latest Opportunity Zone Proposed Treasury Regulations.]

Qualified Opportunity Zones (“QOZs”) are low-income population census tracts situated in urban, suburban or rural areas that have been specifically designated as QOZs by the governors of the various states and U.S. territories in which such QOZs are situated, and certified as such by the U.S. Treasury. The legislative framework for QOZs was added to the Internal Revenue Code by the Tax Cuts and Jobs Act signed into law by President Trump on December 22, 2017. The QOZ legislation is designed to incentivize the migration of equity capital into QOZs for purposes of the formation and establishment of new businesses, the development and redevelopment of real estate, and other forms of economic stimuli, with the ultimate goal of job creation and poverty reduction in the QOZs. On Wednesday, April 18, 2019, the Internal Revenue Service (the “IRS”) released the long-awaited second set of QOZ Proposed Treasury Regulations (the “New Proposed Regulations”) relating to QOZs and qualified opportunity funds.

In response to requests made by the many and varied special interest groups that submitted comments to the first set of QOZ Proposed Treasury Regulations issued on October 19, 2018, the New Proposed Regulations – among many other things — attempt to level the playing field as between real estate-centric businesses physically situated inside the applicable QOZ, e.g., a professional office building or shopping center or municipal parking garage, versus start-up businesses that do have a physical presence inside the QOZ but where the majority of sales are to customers situated outside the boundary of the QOZ. By way of example, a non-real estate-centric business could be a start-up business that develops computer software applications where the customer base is global in scope and the customers purchase the computer software applications through internet download by way of an Amazon-like portal. In the case of real estate-centric businesses, gross income is inherently sourced inside the physical geographic confines of the applicable QOZ. In the latter case, where the customers purchasing the ‘intangible’ QOZB products via internet download are primarily situated outside the physical geographic confines of the applicable QOZ, gross income is inherently sourced outside the physical geographic confines of the applicable QOZ.

Before the issuance of the New Proposed Regulations, QOZ businesses (“QOZBs”) were required to generate at least 50% of their gross income inside the physical geographic confines of the QOZ – an income sourcing rule that stopped at the boundaries of the particular census tract in which the QOZB is situated. For real estate-centric QOZBs, this 50% of gross income sourcing rule did not present a problem because the gross income attributable to such QOZBs is inherently sourced within the applicable QOZ. On the other hand, QOZBs with substantial sales to customers situated outside

the physical geographic confines of the applicable QOZ had little to no chance of complying with the 50% of gross income sourcing rule because the gross income attributable to such QOZBs is inherently sourced outside the physical geographic confines of the applicable QOZ. The New Proposed Regulations provide three alternative safe-harbors – and a separate 'facts and circumstances' test — designed to permit non-real estate-centric QOZBs to demonstrate sufficient nexus to the QOZ in which such QOZBs are situated so as to satisfy what in each case amounts to an alternative test as a replacement for the 50% of gross income sourcing rule, i.e., a QOZB only needs to satisfy one of the three alternative tests – or the separate 'facts and circumstances' test — to qualify.

First, the New Proposed Regulations permit a QOZB to qualify if at least 50% of the services performed (determined by reference to hours worked during the applicable tax year) by employees and/or independent contractors (and employees of independent contractors) of such QOZB are performed within the physical geographic confines of the QOZ. The formula for determination of whether or not the first safe harbor is attained is the fraction (expressed as a percentage), the numerator of which is the aggregate hours worked by employees and/or independent contractors (and employees of independent contractors) of the QOZB where the services are performed within the physical geographic confines of the QOZ, and the denominator of which is the aggregate hours worked by all employees and/or independent contractors (and employees of independent contractors) of the QOZB without regard to geography.

Second, the New Proposed Regulations permit a QOZB to qualify if at least 50% of the services performed (determined by reference to amounts paid for the services performed during the applicable tax year) by employees and/or independent contractors (and employees of independent contractors) of the QOZB are performed within the physical geographic confines of the QOZ. The formula for determination of whether or not the second safe harbor is attained is the fraction (expressed as a percentage), the numerator of which is the aggregate amount paid to employees and/or independent contractors (and employees of independent contractors) of the QOZB where the services are performed within the physical geographic confines of the QOZ, and the denominator of which is the aggregate amount paid to all employees and/or independent contractors (and employees of independent contractors) of the QOZB without regard to geography. Third, the New Proposed Regulations permit a QOZB to qualify if at least 50% of the gross income of the QOZB is 'deemed to be sourced' in the applicable QOZ based on a conjunctive test determined by reference to (i) situs of tangible property within the physical geographic confines of the QOZ; and (ii) the performance of services critical to the 'management and control' of the QOZB, where such services are performed within the physical geographic confines of the QOZ. The third safe harbor is attained if the foregoing clauses (i) and (ii) are each necessary to generate 50% of the gross income of the QOZB.

Lastly, if a QOZB cannot satisfy taxpayers any of the foregoing three (3) safe harbors, then the New Proposed Regulations permit a QOZB to qualify if, based on the totality of the facts and circumstances, at least 50% of the gross income of the QOZB is 'deemed to be attributable' to the active conduct of a trade or business in the QOZ. The New Proposed Regulations are not entirely clear as to how this separate 'facts and circumstances' test works but the IRS has requested further comments on this and on the foregoing three (3) safe harbors.

by Mark Wisniewski

April 18 2019

Berger Singerman LLP

Chris Paganelli: How to Assess OZ Funds (Podcast Episode #22)

What are some due diligence best practices that every investor should undertake before investing in a Qualified Opportunity Fund? Chris Paganelli is a San Francisco Bay Area-based financial advisor at wealth management firm Stifel. He advises high net worth clients on tax strategy, wealth preservation, and portfolio management — with a recent focus on qualified

Continue reading.

April 17, 2019

IRS Releases Second Tranche of Opportunity Zones Guidance.

The long-awaited second tranche of regulations on Investing in Qualified Opportunity Funds has been approved by OIRA and is now available for public comment. Click here to read the new regulations. The 169-page regulatory document is more than twice the size of the first tranche of guidance that was released last October and clarifies most

Continue reading.

April 17, 2019

Federal Tax Reform May Be Saving Money for States, Even High-Tax Ones.

The part of the 2017 law that high-tax states are battling in court is likely helping them lower their debt — at least in the short-term.

Many states that lobbied against federal tax reform's limit on a certain tax deduction are now benefiting from a potential effect of that 2017 policy change.

Tax reform capped the state and local taxes (SALT) that filers can deduct from their federally declared income at $10,000. High-tax states like California, New Jersey and New York have sued to block that change because their state and local taxes can be twice that amount for residents.

But as more people turn to municipal bonds, seemingly as a way to lower their federal tax burden, the result is lower borrowing rates for state governments, which saves money for them.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | APRIL 12, 2019 AT 4:00 AM

The New Tax Law Is Making Waves in Municipal Bonds.

Most tax-exempt municipal bonds have become pricey this tax season. But the opposite has happened in the market for short-term municipal debt.

That market's weekly benchmark interest rate rose by the most since the financial crisis last week, as investors pulled cash from muni money-market funds to pay their tax bills.

The back story. Municipal governments can borrow at floating short-term rates by issuing variable-rate demand notes, or VRDNs. Those notes are effectively daily or weekly loans, and usually are backed by banks. (VRDNs actually have long maturities, but because they allow investors to get their money back on a daily or weekly basis, money-market funds can own them.)

The differential between VRDN yields and other U.S. interest rates has hardly moved since the financial crisis. Back then, the benchmark for that spread—the Sifma Municipal Swap Index—soared by 3.36 percentage points in the span of a week.

What's new. The Sifma index rose by 0.5 percentage points in the week ended Wednesday. That is the largest increase since the week ended Sept. 24, 2008, when the index rose by 2.81 percentage points.

That increase wasn't entirely unexpected; tax season usually puts pressure on the VRDN market. Because VRDNs offer daily and weekly opportunities to withdraw money, individual investors often sell them when they need cash fast, pushing prices down and yields up.

And last week was the deadline for Americans to file their returns for the first time under the new U.S. tax law. While it isn't yet clear whether taxes went up or down for most Americans, state and local taxes went up, and some advisers say their clients were surprised with tax bills.

Indeed, investors withdrew $4.5 billion from tax-exempt money market funds in the week ended Wednesday, according to Lipper, following a $1.8 billion outflow the week before. Banks were left with large inventories of VRDNs on their balance sheets as a result, according to a note from Citigroup .

Looking ahead. It won't be long before yields on VRDNs return to levels that are closer to other U.S. interest rates, analysts say. Barclays expects the Sifma index will keep rising through the end of April, and then return to normal.

That is because investors typically receive a large amount of cash from muni-bond coupon payments in May, June and July. That extra cash will probably find its way into the VRDN market. After all, the fixed-rate municipal bond market is looking expensive.

Barron's

By Alexandra Scaggs

April 19, 2019 12:50 p.m. ET

TAX - ILLINOIS

City of Chicago v. City of Kankakee

Supreme Court of Illinois - March 21, 2019 - N.E.3d - 2019 IL 122878 - 2019 WL 1292293

Plaintiff municipalities brought action against defendant municipalities, brokers, and internet retailers, seeking to recover use tax revenue that was purportedly unjustly retained by defendants under an alleged scheme by which they misreported situs of online retail sales.

The Circuit Court entered an order dismissing claims, and plaintiffs appealed. The Appellate Court reversed and remanded. Leave to appeal was granted.

The Supreme Court held that Illinois Department of Revenue had exclusive jurisdiction over plaintiffs' claims.

Illinois Department of Revenue had exclusive jurisdiction over plaintiff municipalities' claims against defendant municipalities, brokers, and internet retailers to recover use tax revenue that was purportedly unjustly retained by defendants under an alleged scheme by which they misreported situs of online retail sales, since Department was vested with sole authority to audit disputed transactions and to distribute and redistribute tax revenue due to any error.

TAX - COLORADO

Hinsdale County Board of Equalization v. HDH Partnership

Supreme Court of Colorado - April 8, 2019 - P.3d - 2019 WL 1510453 - 2019 CO 22

Hunting and fishing club members appealed decision of the Board of Assessment Appeals which agreed that members, who each held record title to tracts of land within club, were the owners of the parcels and bore the property tax burden.

The Court of Appeals reversed and remanded. Both the Board of Equalization and the Board of Assessment appeals petitioned for writ of certiorari.

The Supreme Court held that:

- Unit assessment rule, rather than the substance-over-form doctrine, applied to determine whether club members or the club itself, were the owners of the parcels and bore the property tax burden, and
- Club's restrictive covenants and bylaws did not operate to strip club members who held record title to tracts of land within the club of fee ownership of their individual parcels, or their property tax liability.

A Sanguine Paradigm for Local Governments to Curb Uncollected Sales Tax Revenues.

Given the rapid change in technology and access to information, it's safe to say that U.S. consumer habits are changing at a rapid pace and the private sector is well equipped to meet and facilitate these dynamic consumer habits.

Here are some astonishing consumer figures:

1. The U.S. Commerce Department reported that consumers spent over $500 billion online with U.S. merchants in 2018, which was 15% higher than the previous year
2. U.S. e-commerce sales now account for almost 15% of total retail sales in the U.S. This figure was merely around 6.5% in 2012

Continue reading.

municipalbonds.com

by Jayden Sangha

Apr 17, 2019

The 'Absurd' Muni-Market Signal Showing SALT Tax Pinch.

- **SIFMA index soars to highest since 2008 amid tax selling**
- **Index may decline again as higher yields will attract buyers**

The $3.8 trillion municipal-bond market offered yet another sign this week that the new tax regime may be painful for some Americans.

An index of variable-rate municipal-bond debt saw the biggest jump in yields since 2008 on Wednesday, an increase likely due to retail investors selling their holdings to pay their tax bills. The bump in yields typically occurs in March and April ahead of the tax filing deadline, but this year's jump was delayed — suggesting that investors waited until the last minute to file their returns with the U.S. Internal Revenue Service.

Congress in late 2017 approved a tax overhaul that capped how much state and local taxes can be deducted from federal returns, hitting high-tax states like New York and California hard.

Continue reading.

Bloomberg Markets

By Amanda Albright and Michelle Kaske

April 18, 2019, 10:30 AM PDT

Opportunity Zones Knocking, But Few Answering the Call So Far.

- **Lack of Treasury rules, vetting of funds are slowing buy-ins**
- **GOP law offers tax-free gains and seven-year break on projects**

Investors eyeing President Donald Trump's Opportunity Zones face a ticking clock if they want to fully capture one of the biggest tax breaks in decades.

But few so far seem ready to make the leap.

Tucked into the 2017 tax overhaul, Opportunity Zones let investors reduce and postpone taxes on

profits from stocks, businesses and investment partnerships provided the money is reinvested in one of more than 8,700 low-income communities across America. Investors can also avoid tax on future profits from those investments, on which they must make “substantial improvements.”

To reap the entire tax bounty, investors have to buy into eligible projects by the end of this year. For investors wanting to fully use the benefit to shelter last year’s profits from hedge funds and other partnerships, the deadline is even sooner — June 29.

The breaks are meant to steer money to parts of the country that have long been starved for capital, creating jobs and economic growth. Critics have said that some zones — like downtown Portland, Oregon and the section of Long Island City, Queens, that was to be home to Amazon.com Inc.’s second headquarters — would have no trouble attracting investors.

The tax opportunity has created a frenzy among private client groups at banks and law, accounting and real estate firms, which in recent months have pumped out scores of white papers and client alerts extolling their tax benefit. An Internal Revenue Service hearing on the benefit in February had lines out the door, something tax experts say is unheard of, and JPMorgan Chase and Co. said that 2,000 clients had tuned in to a recent webinar it held.

“There is a huge amount of interest,” said Kathy Rosa, the global head of alternative investments for J.P. Morgan Private Bank.

But despite a feverish push from developers, accountants and law firms, investors are hesitating before jumping into Opportunity Zone funds, according to wealth advisers.

Some are awaiting more guidance from the Treasury Department, which is expected to release rules this month, while others are heeding caution that some funds are riskier bets or aren’t yet up and running.

Devin Redmond, a 41-year-old property investor, said he had decided not to put $400,000 in capital gains from selling his San Francisco condo this year into an Opportunity Zone fund. “You have to have a really compelling investment,” he said, citing uncertainty over what a fund would actually invest in and the long, 10-year lock up period for tax-free returns.

“The clock is ticking on this opportunity,” said Jeffrey MacDonald, the head of fixed income strategies at Fiduciary Trust Company International, a wealth planning firm that manages $77 billion in client assets.

But MacDonald also acknowledged that there wasn’t “much time” for “extra due diligence” on the Opportunity Zone funds, and he hasn’t put any clients into the funds yet.

Nina Streeter, a director of asset management at Abbot Downing, said that “it’s quite clear to me that the amount of capital closed so far is small.”

“To date, most of the opportunities would not be appropriate investment strategies for our clients,” said Justina Lai, the director of impact investing and a shareholder of Wetherby Asset Management, which manages around $4.5 billion.

Treasury Secretary Steven Mnuchin predicted the tax incentive for Opportunity Zones could take in $100 billion of investments a year. CoStar Realty Information Inc., a real estate data firm, says it’s tracking more than 258 funds. But OpportunityDB, a database for Opportunity Zones, saw only 88 funds seeking to raise a total $26.4 billion as of April 1.

The single largest is commercial real estate firm CIM Group's $5 billion fund, followed by hedge fund firm Skybridge Capital with $3 billion and property developer Decennial Group with $1 billion. Separately, Wall Street banks are hoping to put their wealthy private clients into funds.

It's unknown how many property funds have so-called shovel-ready projects – key if they're to meet criteria governing how soon they must be up and running after taking in investors' money. And most funds are focused on investing in a single piece of property, according to a note by JPMorgan Chase last December -- riskier than diversifying across different properties and regions.

"There's almost this irrational exuberance on the tax side," said Lisa Featherngill, the head of legacy and wealth planning at Abbot Downing, part of Wells Fargo Inc. "Not many people are aware of the need to actually look at the investment."

One of the biggest risks is if the fund becomes disqualified so that the investor no longer is entitled to the tax break. For example, some funds are focused on newly constructed buildings that haven't been issued certificates of occupancy -- a requirement of the provision.

"The last thing you want early is a blow-up in the fund's life that would trip it out of compliance and cause capital gains to be recognized much sooner," Streeter said.

Steve Glickman, who helped draft the provision for tax-writers through the Economic Innovation Group, a bipartisan research and policy organization, and now runs Develop LLC, an advisory firm devoted to the program, called it "the largest capital gains incentive in a generation."

Yet timing is crucial, hence advisers' anxiety. Investors get a reduction in postponed taxes – 10 percent if they hold on to their new investments for five years, and an additional 5 percent for another two years. But to capture that extra 5 percent before the postponed tax bill comes due at the end of 2026, investors have to get in by Dec. 31.

Investors have to put their profits from other investments into qualified funds within 180 days of realizing them. That means a stock investor who wants the full tax benefit can roll in her gains if they're realized by Dec. 31.

But for investors in hedge funds and other partnerships seeking to shelter previous gains, the deadline is June 29 because the taxable year for those investments typically ends on Dec. 31.

Another risk, say wealth advisers, is that people might invest too much in the fund and not set aside enough cash to pay their postponed taxes in a lump sum. Advisers say they're also working to get some clients, with concerns like those of Redmond, comfortable with their investment being locked up for 10 years before it's tax-free.

Other unanswered questions in the provision include how the provision works for companies whose economic activity – online sales, for example – fall outside their physical location in a qualified zone. Rosa said it's also not clear how investors could refinance their projects while remaining in compliance with the provision.

The Treasury Department is expected to issue a second round of regulations governing the provision sometime this month, fleshing out a first round last October. Treasury spokeswoman Tricia McLaughlin declined to comment.

MacDonald said he was worried that new rules issued this far into the process would be "like changing the tire on a moving bus." Still, he added, there was "fear-of-missing-out-pressure" because, he insists, the program is "the opportunity of a lifetime."

Bloomberg Politics

By Lynnley Browning

April 10, 2019, 1:00 AM PDT

SALT Cap Isn't Driving an Exodus From High Tax States, Ratings Agency Says.

At least not yet.

Throwing some cool water on claims by politicians and commentators on the left and right, a credit ratings agency said this week there are no signs yet that people have been fleeing higher tax states due to a new cap on a federal deduction for state and local taxes.

Migration rates out of California, Connecticut, Maryland, New Jersey and New York—states where taxpayers have used the "SALT" deduction heavily—are below pre-recession levels and generally track with the U.S. as a whole, says a report from Moody's Investors Service.

"Compared with the nation, states with high state and local taxes do not have especially elevated rates of out-migration," the report says.

"Many people are moving from one high-tax state to another," it adds, noting that, in 2017, about 25 to 30 percent of people who left New York, Connecticut and New Jersey moved to another one of the five higher-tax states that have had the leading levels of SALT deductions.

It's possible trends could change in future years and people could start pulling up stakes for places where state and local taxes are lower. The authors of the report say it's too early to know, as although the $10,000 deduction cap was set in 2017 this is the first tax season when people will file their taxes with the limit in place.

But they also suggest job opportunities and demographic trends will influence moving patterns more than tax burdens. Slower economic growth and an aging population across the U.S., their report says, means people will be less likely to move than in past years.

The report does caution that Connecticut and New Jersey, with lackluster job growth and few booming cities, may not be able to make up for the departure of older, wealthier residents.

Even though older residents are less likely to move, the report says, departures by older taxpayers who are wealthier can put a disproportionate dent in a state's tax base.

Gov. Andrew Cuomo earlier this year suggested one of the reasons New York was seeing slippage in income tax collections was because of the $10,000 cap on SALT deductions.

He's described the policy as an "economic civil war" that helps Republican states at the expense of Democratic ones and has formed a coalition to try to get the SALT limit scrapped.

The governor was not alone in drawing a connection between the tax deduction cap and interstate migration.

For instance, conservative economists Arthur Laffer and Stephen Moore last year penned a Wall

Street Journal editorial predicting millions of people and thousands of businesses would exit “high-tax blue states” in coming years, with the SALT cap helping fuel the trend.

Route Fifty

by Bill Lucia

APRIL 11, 2019

Jill Homan: OZ Perspective from Washington DC (Podcast Episode #20)

What is the mood in Washington regarding the Opportunity Zones policy? And what should we expect from the second tranche of IRS regulations on Qualified Opportunity Funds? Jill Homan is founder and president of Javelin 19 Investments, a Washington DC-based commercial real estate investor, developer, and Opportunity Zones advisor. She testified at the IRS hearing

Continue reading.

April 10, 2019

Daniel Kowalski: Upcoming IRS Regulations on QOFs (Podcast Episode #21)

The long awaited second tranche of IRS regulatory guidance on Qualified Opportunity Funds will produce a set of principles and safe harbors that will give investors the ability to move forward. The best part? One senior Treasury official has said that they want qualified opportunity zone businesses “to sell to the world.” Daniel Kowalski is

Continue reading.

April 15, 2019

TAX - INDIANA

Daw v. Hancock County Assessor

Tax Court of Indiana - March 8, 2019 - N.E.3d - 2019 WL 1198821

Property owners filed petition for review of Indiana Board of Tax Review’s determination that declined to address their annexation and storm-water claims and that they failed to show that assessment of their property should be changed.

The Indiana Tax Court affirmed in part, and remanded. Town intervened and filed petition for rehearing before Tax Court.

The Indiana Tax Court held that:

- Tax Court would decline to grant town rehearing on issue of whether its storm water charges

constituted a tax;
- Property owners were not entitled to challenge town's annexation decision by seeking declaratory judgment;
- Town was permitted to assert claim that property owners' storm water claim was untimely under Storm Water Act; and
- Property owners were not entitled to assert storm water claim by seeking declaratory judgment.

Tax Court would decline to grant town rehearing on issue of whether its storm water charges constituted a tax, in action by property owners, seeking review of Indiana Board of Tax Review's determination, declining to address property owners' annexation and storm-water claims, and that they failed to show that assessment of their property should be change, in which action town intervened, where town's arguments were based on repealed ordinance.

Property owners were not entitled to challenge town's annexation decision by seeking declaratory judgment, in their action challenging determination of Indiana Board of Tax Review, declining to address their annexation claim, where property owners owned annexation area, and property owners failed to allege their land was not contiguous to town's boundaries or that town failed to implement a fiscal plan.

Town was permitted to assert claim that property owners' storm water claim was untimely under Storm Water Act, in property owners' action seeking review of Indiana Board of Tax Review's determination, declining to address storm-water claim, in which action town intervened, where town's claim had not already been determined by court.

Property owners were not entitled to assert storm water claim related to town's storm water project by seeking declaratory judgment, in their action challenging determination of Indiana Board of Tax Review, declining to address storm-water claim; property owners were able, under Storm Water Act, to assert claim by written remonstrance, and then to appeal town's decision concerning storm water project, if necessary, but they failed to do so.

TAX - SOUTH CAROLINA

CSX Transportation, Inc. v. South Carolina Department of Revenue

United States District Court, D. South Carolina, Columbia Division - January 7, 2019 - 357 F.Supp.3d 497

Railroad brought action against South Carolina Department of Revenue alleging that South Carolina's property tax scheme discriminated against railroads in violation of Railroad Revitalization and Regulatory Reform Act (4–R Act) by excluding railroad property from benefit of 15% cap to increases in appraised values under South Carolina Valuation Act, and seeking injunctive and declaratory relief.

Following bench trial, the United States District Court entered judgment in favor of Department. Railroad appealed. The Court of Appeals, 851 F.3d 320, vacated and remanded.

On remand, the District Court held that:

- Appropriate comparison class to railroad consisted of the other commercial and industrial real property taxpayers within South Carolina, and
- State provided sufficient justification for Valuation Act's failure to extend cap to railroad.

Provision of South Carolina Valuation Act imposing 15 percent cap on increase in fair market value of real property attributable to a periodic countywide appraisal and equalization program constituted a limitation on increases on ad valorem property taxes in South Carolina and not an exemption from tax, and thus provision was subject to Railroad Revitalization and Regulatory Reform Act (4–R Act) prohibition on any tax that resulted in discriminatory treatment of a railroad; whether or not railroad would be allowed to benefit from 15 percent cap would affect railroad's property tax.

Appropriate comparison class to railroad consisted of the other commercial and industrial real property taxpayers within South Carolina, in railroad's action against South Carolina alleging violation of Railroad Revitalization and Regulatory Reform Act (4–R Act) through South Carolina Valuation Act's exclusion of properties valued by the unit valuation method from a general cap on permissible increases in appraised values of commercial and industrial real properties.

State provided sufficient justification for South Carolina Valuation Act's failure to extend general 15 percent cap on permissible increases in appraised values of commercial and industrial real properties to railroad, and thus failure to extend cap to railroad did not violate Railroad Revitalization and Regulatory Reform Act (4–R Act) prohibition on discriminatory tax treatment of railroad; a 20 percent equalization factor applied to railroads but not to commercial and industrial taxpayers, state law provided various tax exemptions for benefit of railroads, and because sale of commercial and industrial property triggered assessment that set fair market value on property without regard to 15 percent cap, lost value was recouped in whole or in part for tax base at time of sale.

IRS Clarifies General Public Use Requirements for Residential Rental Projects Tax-Exempt Bonds.

IRS Clarifies General Public Use Requirements for Residential Rental Projects Tax-Exempt Bonds

The Internal Revenue Service recently eliminated an inconsistency between the definition of "general public use" for purposes of the low-income housing tax credit (LIHTC) under §42 of the Internal Revenue Code of 1986 (the "Code") and the definition of "general public use" for purposes of tax-exempt multifamily housing bonds under Code §142(d).

General public use of residential rental property is required by regulations for LIHTC and tax-exempt bonds as a condition of eligibility for tax benefits. Revenue Procedure 2019-17 clarifies that the LIHTC statutory provision permitting tenant group restrictions or preferences also applies for purposes of the tax-exempt bonds rules.

Specifically, Code §42(g)(9) provides that a low-income housing project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants (A) with special needs, (B) who are members of a specified group under a federal program or state program or policy that supports housing for such a specified group, or (C) who are involved in artistic or literary activities.

The revenue procedure states that a §142(d) qualified residential rental project does not fail to meet the general public use requirement solely because of the above-described occupancy restrictions or preferences. The revenue procedure provides as an example certain housing preferences for military veterans.

This new policy is important to sponsors and developers of affordable housing because it broadens availability of a favored technique for structuring residential rental project financing. If a majority of a project is financed with tax-exempt multifamily housing bonds issued under Code §142(d), the property is eligible for the 4% LIHTC. The presence of the provision permitting occupancy restrictions or preferences in the LIHTC rules (added in 2008) and its absence in the tax-exempt bond rules have led bond counsel to disapprove tax-exempt bond financing of projects with such tenant restrictions or preferences. It is now possible to use tax-exempt bonds and the 4% LIHTC to finance projects with restrictions or preferences in favor of tenants such as military veterans and, depending on the state in which the project is located, teachers, police officers, farmworkers, and other groups.

Dinsmore & Shohl LLP

by Clifford A. Pastel, Sujyot S. Patel, Alexandra C. Rock, Steve M. Sparks & Lona J. Valentine

Tuesday, April 9, 2019

Changes to the State and Local Tax (SALT) Deduction Hitting Taxpayers Hard.

This tax season has been marked by a round of law changes, making filing taxes an even more confusing and frustrating experience for many Americans who normally rely on their refunds.

Among the biggest changes were to the state and local tax deduction amounts, also referred to as the SALT deduction cap. Now that deduction limits are standard across the board regardless of income, both middle and upper-class taxpayers are feeling the financial consequences of the new limits.

Continue reading.

BANKRATE

by KELLY ANNE SMITH

APRIL 10, 2019

Tax Headaches? A Dose of Muni Bonds Might Help.

The new tax law has been a boon for muni bonds.

Wholesale changes in the tax code that went into effect in 2018 contained two provisions that have fueled the municipal bond market.

Many households completing their 2018 return became aware of a central change: A household's federal deduction for state and local taxes (SALT) payments is now limited to $10,000 a year. That has its biggest impact in high-tax states like California, New York, New Jersey and Connecticut, where demand for muni bonds has risen.

The tax law also cut back on the supply of muni bonds by eliminating a category known as "advanced refunding issues," which accounted for around one-fifth of muni bond issues annually.

Continue reading.

The New York Times

By Carla Fried

April 12, 2019

Stefan Schimenes: Using AI to Improve OZ Investing (Podcast Episode #19)

How can AI be used to improve Opportunity Zone investing?

Former AirBNB executive Stefan Schimenes founded InvestReal last month with a mission to create the first data-driven real estate marketplace for Opportunity Zones, using AI to support investment decisions with data from numerous sources.

Click here to listen to my conversation with Stefan.

Opportunity Db

By Jimmy Atkinson

April 3, 2019

Treasury Official Answers Questions on Opportunity Zones Regulations.

On March 12, the second tranche of IRS regulatory guidance on Qualified Opportunity Funds was submitted to the Office of Information and Regulatory Affairs. OIRA is a branch of the White House's Office of Management and Budget.

While the first tranche of regulatory guidance released in October of last year dealt primarily with real estate, this second tranche will clarify how the statute might work in the context of an operating business.

But what specifically might be in this second tranche? And when will it be released to the public?

Daniel Kowalski, counselor to the Treasury Secretary, answered many questions during his prepared keynote address and subsequent Q&A session at the Coasis Coalition Opportunity Zone SuperConference last week. Last Thursday, April 4, he spoke to a room full of investors, developers, and other Opportunity Zones participants at the Plano Event Center just north of Dallas.

Mr. Kowlaski noted that this regulatory guidance is a priority for Treasury and that his department is working diligently on it. OIRA generally has 45 days to review tax regulations, and there has continued to be some give and take on a few issues between the White House and Treasury.

He expects that the second tranche of regulatory guidance should be ready for public comment by the end of April.

Issues that should be addressed by the second tranche

In his prepared remarks, Mr. Kowalski listed six issues that he expects to be addressed by the second tranche of guidance.

1. The definition of "**original use**" for both real and tangible property.
2. The definition of "**substantially all**" as it relates to the use and holding period of Qualified Opportunity Zone Business (QOZB) property.
3. Whether any additional rules regarding the "**substantial improvement**" requirement for tangible property are warranted, or would be useful.
4. Whether it is appropriate to expand the concept of "**working capital**" to the development of business operations in opportunity zones.
5. What is a reasonable **reinvestment period** for a Qualified Opportunity Fund.
6. **Transactions** that may trigger the inclusion of deferred gains, sales, exchanges, and other transfers.

Other topics that Treasury received questions on

In the second part of his prepared remarks, Mr. Kowalski listed an additional six issues that Treasury has received questions on, which may be clarified by the second tranche.

1. Clarification regarding the requirement that at least **50% of the total gross income** of the Qualified Opportunity Zone Business (QOZB) be derived from the active conduct of a trade or business within the opportunity zone. On this point, Mr. Kowalski was clear that the OZ benefit would apply to businesses selling to customers located primarily outside of the zone. He said, "Generally speaking, we want the QOZB to sell to the world. We don't want it just to sell within the qualified opportunity zone. That's not what this incentive is about. We want you to sell to the world. And we are working on some safe harbors that will make it easier for people to be compliant with that requirement."
2. The treatment of **leased property** and the assets, acquisition, and original use and substantial improvements test. How does one value a lease for purposes of the 70% test or the 90% test?
3. The **timing of basis adjustments** for qualified investments of deferred gains. When would a taxpayer be able to utilize those to apply depreciation?
4. Whether **leveraged distributions** from a Qualified Opportunity Fund (QOF) may be available to pay deferred tax liability. If a real estate asset should appreciate in value, would a taxpayer have the ability to draw out that appreciation? Mr. Kowalski stopped short of saying yes, but said that "the answer shouldn't be too surprising."
5. Tax benefits that may be available for the **secondary purchase** of existing QOF investments.
6. How to apply the **capital gains tax benefit** for QOF investments held for at least 10 years.

Further rounds of regulatory guidance

Mr. Kowalski indicated that this second tranche of guidance should offer a **fairly complete set of regulations** regarding how Opportunity Zones work and how they fit into other parts of the tax code. Later this year, the IRS may follow up with a third set of regulations that would react to bad actors. But subsequent revisions to the regulations would be comparatively light.

Treasury is also considering how to best structure **information reporting requirements** for QOFs. Mr. Kowalski indicated that they are cognizant of this demand, but that they are tax administrators,

not social scientists. It is possible that the demand for reporting would be addressed not through regulation, but rather through an expansion to the types of questions asked on IRS Form 8996. But they do not want to introduce reporting that would become too onerous, particularly for smaller funds.

Mr. Kowalski also stressed that the IRS cannot re-write legislation through regulations. But they welcome public comments on how to interpret the law in certain contexts.

Treasury's vision for opportunity zones

Mr. Kowalski concluded his prepared remarks by offering Treasury's vision of the program. Treasury believes that the Opportunity Zones tax policy can be transformational. They believe that capital investment leads to business growth, which leads to better jobs, and wealth creation in distressed communities. They believe Opportunity Zones are an ideal vehicle to match entrepreneurs with investors who want to create positive social impact.

Treasury wants to start a different conversation about economic development. In their view, economic growth comes from businesses responding to market demands, and a successful QOF will be a partner with a community and the qualifying business.

Follow-up Q&A session

Following his prepared remarks, Mr. Kowalski engaged in a Q&A session facilitated by conference panelist Jill Homan of Javelin 19 Investments.

Several key insights came from that Q&A session, including:

1. Regarding **interim gains**, there are two issues: Firstly, after a QOF sells an asset, it might be under the 90% invested threshold and therefore be liable for penalties. The IRS is considering allowing one year for that cash to be counted as compliant with the 90% test. Secondly, the IRS does not see the QOF statute providing for any type of IRA treatment in regards to interim gains. If the QOF has gains income, it will be liable for tax on those incomes.
2. Barring a change by Congress, the **December 31, 2026** date in the legislation is set in stone. It's clear to Treasury that there was an intent for money to be deployed quickly and to reward early adopters. The reason for the 2026 end date is Congressional scoring. All the deferred money comes back in 2026, so that the tax revenue doesn't get lost during the 10-year budget window.
3. The **White House Opportunity and Revitalization Council** is working on a report that will speak to the different levers that different federal agencies can pull to give preference points for some of their programs to projects in Opportunity Zones. Treasury hopes that Opportunity Zones brings a whole different class of investors into these communities, and the White House Council will be part of these efforts.
4. This second tranche of regulatory guidance will make it clear that investors can use Opportunity Zones for **existing businesses in the zone that want to expand**. There will be a mechanism for that. The guidance will define "substantial improvement" of business property, i.e. how to double the basis, because currently that clarity doesn't exist.
5. The statute is pretty clear that the tax benefit goes to deposits of reinvested gains, which doesn't seem to fit **carried interest**.
6. A fund in an opportunity zone doesn't have to start out as a QOF. A fund can make the **QOF election later**. One way to establish would be to set up a fund that borrows money for prospecting work, and then the day before the fund begins to accept outside investing, it can re-organize as a QOF. That gives the fund more running room and more prep time.
7. Treasury will provide guidance on how secondary sales might work for a **partner who needs to**

divest before the end of the 10-year holding period. But it's no different than a partner wanting to get out of a partnership under Subchapter K.

8. Ultimately, the tax rate that is applied to deferred gains in 2026 is not addressed in the statute. A potential increase in the **tax rate is a risk**. But there is nothing that Treasury can do about that risk.

Next steps

The public comment period on the second tranche of regulatory guidance should begin by the end of April. A public hearing would follow later this year.

Special thank you to Coasis Coalition for organizing the conference and bringing in Daniel Kowalski as the keynote speaker.

Opportunity Db

By Jimmy Atkinson

April 8, 2019

State, Local Governments Work to Steer Opportunity Zones Investment.

Opportunity zones (OZs) are a federal tax incentive that has generated unprecedented levels of interest among investors and have enormous potential local and regional impact.

States and municipalities realize the potential power of OZs, which is why there has been and continues to be so much activity at the state, region, county and city level since the enactment of the federal OZ incentive in late 2017.

Many state and local governments have fully embraced the incentive and made it clear that they're open for business and want OZ investment in their communities. Others have expressed concerns about the potentially adverse effects of the incentive on their local communities, and have sought to dampen and more strictly regulate the flow of such capital into their communities and the corresponding impact of the incentive.

State Tax Code Conformity

One crucial way for states to encourage use of the OZ incentive is to conform state tax law to the federal Internal Revenue Code–offering a deferral and reduction in state tax on capital gains that are invested in qualified opportunity funds (QOFs).

Most states have done so–as this issue went to press, 41 states either conformed to the federal OZ provisions or lacked a tax on capital gains, making the point moot. That leaves nine states that treat capital gains invested in QOFs differently than the federal tax code. North Carolina and Hawaii specifically opted out, presumably in an effort to dampen the effect of the incentive or concluding that any revenue loss to the state exceeded the marginal benefits from allowing the incentive. Other currently nonconforming states include California, Pennsylvania and New Jersey–all big states. At least one currently conforming state, Oregon, is considering repealing conformity.

Beyond tax conformity, several states are considering additional financial incentives to encourage

and direct OZ investments within their states.

State Tax Credits

From coast to coast, state-level legislation was introduced in the past six months to incentivize OZ investment. The variety is wide, but the goal is the same:

- A South Carolina bill would create a 25 percent state tax credit for investments in OZs, with a cap of $50,000 per taxpayer.
- Rhode Island legislation would provide a 10 percent tax credit for investments in QOFs that invest in Pawtucket and Central Falls.
- In Washington, legislation would create a tax credit against the state insurance premium tax for contributions to QOFs that invest in rural areas.
- Maryland saw a bill introduced to make OZ investments eligible for three existing tax credits. Those credits–the Job Creation, One Maryland and Businesses that Create New Jobs tax credits–all focus on similar objectives to the OZ incentive.
- A Texas bill was introduced to create a 25 percent state tax credit for businesses that invest in remodeling, rehabilitating or building a structure in an OZ, as well as a business that purchases equipment or machinery for an OZ building. It also would allow a one-time 25 percent tax refund for businesses that spend money on labor, materials and equipment for buildings in an OZ or $50,000, whichever is less.
- Another Texas bill would create a 25 percent tax credit for contributions to state-approved rural QOFs that make investments that meet certain job-creation and job-retention standards.
- In Ohio, a bill was introduced to create a nonrefundable 1 percent tax credit for investments of $250,000 or more in Ohio QOFs, which must hold all of their assets in Ohio OZs. An additional 2 percent credit could be claimed if the OZ projects reach certain levels of tax increase.
- A Kentucky bill would provide tax credits for investments in rural counties and OZs. The annual cap would be $35 million and most of the investments would be required to go to small businesses in small counties.

Other State Incentives

Tax credits aren’t the only state incentive option. Bills in several states take other approaches.

Maryland has aggressively pursued OZ investment, as Gov. Larry Hogan has made OZ investment a prime focus. In January, he announced a series of initiatives to offer tax credits, job training programs, small business loans and affordable housing incentives, all tied to the OZ incentive. One bill, introduced in early March, would create a state low-income housing tax credit, but allow it only in certain areas, including OZs.

West Virginia legislation would exempt new qualified OZ businesses from corporate net income tax and personal income tax during their first decade–a significant benefit for the operating business.

In Florida, Gov. Ron DeSantis paired the OZ with one of his pet projects. His budget proposal would add OZs to areas where state-funded charter schools could be built. That would increase the number of communities where the schools could be built from 47 to about 300, meaning about 85 percent of the neighborhoods where charter schools could be built are OZs. Also in Florida, a bill would revive the expired Florida Enterprise Zones incentive and change the definition of enterprise zones to match OZs. It includes several state incentives for those investing there.

A Nebraska bill would give priority to OZs in awarding state Affordable Housing Trust Fund and other programs.

Local Efforts

State efforts don't stand alone. Cities have different incentives than the federal and state governments and many jumped in with both feet. Often, the most important role has been promoting their OZs and local opportunities.

Bruce Katz of Accelerator for America is a leader of the promotional movement. Katz has championed the idea of creating a prospectus that helps communicate what makes a city distinct and promotes the advantages of their OZs. Katz encourages localities to highlight potential projects and propositions, giving a unified vision to promote investment.

Whether it's with Accelerator for America or otherwise, many cities have taken this approach.

In Erie, Pa., for instance, the regional Chamber of Commerce and the Growth Partnership formed the Pennsylvania Flagship Opportunity Zone Development Company to focus on economic development and promotion efforts in local OZs. Their efforts include a vibrant website, promotional efforts and a list of 17 community partners willing to assist with OZ developments. The company pledges to help quantify deal flow and availability of local capital, identify potential partners–including funds–and promote projects within the OZs. Erie also created a prospectus that is used to pitch the city to developers.

Roughly 400 miles west, in Benton Harbor, Mich., a city of about 10,000 residents on the east coast of Lake Michigan, there is a similar commitment. Benton Harbor collaborated with Cornerstone Alliance to publish a prospectus detailing real estate prospects within the city's three OZs, as well as those in neighboring cities in Berrien County.

Maryland has championed the OZ incentive and Baltimore doubled down. The city has a designated OZ coordinator in the city's nonprofit Baltimore Development Corporation, who is working to help promote and make connections for the city's 42 opportunity zones.

Farther south, in Birmingham, Ala., the city created the Birmingham Inclusive Growth (BIG) Fund to attract OZ investments to the city. The mayor jumped in to promote the incentive, which the city hopes will be used to revitalize aging buildings and spur economic growth.

Out west in Sacramento, Calif., city leaders hope to use part of a special sales tax to increase city staff to help promote and encourage OZ investment. Fifty miles south, Stockton, Calif., created an OZ portal that works as an interactive map of the 19 OZs in the city, with detailed demographic information. The city also published a prospectus to promote opportunities.

Those cities aren't alone. Throughout the nation, aggressive city leaders are finding ways to both bring OZ investment to their area and influence the type of development in those low-income communities.

Not Universal

Not every community fully embraces OZ development. Some are concerned that OZs will attract the wrong type of development. Boulder, Colo., for instance, imposed a moratorium on OZ development in January, concerned about projects proposed there. Since then, the city has allowed several exemptions–primarily for affordable housing–but the concern and moratorium remain.

The Boulder moratorium contrasts with a more needs-based growth option for local and state officials: Incentivizing the type of development desired in OZs. That's what Nebraska and Maryland are attempting with affordable housing and Florida is attempting with charter schools. The same

principle is available locally: Cities and counties can use zoning policy and local incentives to encourage the type of development they want in OZs, using local needs and concerns to help inform decisions on how to direct the flow of investment.

Lessons Learned

The involvement of local and state leaders in pursuing OZ investment in their communities is smart, in both attracting and directing investment. The incentive is a work in progress, but the benefits of bringing billions of dollars of investment to low-income communities can be a game-changer.

Whether it's through promoting their city or region or directing the type of investment wanted, state and local governments considering whether and how to promote and incentivize investment in local OZs should consider the words of Roman philosopher Seneca, spoken nearly 2,000 years ago.

"Luck is what happens when preparation meets opportunity."

Published by Michael Novogradac on Monday, April 1, 2019

Revenue Procedure Clarifies that Veterans Housing is Eligible for Bond Financing.

Tax-exempt residential rental private activity bonds (PABs) can be used to build veterans housing or housing for other specified groups under the low-income housing tax credit (LIHTC) statute, according to a revenue procedure released today by the Internal Revenue Service. Rev. Proc. 2019-17 officially coordinates the general public use requirements for bond-financed residential rental properties with provisions from Internal Revenue Code Section 42 that govern the LIHTC. There had been some question about whether the provisions of Section 42 applied also to PAB-financed multifamily housing.

Novogradac

Wednesday, April 3, 2019

Revenue Procedure 2019-17 – The IRS Issues Helpful Guidance on Qualified Residential Rental Projects.

On April 3, 2019, the Internal Revenue Service issued Rev. Proc. 2019-17, which provides that a qualified residential rental project will not fail the public use element of Internal Revenue Code Section 142(d), and therefore can be financed with exempt facility bonds (assuming, of course, that other requirements are satisfied[1]), if the project contains units that are reserved for, or are prioritized for, certain, specified groups (such as veterans).

We will soon post an analysis of this very helpful guidance.

[1] Like pretty much everything else life, when it comes to tax-exempt bonds, there are always "other requirements."

By Michael Cullers on April 4, 2019

Squire Patton Boggs

Bipartisan Support for Bill Authorizing Tax Exempt Financing of Public Buildings.

A pair of Senators from both sides of the aisle, Senator Todd Young (R-Ind.) and Senator Catherine Cortez Masto (D-Nev.), introduced the Public Buildings Renewal Act of 2019 last week, which would authorize the use of tax exempt financing along with private equity to rebuild schools and public buildings through public-private partnerships. "We owe it to our students and teachers, our firefighters and nurses, and all taxpayers to find a way to upgrade our schools and public buildings. This is a public health and safety issue that impacts not just Hoosiers, but all Americans. Our bill will enable local governments to access private financing to support public building projects for the first time, so that much needed building upgrades can occur. I look forward to working with my colleagues to advance this critical legislation," said Senator Young.

At the end of 2016/beginning of 2017, the IRS issued a revenue procedure which liberalized the ability on the part of public agencies to enter into long-term management contracts with private companies and still benefit from tax exempt financing. However, the P3 industry has yet to come up with a way of using the new IRS rule to couple tax exempt financing with the infusion of private equity in the capital structure. This latest bill (which was originally introduced in the last session of Congress) would expressly authorize up to $5 billion of tax exempt private activity bonds for government buildings in part financed with private equity.

"Whether it be police stations, court houses, hospitals, or schools, our nation's infrastructure is one of the most important assets we have. Having the private sector involved in our infrastructure projects allows us to tap into innovation and technology that the public sector may not otherwise have access to," said Senator Tim Scott (R-SC), another co-author of the P3 bill. "When we allow public buildings to be eligible for Private Activity Bonds, we reduce the cost of capital for public-private partnerships hoping to invest in our neighborhoods and communities."

By adding public buildings as a new class of projects eligible for financing with Private Activity Bonds, state and local governments can more easily attract private investment to pay for public building projects, such as schools, universities, courthouses, and hospitals, and preserve the risk transfer so critical to the success of a P3 project. Private investment in public building provides state and local governments with access to private capital, accelerated project development, transfer of risk, and the ability to spread out payments over the length of the contractual term. The ownership of the building, however, would always remain with the government entity.

By Barney Allison on April 2, 2019

Nossaman LLP

TAX - ILLINOIS

Midwest Palliative Hospice and Care Center v. Beard

Appellate Court of Illinois, First District, First Division - February 25, 2019 - N.E.3d - 2019

IL App (1st) 181321 - 2019 WL 938671

Hospice care provider sought judicial review of denial of its application for property tax exemption as to inpatient hospice care pavilion, based on purportedly exclusive charitable use.

The Circuit Court confirmed the denial. Provider appealed.

The Appellate Court held that:

- Department's decision was subject to clearly erroneous standard of review;
- Evidence supported Department's finding of lack of charitable purpose; and
- Prior settlement stipulation by the Department did not require it to find hospice pavilion exempt.

Illinois Department of Revenue's denial of hospice care provider's application for property tax exemption, as to inpatient hospice care pavilion, was subject to clearly erroneous rather than de novo standard of review on appeal; the issue before the Department in its administrative proceeding was whether provider had met its burden of demonstrating that the pavilion was used exclusively for charitable purposes, such that the Department's decision was a fact-intensive question which was not purely legal.

Evidence was sufficient to establish that revenue received by hospice care provider was not devoted to an identifiable charitable need or the general purposes of charity, supporting the Illinois Department of Revenue's denial of application for property tax exemption as to provider's inpatient care pavilion; evidence showed that provider generated ninety-four percent of its revenue from billing patients rather than patients in need of charitable care, that provider was receiving full payment from relevant government programs, that provider's charitable expenses represented less than one percent of its net services revenue, and that provider rendered charitable services for only eight percent of its patients.

Prior settlement stipulation by the Illinois Department of Revenue providing that hospice provider's palliative care center was tax exempt as a charitable institution did not require the Department to also find tax exempt provider's inpatient hospice care pavilion at the same location, despite fact that the two divisions operated under the same financial policies; provider acknowledged that the care center and pavilion were separate, the stipulation provided that it could not be used as evidence of charitable status in other proceedings, and evidence did not show that the hospice pavilion was reasonably necessary for carrying out the palliative care center's mission.

TAX - ARIZONA

R.O.I. Properties LLC v. Ford

Court of Appeals of Arizona, Division 1 - February 21, 2019 - P.3d - 2019 WL 762110

After taxpayers purchased real property from owner of charter school that filed for bankruptcy protection and ceased operations mid-year, taxpayers brought a tax claim asserting that property remained entitled to charter school exemption for tax year, and filed a petition for refund with county board of supervisors.

County board denied the petition, and taxpayers amended tax court complaint to add special action claim seeking a writ of mandamus directing board to refund tax payment. The Arizona Tax Court granted board's motion to dismiss the complaint. Taxpayers appealed.

The Court of Appeals held that:

- Provision of statute governing tax exemption for property used for education that exempted charter school property from taxation if it was used for education did not apply to taxpayers' property;
- Statute conditioned exemption on continued educational use of property, and thus taxpayers were not eligible for exemption
- Statute did not authorize proration for property that was exempt for a portion of tax year; and
- Taxpayers were not entitled to an award of attorney's fees.

Muni Bond Math: A Tax Time Refresher

Summary

Going forward, investors will be seeking ways to minimize that future tax burden, especially for those in states with high state and local taxes.

Municipal bonds, which are issued by state and local governments, occupy a special place in the investing landscape.

For most investors, the choice of a muni bond fund is primarily driven by the need for tax-efficient income. The income from these bonds is exempt from federal income tax and sometimes state income taxes as well.

Tax preparers everywhere are explaining to clients what they can expect with this year's tax filing. Going forward, investors will be seeking ways to minimize that future tax burden, especially for those in states with high state and local taxes (SALT).

Municipal bonds, which are issued by state and local governments, occupy a special place in the investing landscape. The income from these bonds is exempt from federal income tax and sometimes state income taxes as well. This treatment can make them especially attractive for investors looking for ways to minimize their tax burden.

It's all in the math

To account for their tax benefit, municipal bonds tend to have lower yields than comparable taxable securities, such as corporate bonds or U.S. Treasuries. Calculating a tax-equivalent yield lets you fairly compare these two types of bonds.

The formula is straightforward:

Tax-equivalent yield = Muni bond yield / (1 – tax rate)

In 2019, the highest marginal tax bracket is 37% and the 3.8% Health Care Act tax also applies to investment income, giving us a maximum marginal tax rate of 40.8%.1 Thus, if you had a muni bond that was yielding 2%, then it had a tax equivalent yield of 3.4% (2% / (1 – 40.8%). In other words, a taxable bond would need to yield at least 3.4% to provide a comparable return.

Ramping up tax efficiency with ETFs

For most investors, the choice of a muni bond fund is primarily driven by the need for tax-efficient

income. But the income is only part of the story. Here is a checklist you can use to help determine the tax efficiency of a muni bond investment:

Consider state-specific options if you live in a high-SALT state

For many investors in high-tax states, such as California or New York, only $10,000 of state income taxes can be deducted.1 State-specific funds let investors deduct bond income from their federal and state tax returns.

Minimize capital gains payouts

Both mutual funds and exchange-traded funds (ETFs) must pay out any realized capital gains. According to data from Morningstar, 33% of intermediate-term municipal bond mutual funds paid out capital gains in 2018. These distributions may be taxable events, increasing an investor's tax burden.

Look out for AMT-eligible securities

Income from bonds issued by non-governmental entities, such as a development project for a municipal airport, might be subject to the alternative minimum tax. These bonds might yield more to make up for this tax treatment, but the bond holder will have to report this income and potentially pay tax on the interest. When evaluating an individual bond, mutual fund or ETF, make sure to check for the AMT exposure. (This can typically be found in the annual report or a fund company's website.)

iShares muni bond ETFs check all three tax efficiency boxes. They have:

- Monthly income that is exempt from federal income taxes.
- A history of no capital gains payouts. Since 2007, no iShares municipal bond ETFs have distributed capital gains.
- No AMT exposure. The iShares Municipal Bond ETFs seek to track S&P Municipal Bond indexes that screen out any bonds with income subject to AMT.

Over time, tax savings can have a big impact on your bottom line. April 15 is a good reminder that tax awareness isn't a seasonal activity, but one that's good practice all year around.

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1 Source: Forbes, March 7, 2018; irs.gov.

BlackRock

Mar. 27, 2019

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20 Issues to Track in the Second Tranche of OZ Guidance.

Five months ago, the Treasury department issued its first tranche of proposed regulations concerning the opportunity zones (OZ) tax incentive, releasing 74 pages of regulations, a revenue ruling, an updated Q&A document and a draft of Internal Revenue Service Form 8996.

In the next few weeks, the second tranche will be released. It will include a request for comments and be followed by a public hearing. What will the second set of guidance include? The issues

addressed will likely include many of those presented at the most recent public hearing and included in comment letters, as well as Treasury's assessment of areas most in need of guidance.

The following is a summary of 20 OZ guidance areas that Novogradac is closely tracking as we await the second tranche of guidance. How these issues are addressed will go a long way in determining the success of the OZ incentive in facilitating the investment of equity capital in real estate and operating businesses in distressed communities.

This list is segregated into six broad categories (and assumes a working knowledge of the OZ incentive):

- Compliance testing/calculations
- Operating businesses
- Real estate
- Renewable energy
- Corporations
- Fund management
- Compliance testing/calculations

1. 90 percent and 70 percent asset test. Last year's proposed regulations require that qualified opportunity funds (QOFs) and qualified OZ businesses use generally accepted accounting principles (GAAP) to calculate compliance with the 90 percent and 70 percent asset tests, if they have applicable financial statements. Mandating the use of GAAP to value tangible property is not a suitable valuation method for several reasons. (For additional discussion, see page 8 of the Novogradac Opportunity Zones Working Group (OZWG) Dec. 28, 2018 letter to the Internal Revenue Service (IRS).) The final regulations should allow QOFs and qualified OZ businesses to elect to use unadjusted cost basis to value tangible property regardless of whether or not they have an applicable financial statement.

2. When must a qualified OZ business begin. In order for investments in corporations and partnerships to qualify as opportunity zone property (OZ property), the statute requires that as of the time such interest was acquired, such corporation/partnership was a qualified OZ business (or, in the case of a new corporation/partnership, such corporation was being organized for purposes of being a qualified OZ business). Treasury guidance is needed that provides new businesses that are being organized for the purpose of being a qualified OZ business and existing businesses that are expanding within or into OZs time to acquire and/or improve tangible property and put such property to active use in OZs. (For additional discussion, see page 6 of the OZWG July 16, 2018 letter to the IRS.)

Operating businesses

3. Measuring 50 percent of gross income in OZs. The proposed regulations require that at least 50 percent of the gross income of a qualified OZ business be derived from the active conduct of a trade or business in the OZ. Practitioners need further guidance on how to measure that. Treasury should provide a safe harbor for the 50 percent test that could include such things as location of employee services, location of tangible property and the location where economic value is created. The determination should not be solely based on the location of the customers of the business. (For additional discussion, see page 5 of the OZWG Nov. 26, 2018 letter to the IRS.)

4. Leased property. Under the statute, OZ property must be "purchased." However, the substantially all test for qualified OZ businesses refers to tangible property owned or leased. Guidance is needed as to how to value leased property for purposes of the substantially all test, as

well as how to apply the original-use requirement for leased property. (For additional discussion, see page 6 of the OZWG Nov. 26, 2018 letter to the IRS.)

5. Intangible property. The proposed regulations require that a substantial portion of the intangible property of a qualified OZ business be used in the active conduct of a trade or business in the OZ. Guidance is needed regarding (i) the meaning of the term "substantial," (ii) the meaning of the phrase "used in the active conduct of a trade or business," (iii) a method for measuring the portion of intangible property used in a business, and (iv) a method for determining whether a business's intangible property is used in the OZ. (For additional discussion, see page 16 of the OZWG Dec. 28, 2018 letter to the IRS.)

6. Reasonable working capital definition. Proposed regulations created a reasonable working capital safe harbor for qualified OZ businesses to acquire, construct and/or substantially improve tangible property. However, new and expanding operating businesses also need working capital to cover expenditures such as payroll, inventory and occupancy costs during the startup phase. A similar working capital safe harbor is needed for operating expenditures. (For additional discussion, see page 12 of the OZWG Dec. 28, 2018 letter to the IRS.)

7. Substantial improvement and aggregation of assets. Qualified OZ business property must have its original use in an OZ with a QOF or a qualified OZ business, or the QOF or qualified OZ business must substantially improve the property. Property is treated as substantially improved by the QOF or a qualified OZ business only if, during any 30-month period beginning after the date of acquisition of such property, additions to basis with respect to such property in the hands of the QOF or qualified OZ business exceed an amount equal to the adjusted basis of such property at the beginning of such 30-month period in the hands of the QOF or qualified OZ business. To facilitate the qualification of an existing operating business as a qualified OZ business, it would be quite helpful if, at the election of the taxpayer, the substantial improvement requirement could be met by an operating business on an aggregate basis–where the acquisition of tangible property over any 30-month period exceeds the aggregate adjusted basis of existing tangible property held by the business at the beginning of a 30-month period. (For additional discussion, see page 2 of the OZWG Dec. 28, 2018 letter to the IRS.)

Real estate

8. Refinancing in excess of basis. Guidance is sought on tax consequences for debt-financed distributions from a partnership QOF, especially due to an increase in the fair-market value of a business. At issue is whether such distributions trigger recognition of deferred gain or affect qualification for the 10-year hold fair-market-value step-up election. (For additional discussion, see page 8 of the OZWG July 16, 2018 letter to the IRS.)

9. Substantial improvement requirement for unimproved land. It remains unclear whether unimproved land needs to be substantially improved to meet the substantial improvement test and Treasury could settle that issue. (For additional discussion, see page 9 of the OZWG Nov. 26, 2018 letter to the IRS.)

10. Original use requirement and vacant buildings. The proposed regulations ask whether some period of abandonment or underuse of tangible property erases a property's history of prior use in the OZ and if so, should such a fallow period enable subsequent productive use of the tangible property to qualify as "original use." To facilitate the improvement of vacant or underused property, prior use should be disregarded for property vacant or idle for at least a one year. (For additional discussion, see page 1 of the OZWG Dec. 28, 2018 letter to the IRS.)

11. Treatment of IRC Section 1231 Gains. Section 1231 gains are required to be netted with Section 1231 losses to determine the amount, if any, of capital gains a taxpayer has. This brings into question when the 180-day window to invest Section 1231 gains begins, and whether partnerships can invest gross Section 1231 gains into a QOF. (For additional discussion, see page 4 of the OZWG Dec. 28, 2018 letter to the IRS.)

12. 31-month working capital safer harbor–issues beyond taxpayer's control. The proposed regulations provide qualified OZ businesses with a 31-month safe harbor to hold funds, but make no provision to extend that period for issues beyond their control. It is not uncommon for real estate and other developments to experience delays that are beyond the businesses control–such as delayed permitting and other municipal approvals, contract disputes, supply embargoes, labor stoppages, extreme weather events and national disasters. Additional flexibility is needed to give investors comfort that businesses experiencing these unforeseen delays will not be disqualified. (For additional discussion, see page 12 of the OZWG Dec. 28, 2018 letter to the IRS.)

13. Residential rental property and triple net leases. Guidance is needed as to whether renting property pursuant to a triple-net lease can be an active trade or business and final confirmation is desired that operating residential rental property can be an active trade or business. (For additional discussion, see page 10 of the OZWG Nov. 26, 2018 letter to the IRS.)

Renewable energy:

14. Depreciation recapture under Section 1245. The sale of a partnership QOF interest, after holding the investment for 10 years, will generally result in no net gain, because of the 10-year hold fair-market-value election. However, if the QOF has a direct or indirect partnership interest in depreciated personal property, it is unclear if the investor must recognize ordinary income recapture and a corresponding capital loss. This issue is particularly significant for the renewable energy community.

Corporations:

15. Consolidated group rules. Neither the statute nor the regulations address whether capital gains of one member of a consolidated return group of corporations can be treated as capital gain of other members of the consolidated return group so that gains may be aggregated under a single deferral election by the consolidated return group for purposes of the OZ statute. Guidance is needed as to the proper treatment of QOF investments within a consolidated group. (For additional discussion, see page 10 of the OZWG Dec. 28, 2018 letter to the IRS.)

Fund management:

16. Reasonable time to invest and working capital allowance. QOFs need time to make investments. The OZ statute explicitly states that Treasury guidance is needed to provide a reasonable time for a QOF to reinvest the return of capital from the sale of investments in OZ property. Likewise, QOFs need adequate time to assemble and underwrite initial OZ property investments. Treasury regulations provided qualified OZ businesses a safe harbor, allowing funds to be held for up to 31 months if there is a written plan in place that follows specific requirements. A similar safe harbor is needed for QOFs. (For additional discussion, see page 1 of the OZWG Nov. 26, 2018 letter to the IRS.)

17. Interim gains at fund level. In the first tranche of guidance, Treasury asked whether interim gains should be subject to tax. If yes, an additional question is whether a partnership operating as a QOF can make the election on behalf of its investors to reinvest, rather than being required to make

a distribution and for the investors to then reinvest in the same or another QOF. (For additional discussion, see page 1 of the OZWG Mar. 9, 2018 letter and page 2 of the OZWG Nov. 26, 2018 letter to the IRS.)

18. Time to reinvest interim gains for purposes of 90 percent test. If QOZP is sold for cash, it is no longer a qualified investment for the 90 percent test–but the OZ statute allows a reasonable time to reinvest. Treasury could provide a definition of "reasonable time," which should be at least one year. (For additional discussion, see page 1 of the OZWG Nov. 26, 2018 letter to the IRS.)

19. Exit approach in wind-down period. The OZ statute provides a fair-market-value step-up benefit only if a taxpayer sells its investment in a QOF. That requirement is counter to the way funds generally unwind. Treasury could issue rules that provide that if a QOF disposes of assets after 10 years, pursuant to a plan of liquidation, then the QOF investors can treat such sales in a manner equivalent to selling an interest in a QOF.

20. Appreciated property contribution and carried interest. The statute and proposed regulations do not specify whether investments in QOFs must be cash, or can include property or services. Guidance is needed. If eligible investments include contributions of property, anti-abuse rules are needed to regulate contributions of appreciated property. (For additional discussion, see page 20 of the OZWG Dec. 28, 2018 letter to the IRS.)

This list of 20 OZ guidance areas that Novogradac is closely tracking is not an exhaustive list, but how they are addressed will go a long way in determining the success of the OZ incentive in facilitating the investment of equity capital in real estate and operating businesses in distressed communities. What issues would you add to this list? Email your ideas to cpas@novoco.com.

Join us in Denver
Join OZ investors, fund managers, businesses, community leaders and advisers to discuss this guidance and other timely OZ topics at the Novogradac 2019 Opportunity Zones Spring Conference, April 25-26 in Denver.

Published by Michael Novogradac on Thursday, March 21, 2019 – 12:00am

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Small Cities Feel the Clock Ticking on Opportunity Zones.

David Nikoloff spends his days thinking about real estate and economic development in small Pennsylvania cities that have proud industrial pasts with names you might recognize, like Bethlehem Steel. In a changing global economy, while there's still a lot of pride in Bethlehem or Lancaster or Reading, there seems to be less and less capital, especially for small businesses. It's made it hard to bounce back after de-industrialization.

"With the consolidation of banks, some acquired market share and inherited a bank in Lancaster, and they honestly didn't know what to do with it," Nikoloff says. "God love 'em, but they knew nothing about south central PA or Berks County."

Nikoloff is vice president for real estate lending at Community First Fund, a nonprofit loan fund based in Lancaster, Pennsylvania. Founded in 1992, the loan fund has built up a $42.5 million small business loan portfolio, with clients borrowing money to purchase and renovate buildings for everything from barbershops and a barber school, to locally owned grocery stores, restaurants, and cafe-bakeries. As a federally certified community development financial institution, no less than 60

percent of Community First Fund's loans go to businesses located in low- and moderate-income census tracts.

Continue reading.

NEXT CITY

by OSCAR PERRY ABELLO

MARCH 26, 2019

OZ Framework: Measuring Impact in Opportunity Zones (Podcast Episode #18)

Should the Treasury Department impose a community impact reporting requirement on Opportunity Zone investing? And what would a reporting framework even look like? Earlier this year, the U.S. Impact Investing Alliance, in partnership with Georgetown University's Beeck Center for Social Impact + Innovation, created the Opportunity Zones Reporting Framework — a guideline that defines best

Continue reading

March 27, 2019

SALT-Fueled Rally in Muni Market Faces Tax-Day Test.

- **Muni mutual funds have drawn most cash since records began**
- **But analysts wonder if it's based on reality or perception**

The rally in the $3.8 trillion municipal-bond market is about to face a major tax-season test.

All year, analysts have credited the $10,000 cap on state and local tax deductions for driving a record-setting amount of cash into tax-exempt debt as investors look for ways to cut what they owe to the federal government. The wave of money helped propel a five-month rally that's pushed yields on some municipal bonds to the lowest against Treasuries since at least 2001.

But it's still not clear whether that influx was driven by investors who were sure to face higher tax bills — or those who just feared they would. Analysts are now watching to see if there's a pullback after the last tax returns are due on April 15 should the hit be smaller than expected. And there's also the chance some who are paying more this year will sell bonds to raise cash for their tax bills.

Continue reading.

Bloomberg Markets

By Amanda Albright

April 1, 2019

TAX - WISCONSIN

State ex rel. Peter Odgen Family Trust of 2008 v. Board of Review

Supreme Court of Wisconsin - March 14, 2019 - 923 N.W.2d 837 - 2019 WI 23

Taxpayers sought certiorari review of decision of the town's board of review to sustain property tax assessment that was based upon assessor's change in the classification of taxpayers' property from agricultural and agricultural forest to residential.

The Circuit Court upheld board's decision. Taxpayers appealed, and the Court of Appeals reversed. The Supreme Court granted certiorari review.

The Supreme Court of Wisconsin held that lots were chiefly put towards the growing of Christmas trees, apples, and hay, and thus were devoted primarily to agricultural use and were entitled to be classified as "agricultural lands" for tax purposes.

Two lots were chiefly put towards the growing of Christmas trees, apples, and hay, and thus were devoted primarily to agricultural use and were entitled to be classified as "agricultural lands" for tax purposes, where landowners maintained a barn and a one-acre apple orchard on the smaller of the two lots, the remainder of the lot consisting of untillable forest, apple trees were individually staked out and planted in clean rows, larger of the two lots contained a four- to five-acre Christmas tree farm and a three-acre hayfield, Christmas trees were individually staked out and planted in clean rows, and landowners consistently planted and harvested hay in the hayfield and planned to harvest the field again.

TAX - LOUISIANA

2590 Associates, LLC v. Commissioner of Internal Revenue

United States Tax Court - January 31, 2019 - T.C. Memo. 2019-3 - 2019 WL 413619 - 117 T.C.M. (CCH) 1010

Tax matters partner for limited liability company (LLC) treated as a partnership for federal taxation purposes petitioned for review of final partnership administrative adjustment (FPAA) which denied worthless debt deduction for bridge loan to developer that developer had failed to repay.

The Tax Court held that:

- LLC was entitled to claim worthless debt deduction;
- State law supported finding that lender's transfer of debt to LLC did not negate legitimacy of the debt; and
- Debt became worthless in tax year in which private activity bonds were terminated and district court dismissed developer's counterclaims and affirmative defenses in foreclosure case.

Individual lender's transfer of debt, a bridge loan he had extended to property developer, to limited liability company (LLC) in exchange for equity interest therein did not negate the legitimacy of the debt, and thus, debt was bona fide and LLC could claim a worthless debt deduction when developer defaulted on repayment of the loan; transaction postponed need for development company to repay the debt, it did not discharge the debt, and while the development company and LLC had common, related owners, they did not have identity of ownership, and further, bona fide debt existed between development company and LLC, since LLC held a promissory note with a fixed maturity date and

accrued interest at above-market rate, interest increased upon default, and at time of note's transfer, LLC fully intended to collect the debt from development company.

State law supported finding that individual lender's transfer of debt, a construction bridge loan to developer, to limited liability company (LLC) in exchange for equity interest therein did not negate the legitimacy of the debt, for purposes of LLC's claimed worthless debt deduction when developer defaulted on repayment of the loan; the underlying debt continued to exist, as there was no novation, as required by state law to release debtor of its liability to a creditor, but rather, a creditor's valid assignment of a promissory note.

Bridge loan to developer for construction project became worthless, for purposes of worthless debt deduction from income taxes, not in tax year that foreclosure proceedings were started or in tax year when final judgment of foreclosure was issued, but rather, in tax year in year in which private activity bonds were terminated, since note had value at beginning of that year, and with termination of the bonds, developer did not see viable means to obtain refinancing of the project, and also, the developer's negotiations to avoid foreclosure broke down in that year and the district court dismissed developer's counterclaims and affirmative defenses in the foreclosure case.

TAX - ILLINOIS

City of Chicago v. City of Kankakee

Supreme Court of Illinois - March 21, 2019 - N.E.3d - 2019 IL 122878 - 2019 WL 1292293

Plaintiff municipalities brought action against defendant municipalities, brokers, and internet retailers, seeking to recover use tax revenue that was purportedly unjustly retained by defendants under an alleged scheme by which they misreported situs of online retail sales.

The Circuit Court entered an order dismissing claims, and plaintiffs appealed. The Appellate Court reversed and remanded. Leave to appeal was granted.

The Supreme Court of Illinois held that Illinois Department of Revenue had exclusive jurisdiction over plaintiff municipalities' claims against defendant municipalities, brokers, and internet retailers to recover use tax revenue that was purportedly unjustly retained by defendants under an alleged scheme by which they misreported situs of online retail sales, since Department was vested with sole authority to audit disputed transactions and to distribute and redistribute tax revenue due to any error.

Population Growth, Temporary Cap Increase Boost LIHTC and Bond Ceilings.

The Internal Revenue Service (IRS) released 2019 population figures in Notice 2019-19, indicating the 2019 low-income housing tax credit (LIHTC) ceiling and tax-exempt private activity bond (PAB) cap for all states will increase. From 2018-2019, the U.S. population increased by 1,448,256 people to 327,167,434 in total, representing a 0.4 percent gain. U.S. territories lost more than 140,000 people, a 3.8 percent decrease.

The fiscal year (FY) 2018 omnibus appropriations bill provided a 12.5 percent increase in LIHTC allocations from 2018-2021. For 2019-2021, annual inflation adjustments would be applied to the new 2018 allocation amounts. Novogradac estimates the temporary 12.5 percent increase will

increase affordable housing production by about 28,400 homes over 10 years compared to previous law.

Under Rev. Proc. 2018-57, each state's 2019 LIHTC ceiling is the greater of $2.75625 multiplied by the state population or $3,166,875. The 2019 PAB volume cap is the greater of $105 multiplied by the state population or $316,745,000. With the increase in per-capita allowances, states that lost population but do not qualify for the small-state minimum, will not be seeing a decrease in their LIHTC and PAB cap. In 2018, the state LIHTC cap was the greater of $2.70 per resident or $3,105,000 and state bond caps were the greater of $105 per resident or $310,710,000.

Highlights from Notice 2019-19 include:

Fastest growth: Arizona and Idaho grew by more than 2 percent each, with total population changes of 155,376 and 37,265, respectively. Other states with at least a 1 percent increase in population include (in increasing order): New Hampshire, North Carolina, Montana, Oregon, South Carolina, Nevada, District of Columbia, Texas, South Dakota, Florida, Colorado, Washington and Utah.

Losing population: States that lost population include: Alaska, Connecticut, Hawaii, Illinois, Kansas, Louisiana, Maryland, New Jersey, New York, Rhode Island, West Virginia and Wyoming. Territories that lost population are American Samoa, Puerto Rico and the U.S. Virgin Islands.

New York saw the largest numeric decrease with a 307,190 population decline, representing a nearly 1.6 percent drop. The largest percent decrease is Puerto Rico, with a loss of nearly 4.3 percent of its population or 142,024 residents. The population 2019 population figures for American Samoa, Guam, the Northern Mariana Islands and the U.S. Virgin Islands are the 2018 midyear population figures in the U.S. Census Bureau's International Database and therefore, do not reflect the impact of the 2018 hurricane season.

Biggest states: The 10 most populous states continue to be California with 39,557,045, followed by Texas, Florida, New York, Pennsylvania, Illinois, Ohio, Georgia, North Carolina and Michigan. Eight of the top 10 states saw population increases for 2019. In addition to New York losing nearly 1.6 percent of its population, Illinois also lost 60,943 residents or nearly 0.5 percent of its population. Of all U.S. states with increases, Pennsylvania and California saw the smallest population percentage gain with 0.01 percent and 0.05 percent, respectively.

Small-State LIHTC Minimum: Because their populations are below the small state minimum, these states will receive LIHTC allocations of $3.167 million and not the population-based LIHTC allocation: Alaska, Delaware, the District of Columbia, Montana, North Dakota, Rhode Island, South Dakota, Vermont and Wyoming. U.S. territories are American Samoa, Guam, Northern Marian Islands and the U.S. Virgin Islands. This list of small-state recipients remains unchanged from 2016, 2017 and 2018.

Small-State PAB Cap Recipients:

The small-state PAB recipients for 2019 are the same as those in 2018, with the additions of Arkansas, Mississippi and Montana. Eighteen states, plus the District of Columbia will receive the 2019 small-state PAB minimum: Alaska, Arkansas, Delaware, the District of Columbia, Hawaii, Idaho, Kansas, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North

Dakota, Rhode Island, South Dakota, Vermont, West Virginia and Wyoming.

Published by Michael Novogradac on Tuesday, March 19, 2019

How To Use Muni Bonds For Tax-Loss Harvesting.

Democrats' talk of higher taxes for the rich might intensify interest in state and local government bonds, where income is often exempt from taxes.

Tax-loss harvesting in municipal bond portfolios can allow investors to offset tax liabilities stemming from capital gains in other asset classes—as long as investors and advisors do their homework.

"Basically, when rates go up investors will potentially experience capital losses on munis—and that's when tax-loss harvesting gets powerful and interesting," said Alex Etzkowitz, vice president of investment research and strategy at Gurtin Municipal Bond Management in Solana Beach, Calif. "Investors can swap into other bonds, lock into the same amount of income and actually take advantage of losses to offset gains elsewhere. This is unlike tax-loss harvesting with equities, ETFs and mutual funds, which simply defers payments of taxes into the future and effectively postpones the capital gains tax burden."

In a simple example, your client purchases a municipal bond at $120 that is now priced in the marketplace at $110. He or she realizes a $10 loss on the sale and reinvests into a similar security with an identical maturity date, priced at $110. When the bonds mature, there are no capital gains because the purchases were executed above par. But the client has locked in a $10 capital loss that can be used to offset other gains realized through other investments.

Historically, muni bonds have outperformed Treasurys after the hiking of top marginal tax rates. "For top taxpayers, municipal bonds should be a core piece of an overall asset allocation," Etzkowitz said.

High-earning individuals are often better positioned to realize the most benefit from tax-free municipal bonds, said Jim Barnes, director of fixed income at Bryn Mawr Trust in Bryn Mawr, Pa., especially after tax reform introduced limitations on such long-standing deductions as state and local tax and property (SALT) tax.

Muni bonds have become desirable to wealthy investors in high-tax states such as California and New York, where the limitation on the SALT deduction hit hardest.

"We have a few clients in which we do manage a tax-free bond mutual fund portfolio for them in their taxable accounts and we're able to generate fairly comparable yields after taxes to stocks and other taxable bond portfolios," said Bruce Primeau, president of Summit Wealth Advocates in Prior Lake, Minn. He cited the example of managing a portfolio that is 55 percent stocks and 45 percent bonds for a couple that lives in Texas, which has no state income tax. "They do have about $1 million in tax-deferred accounts, but several million dollars in a taxable joint account," he said. "We have to manage a bond component in their taxable account to keep their overall asset allocation in line. In their case, we own a few different municipal bond mutual funds to construct a short-to-intermediate municipal bond portfolio for them, and it's been generating a little over 2 percent after-tax return for them each year."

The market comes with potholes. "The municipal bond market is thin and not efficient for trading,"

said William Velekei, a CPA and financial advisor with Corbenic Partners in Bethlehem, Pa. “Investors have more attractive pricing trading larger bond lots than those who trade smaller lot sizes. One strategy we recommend is building out and owning individual bonds in a laddered portfolio. It hedges against the risk of rising interest rates by reinvesting maturing bond proceeds, and it diversifies the holdings of the individual bonds across multiple issuing agencies.”

Velekei’s firm has clients who live in states that have above-average state income tax rates. “This strategy gives us the flexibility to customize a municipal bond portfolio that not only maximizes the benefit at a federal tax level but also at the state income tax level,” he said.

But he had one note of caution: “Municipal bonds are often thought of as safe and conservative. The majority are. But individuals should be aware that not all states, municipalities or agencies have the same credit quality,” Velekei said.

FINANCIAL ADVISOR

by JEFF STIMPSON

MARCH 18, 2019

TAX - NEW YORK

MSK Realty Interests, LLC v. Department of Finance of City of New York

Supreme Court, Appellate Division, First Department, New York - March 7, 2019 - N.Y.S.3d - 2019 WL 1064041 - 2019 N.Y. Slip Op. 01662

Taxpayer, a limited liability company (LLC) that owned a condominium in New York City, brought article 78 proceeding to annul rules of the Department of Finance of City of New York which retroactively eliminated eligibility for a tax abatement for corporate and other non-individual owners of condominiums and cooperative apartments.

The Supreme Court, New York County, denied the petition, and taxpayer appealed.

The Supreme Court, Appellate Division, held that:

- Department’s determination that the term “primary residence” in statute granting a partial tax abatement for cooperatives of condominiums referred to the dwelling place of individuals and did not apply to corporations, LLC partnerships or other entities was not arbitrary or capricious, and
- Department did not violate taxpayer’s due process rights when it restored erroneously abated taxes for four years.

Determination by the New York City Department of Finance that the term “primary residence” in statute granting a partial tax abatement for cooperatives or condominiums referred to the dwelling place of individuals and did not apply to corporations, limited liability company (LLC) partnerships or other entities was not arbitrary or capricious; determination was consistent with dictionary definitions and common usage of the term, and was also consistent with legislative history.

New York City Department of Finance did not violate due process rights of taxpayer, a limited liability company (LLC) that owned a condominium in city, when it restored erroneously abated taxes for four years after determining that the statute granting a partial tax abatement for cooperatives or condominiums did not apply to units owned by LLCs; statute’s primary residency

requirement was made retroactive, and the retroactivity provided for in the statute was not excessive.

TAX - NORTH CAROLINA

Matter of Aaron's, Inc.

Court of Appeals of North Carolina - February 19, 2019 - S.E.2d - 2019 WL 660961

After county board of equalization and review affirmed Tax Administrator's decision to allow assessment of tax deficiency issued by county office of tax assessor against taxpayer for unpaid taxes on goods taxpayer offered to customers through "lease purchase" agreements, taxpayer appealed, arguing that such property was inventory exempt from taxation.

The Property Tax Commission, sitting as the State Board of Equalization and Review, determined that property in physical possession of taxpayer's customers pursuant to "lease purchase" agreements was subject to ad valorem taxation. Taxpayer appealed.

The Court of Appeals held that:

- Taxpayer's transfers of property did not constitute sales, and thus transferred property was not exempt from taxation; and
- Statutory definition of "inventory" did not include goods taxpayer transferred to customers.

Taxpayer's transfers of property to customers through "lease purchase" agreements did not constitute sales, and thus transferred property was not exempt from taxation as "inventor[y] owned by retail and wholesale merchants"; customers were under no obligation to purchase leased property or to pay total purchase price of property, and were permitted to return leased property at any time without penalty, and price to purchase leased property through purchase option was higher than price for purchasing property directly.

Statutory definition of "inventories" as goods "held" for sale in regular course of business did not include goods taxpayer transferred to customers through "lease purchase" agreements, where property was in customers' possession.

Do Corporate Tax Incentives Work? 20 States, and Most Cities, Don't Know.

Washington state, which gave Boeing $1 billion over the past four years, has a well-established system to evaluate tax deals. Many governments don't.

SPEED READ:

- Boeing has received roughly $1 billion in tax incentives and credits from Washington state over the past four years.
- Washington is one of 30 states that regularly evaluates corporate tax incentives.
- Only a few cities regularly track and assess these business deals to see if the promised results were achieved.

The aircraft manufacturer Boeing has received roughly $1 billion in tax incentives and credits from

Washington state over the past four years. That includes tens of millions of dollars for activities in 2017 related to production equipment for the 737 MAX jets, all of which have been grounded in the past week after two fatal crashes.

That information is known because Washington state has one of the more well-established tax incentive evaluation programs in the country. As corporate tax breaks — like the ones used to lure Amazon's HQ2 — have come under increasing scrutiny, more states are tracking them and attempting to ensure that the businesses that receive them are holding up their end of the deals.

Continue reading.

GOVERNING.CCOM

BY LIZ FARMER | MARCH 20, 2019 AT 4:00 AM

Will the IRS Include Brownfields Properties in Its Opportunity Zone Regulations?

The Opportunity Zone tax incentives created by the federal Tax Cuts and Jobs Act of 2017 seemed to be a perfect opportunity to spur development of environmentally impaired properties, known as brownfields, in economically distressed communities. But the IRS draft regulations currently under consideration do not appear to allow for inclusion of brownfields in the program. That could mean, for lack of a better description, a real lost opportunity for many communities since brownfields often are in the very areas that the Opportunity Zone program is intended to benefit.

The tax law created Opportunity Zones, which now have been designated in all 50 states, the District of Columbia and five U.S. territories, to provide tax benefits to investors in the form of deferred tax on gains invested in a Qualified Opportunity Fund (QOF) until they sell or exchange the investment in the fund or December 31, 2026, whichever is earlier. Depending on how long the investment is held, up to 15 percent of deferred gain can be excluded. If held for more than 10 years, the investor will not be taxed on any gain from a sale or other disposition of the interest in the QOF. Many investors and economically distressed areas have been eager to take advantage of the program.

Not coincidentally, many Opportunity Zones have properties that could qualify for inclusion in the federal Environmental Protection Agency's (EPA) Brownfield Program, which has existed for a number of years to cleanup and reuse properties that sit idle due to environmental contamination. Although the Opportunity Zone provisions and the Brownfields program seem like a match made in investor-heaven, the EPA pointed out in comments on the IRS proposed regulations and guidance that brownfields may not fall within the definitions of property that qualifies for the incentives.

The statute requires that at least 90 percent of a QOF's assets be Qualified Opportunity Zone (QOZ) property, which ultimately requires direct or indirect ownership of "qualified opportunity zone business property." To be QOZ business property, the "original use" of the property must commence with the QOF or the QOF must make "substantial improvements" in the property within 30 months of acquisition. "Substantial improvements" generally means additions to the property's basis greater than the adjusted basis of the property at the beginning of the 30-month period.

For brownfields properties, the "original use" and the "substantial improvement" requirements are potentially problematic. A property is a brownfield in the first place because its former use(s) caused environmental contamination that render it uneconomical to redevelop without substantial

remediation. Under the current "original use" test, this prior use of a former factory site requiring extensive remediation means that the "original use" cannot begin with the QOF. Further, in Rev. Rul. 2018-29, which provides guidance on the meaning of "substantial improvement," the IRS indicated that the substantial improvement rules do not apply to land. Even if the remediation qualified as "substantial improvements," they do not have much chance of completion in the 30-month window for "substantial improvement."

The EPA's comments to the IRS recommend defining "original use" to incorporate brownfields properties located in QOZ. Thus, if a brownfields remediation firm buys a contaminated property in a QOZ with the intent to remediate the property and redevelop it for a new use, the EPA suggests that the brownfield status should qualify as the "original use." Similarly, the EPA recommended that the IRS treat the "original use" of property that has been vacant or underutilized for a year or more as commencing with the QOF, and allow foreclosed and tax-reverted properties held by local governments to be treated as "underutilized or abandoned" property. If adopted, this recommendation would allow the QOF to satisfy the 90 percent test during the remediation period.

The EPA also recommended that the IRS treat the environmental assessment, cleanup and other site preparation costs as expenses meeting the "substantial improvement" test. Rev. Rul 2018-29 appears to apply only to improvements to a building, which would leave out the critical improvements to the land necessary to make a brownfield ready for redevelopment. If adopted, this recommendation would resolve the potential ambiguity as to whether improvements to the land itself count towards the necessary investment to constitute a substantial improvement. Finally, the EPA recommended that IRS allow carryover of gains from QOF investments in brownfields properties to other QOF investments and stacking of QOF investments of brownfield properties.

The IRS held a public hearing last month after having to delay the hearing from January 2019 due to the government shutdown. The final version of the regulations are expected any time. It is, however, unclear whether the IRS will adopt any of these recommendations in its next iteration of the regulations. The IRS's clarification on this and other issues is time sensitive — the elimination of the 15 percent of capital gains invested in a QOF requires a seven-year holding period in the QOF. This means December 31, 2019, is the last day to make the investment to meet this holding period by the end of 2026, the year in which the deferred gain is recognized.

Lane Powell PC

March 15, 2019

Investors Eagerly Await Trump Rules on Opportunity Zones.

AVONDALE, Ariz. — A hotel groundbreaking ceremony here in an old cotton field not far from Interstate 10 last month featured two United States senators, a hot catered lunch and a stream of speeches about driving economic investment to this corner of the Southwest that is still recovering from the Great Recession.

Whether they were celebrating the beginnings of a wave of investment in distressed parts of America, or just another Marriott property, could hinge on a coming decision by the Trump administration.

A new batch of tax regulations from the Treasury Department will establish the most comprehensive guidelines yet for what sorts of investments qualify for tax benefits associated with opportunity

zones, which were created by the 2017 tax law, and how investors must proceed in order to take advantage of them.

Potentially billions of dollars are waiting on the Treasury's decision. Civic leaders in areas like Avondale, which is still hurting from the 2008 housing crisis, are hoping the rules will be broad enough to improve the odds of attracting new businesses that offer well-paying jobs to residents. Investors, eager to put money into the tax-advantaged opportunity zones, are also clamoring for guidelines that could determine the types of projects they can back.

Among the money dependent on the Trump administration's rules is $22 million in investment guarantees, to be announced Monday by the Kresge Foundation, to support two socially conscious investment funds that hope to pour $800 million into manufacturing, clean energy and other business development in Opportunity Zones.

The zones are a creation of President Trump's signature tax law that use tax advantages to lure capital to economically lagging cities, suburbs and rural areas. So far, they have stirred growing investor interest, including from Wall Street, and criticism from some tax experts who worry they will serve mostly as a handout to the rich.

Most of the projects spurred so far by the zone designations are real estate, like condominium developments, or hospitality, like the SpringHill Suites by Marriott project started here in Phoenix's west suburbs by a private equity group called Virtua Partners.

Whether the zones can ultimately spur other types of investment, like small businesses and start-up technology companies, will depend on how the rules are structured. Treasury officials have sent the White House a draft version of what will be the second batch of regulations governing so-called opportunity funds, which invest in Opportunity Zones, and what types of investments can qualify for the special tax treatment.

The tax break works by allowing investors to roll capital gains from other investments into the funds. Taxes on those original gains are deferred and, if the investment is held for several years, can be sharply reduced. Adding to the attraction is the potential for investors who hold their money in the opportunity fund for a full decade to be exempt from any capital gains taxes on that investment.

Conflict over the regulations reflects, in part, a tension among officials concerned most with limiting the potential for investors to exploit loopholes in the program in order to reduce their tax bills, and those most concerned with maximizing investment in struggling parts of America.

In the first batch of regulations, Treasury officials took a more restrictive approach, according to documents obtained through a Freedom of Information request. But those were ultimately overruled by the White House, which prevailed on several points that investors had championed, those records show.

A recent Internal Revenue Service hearing on what will be the second batch of regulations was dominated by investors and civic leaders requesting changes and additions to the rules in several areas that could deter investment in start-up companies.

Those include a provision that currently requires qualifying businesses to earn 50 percent of their income inside the zones, which would seem to limit businesses that make money by exporting goods or selling them online. Investors are also seeking flexibility to sell their stake in a business before the end of a decade and use the proceeds to invest elsewhere in an opportunity zone.

Investors also want to clarify a rule that forces them to "substantially improve" an asset in order to

qualify for the tax benefit, to ensure that biotech, software and other start-ups that deal largely with intellectual property can meet the test.

“The second tranche of regulations is a moment of truth for investors and communities,” said John Lettieri, the president of the Economic Innovation Group think tank, who was an architect of the Opportunity Zone concept. The difference in potential investment in the zones between favorable and unfavorable regulations, he said, “is orders of magnitude.”

While investors wait for clarity, the existing regulations have “frozen some of the market for business investment,” said Steve Glickman, another architect of the concept who now runs an Opportunity Zone-related consulting business called Develop L.L.C., and who has produced an Opportunity Zone Index to help investors find and select promising zones for projects.

The Kresge guarantees, for example, are meant to help two funds — run by Arctaris in Boston and Community Capital Management in Fort Lauderdale, Fla. — deploy $800 million into Opportunity Zone projects like solar farm development in Flint, Mich. In exchange, the funds are committing to a set of rules that would require them to invest in creating living-wage jobs, form community advisory boards and seek to avoid displacing residents from those zones. They will also compile and share data on the quality and impact of their investments, which is not currently required by the federal government.

But they are dependent on the outcome of the regulations, and whether they will encourage business projects. “These are practical concerns for us,” said Aaron Seybert, a social investment officer at Kresge. “We need to quantify the risk that we’re taking.”

The existing regulations have made that calculation relatively easy for real estate investors, who are accelerating previously planned projects in the zones and starting new ones that might not have worked without the special tax treatment. That activity has already paid off for incumbent landowners in Opportunity Zones, according to research by the real estate firm Zillow: Average sales prices in the zones jumped 25 percent last fall, compared with the year before.

City officials welcomed the new hotel to Avondale, a majority-Hispanic city of 84,000 people that is still recovering from the burst housing bubble a decade ago. At one point, 40 percent of the city’s homeowners were underwater on their mortgage or had fallen into foreclosure.

Conditions have improved, slowly, and developers have added 200,000 square feet of new retail space in the last five years, city officials said. But Kenn Weise, the mayor, said the city still needed help — and real-estate development won’t do it alone.

The city, Mr. Weise said, needs to revitalize its historic downtown, which has fallen on hard times, and it needs businesses to employ the more than 80 percent of workers who live here but endure long commutes to other parts of the metro area, where the jobs are.

“This part of it is easy,” Mr. Weise said under the shade of a white tent here recently, gesturing toward the row of shovels that were about to break ground on what will be the latest in a recent string of new hotels near the freeway in and around Avondale. “This is the low-hanging fruit.”

The more far-flung dignitaries gathered for the ceremony made similar points, even as they praised Virtua and Hotel Equities, the company that will manage the new hotel. “At the end of the day, real estate development is a very important step forward,” Senator Tim Scott, Republican of South Carolina and the principal champion of the Opportunity Zone provision in the tax law, said in a brief speech. “Bringing jobs into the community is a leap forward.”

Virtua Partners has 15 projects in the works in the Phoenix area alone, including a townhouse development on the site of a crumbling RV park in nearby Surprise, and more than 100 total projects planned in zones around the country. Construction in the Avondale cotton field will create 120 temporary jobs and 30 permanent ones in the hotel, which officials at the groundbreaking promised would provide pathways for employee advancement.

“Our goal is to give everyone the opportunity to move into the middle class,” Quinn Palomino, Virtua’s chief executive, said at the groundbreaking, which along with Mr. Scott also featured Senator Martha McSally, Republican of Arizona, and Jan Brewer, the state’s former governor.

But even real estate investors would like more from the Treasury in the next round of regulations. In an interview, Ms. Palomino said she hoped the government would mandate reporting on metrics such as the number of jobs and affordable housing units created in the zones.

“Everyone’s running to this industry,” including a lot of people without the background in real estate development, she said. “It’s pretty scary out there, some of the projects that are coming in. Kind of, two guys in the back of a van, trying to get an Opportunity Zone project done.”

The New York Times

By Jim Tankersley

March 17, 2019

Real Estate Investors Expected to Unlock Trillions as Feds Finalize Opportunity Zone Rules. Here's Where the Money is Likely to Flow.

Washington’s political rancor is rippling across the nation’s real estate industry, as the recent federal shutdown has delayed a plan to unleash trillions in property investment in the country’s biggest cities and most impoverished communities.

Specifically, the delay has affected new rules for investing in so-called Opportunity Zones, and in the process has prevented many investors from exploiting one of program’s key benefits: the ability to sell long-held properties, more or less tax free.

The potential payoff, which limits capital gains taxes on investment gains that are then reinvested in Opportunity Zones, stems from a little-known provision in the federal tax code changes passed by Congress in 2017.

Continue reading.

By Jeff Jeffrey – National Digital Producer, The Business Journals

Mar 15, 2019, 1:12pm EDT

What to Think About Next With Opportunity Zones? Community Input For

One Thing.

“If you simply try to impose something on a community, you do so at your own peril,” says one mayor. This and other themes emerged this week at a summit focused on the program.

STANFORD, Calif. — Mayor Sly James, of Kansas City, Missouri, says the Opportunity Zones in his city are getting ample attention from investors and developers, but emphasizes that it’s going to take more than that to make the program a success.

“There’s a high level of interest,” he told Route Fifty here Monday during a summit of about 400 state and local leaders, investors and others gathered to discuss the economic development program. “There’s people that want to make the investments.”

But some, James says, are eying ventures that may not mesh with the city’s overall vision for developing the zones—census tracts that are eligible for investment under the program.

“We’re saying, ‘No, no, no, no, no.’ We’re not going to have these little scattershot one-off projects,” he said. “We want transformative things. So everybody cool your jets. Let’s focus this.”

Monday’s summit shed more light on how governments, the investor community, and nonprofit organizations are approaching Opportunity Zones, a program designed to stimulate investment in low-income areas by offering taxpayers a federal tax break on their capital gains.

Attendees stressed that community engagement will be crucial in any places where investment does take place. There was also discussion about the need for working across agencies and levels of government as the public sector interacts with potential investors in the zones.

And there was talk about the key role philanthropic organizations and foundations may have to play as the program continues to unfold.

“This is one of those moments when we have to go on offense,” said Mary Ellen Wiederwohl, CEO of Louisville Forward, an economic development agency in Louisville, Kentucky.

Wiederwohl says there’s a need for cooperation among agencies involved in economic development, land use and permitting, with the aim of providing “concierge service” when inquiries comes in from prospective Opportunity Zone investors and developers.

“You don’t have to go: ‘Well, call the planning department and get back to me on what they say,’” she said. “You’re going to lose that deal.”

Ben Seigel is Baltimore’s point person for Opportunity Zones. In his remarks he bemoaned that he was appearing at the event days after The New York Times Magazine published an article headlined: “The Tragedy of Baltimore,” billed as a look at “the crackup” of the city.

But he said in his work he’s trying to serve as sort of a “Match.com” for investors and projects in the city that might be a good fit for them.

He noted that Baltimore has launched a “neighborhood impact investment fund” backed by lease revenues from city-owned parking facilities and that the fund will operate alongside the so-called “opportunity funds” that will make investments in zones.

Route Fifty

By Bill Lucia,
Senior Reporter

MARCH 19, 2019

Activated Capital: Blockchain Technology for Opportunity Zone Investing (Podcast Episode #17)

Can blockchain technology revolutionize Opportunity Zones real estate investing? Security token offerings utilizing distributed ledger technology enables tokenization of assets, increased liquidity, reduction of costs, and improved transaction speed. And it has the potential to change how properties are sold and how deals are recorded. Josh Burrell and Lane Campbell at Activated Capital have an

Continue reading

Opportunity Db

March 20, 2019

New TEFRA Regulations for PABs Set to Go into Effect: Hunton Andrews Kurth

Read the Client Alert.

Hunton Andrews Kurth | Mar. 13

IRS Submits OZ Guidance to OIRA for Review.

Following last month's hearing on Qualified Opportunity Funds, the IRS has completed its second tranche of regulatory guidance.

Yesterday, the proposed rules were submitted to the Office of Information and Regulatory Affairs for review. OIRA is a branch of the White House's Office of Management and Budget.

OIRA will now review the proposed guidance for at least 10 days before releasing them for publication in the Federal Register.

Issues that the publication may clarify include: Opportunity Zone business qualification requirements, 70% and 90% asset test requirements, interim gains reinvestment, treatment of land, treatment of refinance proceeds, the substantial improvement test, treatment of multi-asset funds, treatment of carried interest, and depreciation recapture treatment, to name a few.

OpportunityDb

By Jimmy Atkinson

March 13, 2019

Fitch Ratings: SALT-Linked US State Revenue Volatility to Decline

Fitch Ratings-New York-11 March 2019: Recent US state tax revenue data affirms Fitch Ratings' view that the passage of the federal Tax Cuts and Jobs Act (TCJA) in December 2017 would contribute to abnormal state revenue volatility and uncertainty. We expect volatility to continue in 2019, but lessen over the next several years as taxpayers and states adjust to the changes, particularly the cap on State and Local Tax (SALT) deductions. Long-term state credit implications from the TCJA should be broadly limited but there are risks of variable effects depending on the state and reduced revenue-raising flexibility.

State personal income tax (PIT) revenue data for January showed a notable deterioration. The median change in PIT revenue for 33 reporting states was basically flat, growing only by 0.1% yoy. A significant majority (29) of those states showed either a deceleration in the rate of PIT revenue growth or an outright yoy contraction. The weak PIT data for January was a marked contrast to the same period in 2018, where 100% of reporting states showed acceleration in revenue growth and the median growth rate was 8.8% yoy.

PIT revenue data also contrasted with sales and use taxes (SUT), which broadly increased. For reporting states, median SUT revenue grew by 4.6% yoy in January versus 3.3% in January 2018. Furthermore, 34 of 36 reporting states that have a SUT showed an increase in the SUT revenue growth rate in January.

The contrasting trends in PIT and SUT revenue growth and the significant volatility on the PIT side point to direct state revenue effects from the TCJA. It is notable that PIT revenue, on average, declined even as economic growth and labor market indicators showed positive trends during the period – factors which likely contributed to the improving SUT revenue trends.

The scale of PIT revenue growth change between January 2018 and 2019 is highly abnormal and points to specific taxpayer incentives caused by the TCJA, namely the $10,000 cap on SALT deductions. Taxpayers were incentivized to push non-withholding income into calendar and tax year 2017 to maximize deductions in the last year of uncapped SALT deductions, which bolstered December 2017 and January 2018 PIT revenue dramatically. Without this incentive, taxpayers may now push non-withholding income to the end of the tax filing season in April and May 2019. Under the pre-TCJA unlimited SALT deduction, taxpayers always had the incentive to pay their taxes by December 31 versus later in the tax filing season to bring the benefits of the deduction forward. Stronger capital markets performance in 2017 and sharp declines in December 2018 also contributed to these trends.

PIT revenue volatility is leading to uncertainty for state revenue outlooks this year. States generally anticipated some level of decline in PIT collections from last year's record highs but the depth of the decline in December and January was a surprise. Some states experiencing yoy declines in PIT revenue through January, such as California, are anticipating strong rebounds in PIT collections by the end of the fiscal year. Other states, such as Maryland, are revising revenue forecasts downward to account for relative weakness seen to date. April and May revenue results will be particularly informative for states as they could confirm a significant shift in timing of tax filings and payments.

In most cases, the data will come in before final budgets for fiscal 2020 are enacted, allowing states to make any final budgetary adjustments before the start of the new fiscal year.

We believe the recent revenue volatility is not likely to be sustained and should not have a direct, long-term fundamental credit effect for states, as TCJA results on PIT non-withholding collections peter out. However, unintended and indirect effects from the TCJA could have consequences for states. In particular, the SALT cap could affect revenue growth prospects and revenue-raising flexibility. Uncertainty over how individuals and companies adjust to the changes imposed by the TCJA could also lead to lingering complications for states' revenue forecasting, making the budgeting process more unpredictable.

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Even SALT-Pinched Minnesotans Flocking to 'Last Great Tax Haven'

- **Minnesota has 4th-highest state income tax rate in the U.S.**
- **Municipal bonds seen as way to reduce federal tax liability**

It's not only residents of high-cost coastal states that are plowing into municipal bonds as a haven from the new deduction limits. It's happening in Minnesota, too.

Pinched by the new cap on state and local tax deductions, Minnesota residents are buying up municipal debt to reduce their tax burden because the securities pay interest that's exempt from federal and state taxes. New York and California investors have gotten plenty of attention for helping drive a $20 billion influx of cash into municipal mutual funds in 2019. But there's also more interest in the asset class by investors living in smaller high-tax states, asset managers say.

Minnesota had the fourth-highest top state income-tax rate in the country last year at 9.85 percent, according to TurboTax. That's driven more interest in Eaton Vance's $135 million Minnesota Municipal Income Fund, said Craig Brandon, co-director of state and local government bond investments at Eaton Vance Management. Of the company's 17 state-specific municipal mutual funds, 16 have seen positive net inflows in 2019.

Continue reading.

Bloomberg Markets

By Amanda Albright

March 13, 2019, 10:32 AM PDT

IRS Signals New OZ Tax Break Details to Come Shortly.

In possibly less than two weeks, financial advisors and their clients may hear the answers they've been anticipating from the IRS about additional regulatory guidance on the Opportunity Zones-based capital gains tax waivers.

On March 12, the IRS dispatched to the White House's Office of Information and Regulatory Affairs and the Office of Management and Budget its second tranche of proposed OZ program regulations.

This new set of rules will likely: "address what types of property qualify as qualified OZ business property; steps an OZ business must take to be qualified; the penalty for a qualified opportunity fund's failure to meet the 90 percent investment standard; and more," according to Novogradac, an organization of accountants that closely follows the new tax-sheltering option.

Plenty of FAs and their employers will welcome more details from the IRS about the program.

"While the proposed regulations addressed a number of key questions, many investors, practitioners, and community stakeholders are awaiting clarification on a number of open items," Andrew Lee, who is head of Americas sustainable and impact investing at UBS Global Wealth Management, wrote in a report issued in January.

"Opportunity Zone" investments became an option for clients following the passage of the Tax Cuts and Jobs Act of 2017. Congress identified capital gains tax relief as a way to induce investment into long-neglected U.S. neighborhoods. Ultimately, the U.S. Treasury approved some 8,700 census tracts, located in all 50 states, as economically disadvantaged enough to be eligible for OZ investments.

But investors have been waiting for the IRS to finalize the regulations for the new program.

The IRS sent a first set of proposed regulations last year, and the White House and the OMB reviewed those for 36 days before releasing them for public comment. The OMB has a required 10 days of review before releasing any new proposed rules.

At a public hearing in mid-February on the IRS's first set of rules, an overflow crowd lobbed a wide array of questions and recommendations at agency officials. Many commenters focused on ways to make it easier for investors to purchase stakes in operating businesses rather than just real estate properties in the OZ census tracts and still preserve the preferential capital gains tax treatment.

"This is obviously an exciting area of the tax law with a great deal of potential to have significant impact throughout various parts of the country. It's also, as you well know, rules that are not particularly specific," and leave a great deal of questions, Scott Dinwiddie, associate chief counsel for the IRS, told the audience at the start of that hearing.

Financial Advisor IQ

By Miriam Rozen

March 13, 2019

These Opportunity Zone Investors Want to Support Local Businesses.

Through the Tax Cuts and Jobs Act passed in 2017, the federal government has created nearly 9,000 "Opportunity Zones" in the U.S. to stimulate investment in low-income communities. Thanks to the tax incentive attached to this program, around $20 billion in capital has already been raised in investment funds for development in the designated areas. However, money alone won't be enough, according to Rachel Reilly, director of impact strategy at the Economic Innovation Group. Reilly sees the potential to unlock significant benefits through the Opportunity Zone program, but she says achieving that means overcoming obstacles.

"Across the nation, what I'm seeing are investors trying to find places to put capital and communities struggling with capacity issues and figuring out how to connect to investors and elevate the types of deals and the types of businesses that are going to be long-term beneficial for those communities," Reilly says.

Neighborhoods that are Opportunity Zones have been short on investment for years so capital markets lack experience working in these communities. That means, Reilly says, working with local partners is critical to making sound investment decisions.

Continue reading.

NEXT CITY

by ZOE SULLIVAN

MARCH 12, 2019

TAX - WASHINGTON

Eyman v. Ferguson

Court of Appeals of Washington, Division 2 - January 23, 2019 - 433 P.3d 863

Tax protester sought declaration that separate advisory votes were required for each tax increase in tax legislation.

The Superior Court dismissed the action. Protester appealed.

The Court of Appeals held that:

- Protester's appeal was moot;
- Public interest exception to mootness doctrine applied;
- Phrase "not subject to appeal" applied only to short description to be placed on ballot for advisory vote; and

- Protester's petition for declaratory judgment was untimely.

Exception to mootness doctrine for matters of continuing and substantial public interest applied to tax protester's appeal from trial court's denial of his petition for declaratory judgment as untimely, in protester's action claiming that a separate advisory vote was required for each tax increase enacted by tax legislation; the content of a ballot and issues of statutory interpretation were generally matters of substantial public interest, the timeliness and appealability issues did not depend on the nature of the tax increases at issue, and whether separate advisory votes were required was an issue that would likely recur with each package of legislative tax increases.

TAX - OHIO

State ex rel. St. Clair Township Board of Trustees v. City of Hamilton

Supreme Court of Ohio - March 5, 2019 - N.E.3d - 2019 WL 1032378 - 2019 -Ohio- 717

Township brought mandamus action against city, city manager, and city finance director, seeking order compelling defendants to calculate and pay lost tax revenue associated with territory annexed to the city and subsequently excluded from the township 14 years later under conformity of boundaries statute.

The Supreme Court of Ohio held that:

- Current version of statute imposing duty to pay for lost tax revenue applied, but
- Township failed to show clear right to payments, as required for mandamus relief.

Current version of statute imposing legal duty to pay lost tax revenue to township upon annexation of territory and exclusion under conformity of boundaries statute, rather than prior version requiring payment only upon annexation, applied in township's mandamus proceeding against city seeking payment of lost tax revenue with respect to territory annexed while prior version was in effect, but excluded after current version became effective; uncodified language of intervening version requiring application of prior version for annexations occurring while prior version was in effect did not apply, city's claim of overpayment required evaluation of wisdom of current statute's payment scheme, and application of current statute did not violate prohibition against retroactive legislation.

Township failed to demonstrate a clear legal right to payment of lost tax revenue for territory annexed by city, thus precluding mandamus relief; township did not identify the extent of annexed territory excluded from the township under conformity of boundaries statute, as required to calculate the amount of lost revenue, there was no evidence of the tax rate applicable to the territory, and failure of county auditor to create a millage rate for portion of township's territory that overlapped with city did not excuse township's failure to establish a clear legal right to the requested relief.

TAX - OHIO

Kohl's Illinois, Inc. v. Marion County Board of Revision

Supreme Court of Ohio - November 6, 2018 - 154 Ohio St.3d 281 - 113 N.E.3d 546 - 2018 -Ohio- 4461

County board of revision and school board sought judicial review of a decision of the Board of Tax

Appeals adopting an appraisal valuation that reduced the value of owner's property.

The Supreme Court of Ohio held that Board properly applied collateral estoppel to preclude relitigation as to covenant that prohibited valuation complaints.

Non-enforceability of a covenant in a tax-increment-financing (TIF) agreement that purportedly prohibited property owner from contesting county auditor's valuations of the property was actually determined in a prior decision of the Board of Tax Appeals, and thus the Board properly applied collateral estoppel to preclude school board's attempt to relitigate the issue in owner's subsequent appeal to the Board contesting the property's valuation; the prior decision included a finding that the proponents of applying the covenant failed to prove that they were entitled to its enforcement, the prior decision made no statement about retaining jurisdiction in remanding to county board of revision, and Board's remand order did not call for county board to reconsider whether to enforce the covenant.

House and Senate Members Move to Make New Markets Tax Credit Permanent.

Bipartisan Call to Make Permanent the Federal Tax Credit that Leverages Private Investment in Economically Distressed Communities, Expands Businesses and Creates Jobs

Washington, D.C. March 12, 2019 – Legislation was introduced in the House and Senate to secure the future of the New Markets Tax Credit (NMTC). Congresswoman Terri Sewell (D-AL) and Congressman Tom Reed (R-NY), introduced the House bill. In the Senate, the bill was introduced by Senators Roy Blunt (R-MO) and Ben Cardin (D-MD). The bills, both titled The New Markets Tax Credit Extension Act of 2019, would ensure that rural communities and urban neighborhoods left outside the economic mainstream have access to financing that stimulates economic growth and job creation.

Established in 2000, in the Community Renewal Tax Relief Act (P.L.106-554), also called the New Markets Tax Credit, is a bipartisan effort to drive economic growth in low-income urban neighborhoods and rural communities. Congress extended the NMTC for five years as part of The PATH Act. (P.L. 114- 113) in December 2015. As Congress and the Administration continue to push tax reform, organizations, businesses and communities that have seen the positive impact of the NMTC have increasingly urged Congress to make the credit a permanent part of the tax code.

"Last Congress, over 125 members of Congress from both parties cosponsored NMTC extension legislation. The strong support of the New Markets Tax Credit was a direct result of the tangible impact it makes in distressed rural and urban communities that have been left outside the economic mainstream," said Bob Rapoza, spokesperson for the NMTC Coalition. "The NMTC has generated over 1,000,000 jobs and delivered $90 billion in total capital investment through public-private partnerships."

A majority of the members of the House Ways and Means Committee cosponsored NMTC extension legislation last session, and the new bill starts off with support from 17 members of the powerful tax-writing committee.

U.S. Department of the Treasury data indicates that more than 72 percent of NMTC activity is in severely distressed communities with unemployment rates at least 1.5 times the national average or

with poverty rates of at least 30 percent. In FY 2018 alone, the CDFI Fund, which operates the program at the Treasury, reported that the NMTC delivered nearly $4 billion in financing to 680 businesses, community facilities and economic revitalization projects. Communities put the capital to work, creating nearly 9,500 permanent jobs and almost 30,000 construction jobs in areas with high unemployment and poverty rates.

House and Senate lawmakers have added their own perspective to the introduction of this legislation:

“The New Markets Tax Credit is an essential tool for revitalizing rural and urban communities across the country, and is a proven, cost-effective incentive that spurs investment in areas by providing businesses with flexible, affordable access to financing. I am confident that extending the tax credit will continue to help attract new investment in Alabama’s 7th District. New Markets Tax Credits have helped spur a number of important projects in the 7th District, including financing the Entrepreneurial Center in Birmingham and transforming the Huyck Felt brick plant into a new wood pellet manufacturing facility in Aliceville, creating 275 jobs,” said Congresswoman Terri Sewell.

“We care about boosting jobs here in New York and across the country, but unfortunately some small businesses – the backbone of our economy – still struggle to secure a fair amount of capital to spur revitalization. By creating a better environment for businesses we will see transformative projects to thrive – boosting wages, services and economic development where it’s needed most,” said Congressman Tom Reed.

“The New Markets Tax Credit is a critical tool for encouraging new investment in areas that need it most. This program has a successful record of expanding economic opportunities and improving quality of life in areas across our state, whether it’s financing a training center for sheet metal workers in St. Louis or the first new grocery store in more than a generation in Pagedale. This program benefits families and local economies and urban and rural areas alike, and I urge all of our colleagues to support it,” said Senator Roy Blunt.

“In Maryland, the New Markets Tax Credit has been deployed across our state on a diverse range of infrastructure and community development efforts, from an affordable housing project to provide apartments for educators and teachers in my home city of Baltimore, to a multicultural center for low-income minority families in Langley Park. I am pleased once again to be a supporter of this bipartisan legislation, which will create jobs and stimulate our economy in communities across Maryland and across America,” said Senator Ben Cardin.

Senators Roy Blunt and Ben Cardin were joined by four original cosponsors, including Senators Chuck Schumer (D-NY), Rob Portman (R-OH), Tim Scott (R-SC) and Maria Cantwell (D-WA). In the House, Representatives Terri Sewell and Tom Reed were joined by Representatives Gwen Moore (D-WI), Earl Blumenauer (D-OR), Brian Higgins (D-NY), Suzan DelBene (D-WA), Bill Pascrell (D-NJ), John Larson (D-CT), Daniel Kildee (D-MI), Danny Davis (D-IL), Ron Kind (D-WI), Linda Sanchez (D-CA), Brad Wenstrup (R-OH), Jackie Walorski (R-IN), Mike Kelly (R-PA), Jason Smith (R-MO) and Darin LaHood (R-IL).

For examples of how the NMTC is making an impact in each state, see the NMTC Coalition’s NMTC at Work in Communities report or check out its Project Profile Map.

Posted on March 12, 2019 By Paul Anderson

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States See Sales Tax Growth After Supreme Court Ruling.

South Dakota v. Wayfair opened the door for new collections from online retailers, with several states currently considering plans.

State sales tax collections in the third quarter of 2018 outpaced average levels in recent years, a trend due at least in part to a Supreme Court ruling last summer that cleared the way for states to bring in additional tax revenues from online sales, new research suggests.

Last June, the U.S. Supreme Court in *South Dakota v. Wayfair* overturned prior rulings that had made it difficult for states to collect taxes on sales by out-of-state, or "remote," online retailers. States made legislative and regulatory changes in the wake of the case, seeking to ensure they didn't continue to lose out on these tax dollars.

Research the Urban-Brookings Tax Policy Center published this month shows general state sales tax collections grew 6.5 percent in the third quarter of last year, or 4.1 percent when adjusted for inflation, compared to the third quarter of 2017.

Continue reading.

Route Fifty

By Bill Lucia,
Senior Reporter

MARCH 15, 2019

Lawmakers Press Treasury Secretary Mnuchin for Opportunity Zones Oversight.

"I want to make sure it works the way it was intended," one Ways and Means Committee member said of the new program.

Congressional lawmakers stressed to Treasury Secretary Steven Mnuchin on Thursday that they want to see data and metrics for the Opportunity Zones program so that the initiative is transparent and its effectiveness can be assessed.

Their comments came during a House Ways and Means Committee hearing where Mnuchin testified. He fielded other questions related to Opportunity Zones as well, like whether the program could be expanded to more places and when people could expect a second round of promised regulations for it to be released.

Opportunity Zones were created under the massive tax package President Trump signed into law in December of 2017.

Under the program people and companies can get tax breaks on capital gains by funneling money

into special funds that invest in economically distressed census tracts designated as zones.

U.S. Rep. Ron Kind, a Wisconsin Democrat, was one of the lawmakers who brought up the initiative in Thursday's hearing.

"Right now there's no accountability or data reporting requirements as far as where these investments are going," he said. "Nor is there government data at this time tracking the number or the characteristics of the qualified opportunity funds."

Kind expressed optimism about the program, but added: "I want to make sure it works the way it was intended."

Mnuchin agreed that data collection and accountability are concerns. He told the lawmaker that if there is specific information he'd like to see collected, he should send the Treasury Department a letter describing it. "We will take that into consideration," Mnuchin said.

Terri Sewell, an Alabama Democrat, also raised data collection and reporting issues, saying she wants to make sure metrics are tracked to show whether communities are benefiting from the program.

Mnuchin told her that the only reason Treasury has not issued guidelines around reporting and data collection is that the department did not want to rush the process of coming up with them.

"We want to have the proper reporting," Mnuchin said. "We'll work with you very closely."

Sewell and Kind were among 16 House and Senate members who signed onto a letter in January that outlined concerns about the first round of proposed Opportunity Zones rules, issued last October.

One issue they addressed was to urge Treasury to include reporting requirements to prevent waste, fraud and abuse in the program and to help verify that is achieving desired results.

Sewell and a Pennsylvania Republican, Rep. Mike Kelly, both asked Mnuchin about the status of additional Opportunity Zones regulations Treasury and the IRS are working on. The secretary did not offer a specific date for when further guidelines might be issued, saying that they are going through a review process.

"I ask my team every day: 'Where are they?'" Mnuchin said. "I hope this is a matter of weeks that we can get these out," he added. "I can assure you this is on the top of my list when we have tax meetings every day."

There are currently about 8,700 census tracts designated as zones around the U.S. These areas were selected by governors and approved by the federal government.

Mnuchin told the lawmakers that he does not believe the Treasury Department has legal authority to allow for any more zones to be designated, but that the department would be willing to work with lawmakers to pass the appropriate legislation to expand the program to more tracts if that is something that Congress is interested in.

Route Fifty

By Bill Lucia,
Senior Reporter

MARCH 14, 2019

Triple Bottom Line Returns in Opportunity Zones (Podcast Episode #16)

How can real estate investing in opportunity zones create triple bottom line returns? And what are some ways we can measure the social impact of these investments? Loren Schirber is project pipeline manager for Minnesota Opportunity Zone Advisors, which recently started raising capital for their DREAM Fund. DREAM stands for “Developing Real Estate in Emerging

Continue reading.

March 13, 2019

Treasury will Consider Changes to Proposed Reissuance Regulations.

BONITA SPRINGS, Fla. — A senior Treasury official said Thursday that consideration will be given requests by municipal bond market trade groups for allowing issuers of tax-exempt bonds to elect to declare when a reissuance has occurred.

Treasury also will consider requests for allowing qualified tender bonds to be remarketed at a premium after being converted to fixed interest rates to maturity, John Cross, associate tax legislative counsel at the Treasury’s Office of Tax Policy told attorneys attending a National Association of Bond Lawyer conference here.

“We are certainly receptive to relooking at that issue,” Cross said in reference to the request for permission to continue the remarketing at a premium.

Cross noted it wasn’t included in the proposed Internal Revenue Service rule on reissuance because of technical reasons.

All four industry groups that submitted comments on the proposed rule requested a continuation of the practice that allows remarketing reissuances at a premium.

The request was made in separate letters by NABL, the Bond Dealers of America, the Government Finance Officers Association and the Securities Industry and Financial Markets Association.

“If qualified tender bonds are forced to be sold only at par to avoid a reissuance, demand will decrease and issuer costs will increase, GFOA said. “Similarly, if a transaction does trigger a reissuance because they are sold at a premium, issuers would incur extra issuance costs.”

SIFMA said, “A rough estimate of the cost to a municipal securities issuer, of issuing par bonds instead of premium bonds, is approximately a 30-60 basis point differential on a 30-year level debt service structure.”

“Particularly in a rising interest rate environment, as a result of the de minimis rule, investors have an incentive to purchase premium bonds,” wrote Leslie Norwood, SIFMA managing director and associate general counsel.

The request for issuers to be able to declare a reissuance came from NABL but GFOA's letter signed by Emily Brock, director of the federal liaison center, also asked for clarity as to when a reissuance takes place.

"Case in point – as state and local governments and entities continue to suffer the economic costs related to the loss of advanced refundings, many are looking for different ways to achieve the benefits that advance refundings provide, including interest savings for taxpayers," GFOA wrote. "This includes executing 'Cinderella' bond transactions where taxable advance refunding bonds convert to tax-exempt bonds at the time of the call date for the refunded bonds."

The BDA letter pointed out that remarketing at a premium has been allowed under IRS rules issued in 2008 as part of Notice 2008-41.

Cross, in his opening remarks for a panel discussion on reissuance, said tender bonds have become less important since the 2008 financial crisis and amounted to about $10 billion annually over the last two years.

"Since that time, the topic of tender option bonds has become less significant in the market because of the Fed's zero interest policy and the last 10 years worth of really low interest rates," Cross said. "Just to illustrate, in 2007 there were probably $100 billion in primary market tender option bonds."

However, Cross emphasized that Treasury does not intend to use the proposed rules to change its policy. He said Treasury will "continue the special protection for the structure of tender option bonds and otherwise send people to the general significant modifications standard in Section 1001."

As an illustration of how the proposed regulations will not change current practices, Cross said, "For tax exempt bond purposes, the intent was that both that the existence and exercise of qualified tender rights, basically the put option with certain features, do not give rise to a reissuance nor does the change in interest rate mode in the connection with the exercise of one of these puts."

The comment letters submitted by NABL and GFOA also requested that Treasury address the phase-out of Libor and the transition to SOFR.

Cross said that issue will be addressed separately.

"We expect IRS and Treasury to put out guidance," Cross said. "It's really in more general tax guidance that would provide pretty broad relief for movement from Libor to some benchmark of this new benchmark rate by the Fed called SOFR."

By Brian Tumulty

BY SOURCEMEDIA | MUNICIPAL | 03/07/19 03:19 PM EST

Reissuance for State and Local Bonds: SIFMA Comment Letter

SUMMARY

SIFMA provides comments to the Internal Revenue Service (IRS) in response to request for comment on proposed regulations that address when tax-exempt bonds are treated as retired for the purposes of section 103 and sections 141 through 150 of the Internal Revenue Code. (Re:

REG–141739–08: Reissuance of State or Local Bonds)

Read Comment Letter.

New Jersey Millionaires' Tax a Double-Edged Sword for Bonds.

- **State's bonds could get more valuable as tax shelters sought**
- **But some risk seen that wealthiest could move out of state**

A millionaire tax is a Catch-22 for New Jersey's bondholders.

Taxing the rich at higher rates — which Governor Phil Murphy proposed Tuesday as part of his $38.6 billion budget — would likely boost demand for municipal bonds because the interest is exempt from federal and state taxes. But at the same time, some investors say the Garden State's precarious finances could be worsened if wealthy people start moving out of a state where high property taxes are already a major complaint.

"It's going to be a tremendous balancing act because they're going to see how far they can push these taxes without losing the entire population of wealthy individuals," said Brad Harris, director of fixed income for Lantern Investments, which manages money for clients living in New Jersey.

Murphy came away from last year's budget negotiations with a higher levy on incomes above $5 million, affecting about 6,700 people in and out of the state. In his budget speech in Trenton today, he said he could raise another $447 million on those earning at least $1 million. The hunt for extra money comes after New Jersey's income-tax collections, the state's biggest revenue source, fell 6 percent this fiscal year through January, in part because of a rush by wealthy residents to shift bonuses and other income into 2017 before President Donald Trump's tax overhaul took effect.

That law has since driven a stampede into New Jersey bonds as residents seek to drive down their taxable income after being hit by the $10,000 cap on state and local deductions, which was broadly felt in the state. As a result, the extra yield that investors demand on New Jersey general-obligation bonds maturing in 10 years has fallen to 59 basis points, lower than the one-year average of 67 basis points, according to data compiled by Bloomberg, while bonds sold by borrowers in the state have outperformed the market.

A millionaire's tax would add to the already-strong demand, said Gary Pollack, head of the private clients fixed-income desk at Deutsche Bank Wealth Management.

That demand has drive yields closer to the benchmark for certain New Jersey bond issuers, particularly the ones that don't need state support, he said. Issuers that rely on funding from New Jersey's general budget trade "much cheaper" because of concerns surrounding the state's finances, he said. While both types of bonds will likely benefit from a millionaires' tax — driving down borrowing costs for the state and local governments — he said it could act as a drag on the economy in the longer term.

It is "a mixed blessing for the state's overall economy," Pollack said. "While there's an immediate boon to the state's tax receipts, on a long-term basis it might be negative as affluent taxpayers flee the state for lower-tax states."

But such concerns have been raised for years in states with high taxes, and whether such levies actually compel residents to move is still a subject of debate. Analysts from Morgan Stanley, for example, expressed skepticism that residents are fleeing high-tax states, saying the population loss in New York reflects the hollowing out of its manufacturing strongholds.

Taylor Financial Group, a wealth management company that specializes in high-net worth clients, has increased allocations to New Jersey municipals because of the new limit on state and local tax deductions, said Debra Taylor, principal of the firm in Franklin Lakes, New Jersey.

While buying more municipal bonds would blunt the impact of a millionaires' tax on investors, residents are becoming increasingly squeezed by the high cost of living, she said. Taylor said she's seeing more and more investors concerned about their taxes. In a Feb. 12 Monmouth University poll, 45 percent of residents said property taxes were the most important issue facing the state.

"The folks that are subject to this millionaires' tax have options," she said. "They'll figure out a way to avoid the tax or declare residency in another state."

Bloomberg Markets

By Amanda Albright and Claire Ballentine

March 5, 2019, 10:31 AM PST Updated on March 5, 2019, 11:35 AM PST

— With assistance by Martin Z Braun, and Elise Young

Big California, NYC Bond Deals Test Demand for SALT Tax Havens.

- **'Demand has been huge' as residents see their new tax bills**
- **New York City and California deals total around $3.3 billion**

Wealthy investors from big coastal states will find an opportunity for refuge from the federal tax overhaul as California and New York City sell about $3.3 billion of tax-free bonds over the next two days.

Key Insights:

- The federal cap on state and local tax deductions has hit high-net-worth residents of states like New York and California hard. Analysts say they are now looking for investments that will help shelter some of their income, which has spurred demand for municipal bonds in their home states.
- Investors have poured $10 billion over eight straight weeks into municipal-bond mutual funds, according to Lipper US Fund Flows data.
- Supply of new municipal securities is also depressed because of a more direct effect of the federal tax overhaul: it banned a kind of refinancing known as advance refundings, contributing to a steep slowdown in new sales last year.
- While local governments have issued nearly $50 billion of new debt during the first two months of the year, that's less than what was sold during the same period in 2015, 2016 and 2017, according to data compiled by Bloomberg.
- Demand outstripping supply had led to high prices of munis, with 10-year benchmark state and local government yields on Friday hitting the lowest against Treasuries since Bloomberg's records began in 2001.

California's $2.3 Billion Deal

- Individual investors on Tuesday can place orders for the state's biggest general-obligation deal since August 2017, followed by institutional firms Wednesday. The offering is also the biggest for the municipal market in six months.
- Yields on California's bonds have fallen close to those on top-rated securities, spurred by brisk demand and fiscal gains that have left the government with swelling surpluses. The state's 10-year bonds yield about 2.23 percent, or 0.08 percentage point over the benchmark. That gap, a key measure of perceived risk, is down from 0.32 percentage point two years ago.

New York City's $986 Million Deal

- The city's sale comes after Friday's rating upgrade to Aa1, the second-highest level, by Moody's Investors Service. Individual investors are getting the first crack, with the bonds initially offered for yields of 0.05 percentage point to 0.20 percentage point over the benchmark, according to a person familiar with the matter.
- Pricing for institutional buyers will end Wednesday
- As with California, yields on the city's bonds have fallen close to those on top-rated securities. On Thursday, the gap over the benchmark was just 0.07 percentage point in trading of already issued securities, the lowest since at least 2013, according to Bloomberg BVAL indexes.

Expectations

- California and New York will easily sell their deals, said Dora Lee, vice president at Belle Haven Investments.
- "Demand has been huge," she said. "Everyone is getting their tax bills and realizing that munis are a very attractive place to be."

Bloomberg Markets

By Romy Varghese

March 5, 2019, 5:19 AM PST

— With assistance by Danielle Moran, and Martin Z Braun

The Problem With Opportunity Zones.

They're supposed to help distressed communities. We need strong reporting requirements to make sure they're really doing that.

When President Trump signed the Investing in Opportunity Act into law in 2017, it caught the attention of mayors and entrepreneurs as well as developers and investors. They all saw the promise to increase economic opportunities for the many communities that have increasingly watched those opportunities slip away.

By waiving capital-gains taxes for long-term investments in more than 8,000 designated low-income census tracts across the country — referred to as "opportunity zones" — the incentive is intended to stimulate commerce and create jobs in economically distressed communities.

But how will we know if it's really working? The legislation currently has no built-in reporting requirements to make clear which projects received investment. Nor does it require managers to track or measure the impact on their communities.

An opportunity zones framework released in February by the U.S. Impact Investing Alliance and the Beeck Center at Georgetown University aims to elevate these essential considerations, ensuring that opportunity zone returns accrue equally to communities and to investors. The framework, funded in part by the Kresge Foundation, is an important first set of principles to guide this rapidly emerging market. But those principles are only as useful as their adoption. Unless the federal legislation is amended to include requirements for transparency, measurement and impact reporting, we'll simply never know the full impact of opportunity zones in our communities. We won't know if incentivizing investors with tax relief results in them making investments they otherwise wouldn't have made.

Early media reports on projects receiving investment under the program have added to my worries. In Texas, for example, a commercial real estate company made a $16 million purchase of 10 acres of land outside San Antonio to build a storage warehouse. A waterfront hotel is being developed as part of a mixed-use project in Seattle. And luxury apartments are going up in Baton Rouge, La.

Perhaps there are unseen community benefits built in to these projects. But in principle, disinvested communities need more than storage, fancy hotels or unaffordable condos. They need deep investment in affordable housing, living-wage jobs and infrastructure. It's hard to see how a facility for affluent homeowners to deposit their excess belongings will provide significant benefits to struggling neighborhood families.

Opportunity zone investments should breathe life into forgotten communities by funding public spaces and revitalizing shopping centers, schools or small-business corridors. They should give small entrepreneurs the boost they need to create jobs and economic opportunity for residents. Otherwise, capital will always flow to the lowest-risk, highest-return investments. It's simple economics. The natural winners will not be residents of the economically distressed areas this legislation is supposed to help.

What if, as intended, opportunity zone investors were truly incentivized to focus on small storefronts and new ventures in rural Michigan or central-city Phoenix and not only on shovel-ready projects? In an age of growing income inequality, this program could facilitate an investment pipeline that lifts working families and that does not just reward the rich.

At the U.S. Conference of Mayors' winter meeting in January, I joined a room full of policymakers from across the country to lay out the true promise of the opportunity zones program and how its risks can be mitigated. Simply adopting current reporting standards in place for another federal program, the New Markets Tax Credit Program, would largely remediate many concerns. It's an easy fix.

At the Kresge Foundation, we've launched incubators for opportunity zone funds with measurable community impact objectives, and we're implementing loan guarantees for organizations that will commit to reporting their true community impact. We're also calling on philanthropic and financial institutions and policymakers across the country to speak out against investment strategies that do not create jobs and expand opportunities for the people who need them most.

This is a crucial moment. As we await the next round of regulatory guidance on opportunity zones, it's an important inflection point for a piece of legislation that could do a lot of good in a lot of places. To fully realize that potential, policymakers need to incorporate guidelines that ensure that transparency, meaningful community benefit and broad geographic impact are achieved. If that

happens, opportunity zones could chip away at inequality and increase opportunities for working families across the country.

governing.com

By Kimberlee Cornett | Contributor
Managing director of the Kresge Foundation's Social Investment Practice

MARCH 7, 2019 AT 6:15 AM

Corporations Often Secretly Renegotiate Their Tax Incentives, Study Finds.

Tax breaks to corporations in exchange for jobs are often modified — in secret — after the fact, a new study finds.

Governing magazine reports that the University of Texas at Austin studied 165 awards given out by the Texas Enterprise Fund, which manages such corporate incentives for the state. In 46 of those cases — about a quarter — the fund changed contracts after they had been finalized. In most cases, the changes were favorable to the company, lowering the number of jobs required to get the tax breaks, or changing the schedule for meeting those requirements. And many times, Governing says, the changes happened right before a company would be subject to provisions requiring it to pay back the incentives it received for not creating those jobs.

There might be more amended deals than included in the study, as many companies challenged UT Austin's public-records requests during its research. "This finding, from a single state, is troubling," Nathan Jensen, the study's co-author, told Governing. "If companies can not only secretly renegotiate the rules, they can also make sure that public records laws shield them from revealing these renegotiations."

Continue reading.

NEXT CITY

by RACHEL KAUFMAN

MARCH 7, 2019

Launch Pad: Creating Coworking Hubs and Startup Investments in Opportunity Zones (Podcast Episode #15)

What will business investing in opportunity zones look like? Coworking hub and startup incubator Launch Pad may offer the best example I've seen so far. The husband-wife team of CEO Chris Schultz and president Anne Driscoll are on a mission to create the world's strongest community of entrepreneurial workers. They believe in a world where

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opportunitydb.com

March 6, 2019

TAX - OHIO

State/Village of Put-in-Bay v. Mathys

Court of Appeals of Ohio, Sixth District, Ottawa County - January 18, 2019 - N.E.3d - 2019 WL 259737 - 2019 -Ohio- 162

Village filed criminal complaints against business operator and business, claiming that they had violated ordinance imposing a license fee upon owners of vehicles used for transportation or property, for hire and for use in the village.

After transfer from village's mayor court, the Court of Common Pleas granted defendants' motions to dismiss. Village appealed. Appeals were consolidated.

The Court of Appeals held that:

- Ordinance imposing a license fee upon owners of vehicles used for the transportation of persons or property, for hire and for use in the village, was a valid exercise of village's taxing power;
- Home Rule Amendment's did not bar village's imposition of license fee; and
- Village's argument that the trial court erred when it failed to apply the doctrines of res judicata and stare decisis when it considered motions to dismiss was moot.

TAX - WASHINGTON

End Prison Industrial Complex v. King County

Supreme Court of Washington - December 27, 2018 - 431 P.3d 998

Objector brought declaratory judgment action against county, challenging county's assessment of increased property taxes.

The Superior Court, King County, dismissed action as untimely. The Court of Appeals reversed.

After grant of review, the Supreme Court of Washington held that:

- Proposed measure for increase in property taxes sufficiently described taxation structure which county later implemented, and therefore ten-day time limit for challenging measure's ballot title applied;
- Challenges to a ballot title based on failure to comply with statute requiring a ballot title for a levy lid lift to contain an express statement in certain circumstances must be raised during the statutory ten-day time limit for challenges to a ballot title; and
- Challenges to a ballot title based on failure to comply with statutory accuracy and clarity requirements must be raised during the statutory ten-day time limit for challenges to a ballot title.

GFOA's FAQ's on Streamline Sales Tax.

Local and State governments are working together to advance and streamline online sales tax

collection in order to ensure success for all stakeholders.

Click here for the FAQ's about the Streamline Sales Tax Project.

IRS Rewrites the Internal Revenue Manual Section on Closing Agreements for Tax-Advantaged Bonds: Squire Patton Boggs

You have been waiting all weekend to hear the news, so we will get straight to the point. It took three years, but the IRS finally corrected the brain-melter that we posted a few days ago, making fairly comprehensive changes to Part 4, Chapter 81, Section 6 of the Internal Revenue Manual (IRM 4.81.6), titled "Closing Agreements," on February 20, 2019. Exciting, is it not?

As we've discussed before, the Internal Revenue Manual provides detailed rules for calculating the taxpayer exposure that must be paid on an issue that is taken into VCAP or that is ensnared in an audit that reveals a problem with the bonds. Once the issuer calculates the taxpayer exposure amount for each affected year, the issuer must be future-valued forward in time or present-valued back in time to the date on which the issuer enters into a closing agreement with the IRS to fix the problem with the bonds.

The IRS rewrote the example from the weekend into the imperative mood, making it somewhat less incomprehensible.[1]

Continue Reading

By Alexis Baker on March 4, 2019

The Public Finance Tax Blog

Squire Patton Boggs

Fourth Circuit Holds that a Municipal Stormwater Management Assessment is a Fee and Not a Prohibited Railroad Tax.

On February 15, the U.S. Court of Appeals for the Fourth Circuit decided Norfolk Southern Railway Co. v. City of Roanoke, et al.; the Chesapeake Bay Foundation was an Intervenor-Defendant. The Fourth Circuit held that a large stormwater management fee (stated to be $417,000.00 for the year 2017) levied by the City of Roanoke against the railroad to assist in the financing of the City's permitted municipal stormwater management system was a permissible fee and not a discriminatory tax placed on the railroad.

The Railroad Revitalization and Regulatory Reform Act of 1976 specifically provides that states and localities may not impose any tax that discriminates against a rail carrier, 49 U.S.C. § 11501. Accordingly, the issue confronting the Fourth Circuit was whether the assessment was fee and not a tax.

A 1992 decision of the U.S. Court of Appeals for the First Circuit, San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico, provides a framework by which the courts can decide

these very close cases. Applying this framework, the Fourth Circuit concluded that the City's charge—levied against only local property owners and not the general public, "is part of a regulatory scheme, rooted in the Clean Water Act, whose purpose is to remedy the environmental harms associated with stormwater runoff and to hold stormwater dischargers responsible for footing the bill."

Judge Wilkinson filed a concurring opinion, noting how degraded the Chesapeake Bay has become over the years, but that effective municipal stormwater management systems established to handle large quantities of stormwater will not only ensure the City's compliance with its permit and the Clean Water Act, it will eventually enhance the overall health of the Bay, even though the City of Roanoke does not lie within the Bay's watershed. To rule otherwise would put existing Chesapeake Bay-area cleanup projects, financed by such fee systems, at risk. He writes that

> "Our rivers and estuaries are complex, interconnected ecosystems. It follows, therefore, that efforts to restore the are correspondingly complex and interconnected… Everyone… is better off when our streams run clear and estuarine flora and fauna are flourishing."

Pillsbury – Gravel2Gavel Construction & Real Estate Law

by Anthony Cavender

February 26, 2019

HUD Expands Low-Income Housing Tax Credit Program to Encourage Opportunity Zones Investment.

The pilot program will now include "new construction" and "substantial rehabilitation" projects

The federal Opportunity Zones program has been wildly popular with investors and developers, but critics say the tax incentive program has so far not gone to areas most in need.

Now, the Department of Housing and Urban Development has announced an initiative to encourage affordable housing investment within the thousands of designated Opportunity Zones nationwide.

The Federal Housing Administration's low-income housing tax credit financing pilot program will now include "new construction" and "substantial rehabilitation" of multifamily projects only, HUD Secretary Ben Carson said. Opportunity Zones development, meanwhile, can cover a wide range of property types.

The provision could speed up the application process for developers looking to use the low-income tax credit to build new ground-up apartment projects, or for those seeking to drastically redevelop old buildings in Opportunity Zones. HUD said the average processing time for low-income credit deals is currently 90 days, but under the FHA pilot it can potentially reduce this time to 30 days.

The low-income tax credit is a federal subsidy that finances low-income housing. It allows investors to claim tax credits on their federal income tax returns for building affordable housing.

In recent years, allegations have surfaced of fraud and misuse of the low-income tax credits. In August, Bloomberg reported Wells Fargo was being investigated by the Department of Justice for allegedly colluding with affordable housing developers nationwide to drive down the prices of low-income tax credits — potentially defrauding hundreds of millions of dollars from the federal program.

The Opportunity Zones program, pushed forward by President Trump's tax plan in 2017, allows developers and investors to defer and possibly forgo paying capital gains taxes if they invest in historically distressed areas. The biggest tax advantage goes toward developers or investors who hold the properties for at least 10 years.

The Opportunity Zones program does not have a requirement to build affordable housing, and there are only a few restrictions as to what a developer cannot build in the zones.

Critics are worried the program will only benefit wealthy developers in gentrifying and up-an--coming areas that happen to be located in Opportunity Zones, and that the truly distressed areas will be ignored.

Real estate developers are anxiously awaiting the IRS and the U.S. Treasury, which will release more guidance and rules around Opportunity Zones.

In recent months, firms have launched numerous Opportunity Zones funds targeting hundreds of millions of dollars. Some of those companies include Youngwoo & Associates, Fundrise, RXR Realty and EJF Capital. SkyBridge Capital is targeting a $1 billion fund. That fund was rolled out in December with EJF as a subadviser, though SkyBridge later dissolved the partnership and found a new subadviser.

The Real Deal

By Keith Larsen | February 25, 2019 04:30PM

Erin Gillespie: A Community-Driven Approach to Opportunity Zone Investing (Podcast Episode #14)

What types of opportunity zone investments are community leaders looking for? And what can local communities do to incentivize investment in their opportunity zones? Joining me on the podcast to discuss these topics and more is Erin Gillespie, principal at economic development consulting firm Madison Street Strategies and former deputy chief of staff for Florida's…

Continue reading.

February 27, 2019

TAX - FEDERAL

Dawson v. Steager

Supreme Court of the United States - February 20, 2019 - S.Ct. - 2019 WL 691579 - 2019 Employee Benefits Cas. 54, 600 - 19 Cal. Daily Op. Serv. 1556

Taxpayer, who was a retired federal marshal, sought judicial review of Office of Tax Appeals' decision affirming refusal of Tax Commissioner of State of West Virginia to allow taxpayer to exempt from his taxable state income benefits received from Federal Employee Retirement System (FERS).

The Circuit Court reversed the Office of Tax Appeals. Commissioner appealed. The Supreme Court of Appeals of West Virginia reversed and remanded. Certiorari was granted.

The Supreme Court of the United States held that the West Virginia statute exempting from state taxation the pension benefits of certain state and local law enforcement officers, but not the federal pension benefits of retired federal marshal, violates the intergovernmental tax immunity doctrine, as codified in federal statute.

Although the favored class is small, the state statute expressly affords state law enforcement retirees a tax benefit that federal retirees cannot receive, there were no significant differences between federal retiree's former job responsibilities as a United States Marshal and those of tax-exempt state and local law enforcement retirees, and so state statute unlawfully discriminates against retired federal marshal "because of the source of [his] pay or compensation," as forbidden by federal.

When It Rains, It Pours: New Jersey's Proposed 'Rain Tax'

The so-called Clean Stormwater and Flood Reduction Act (Assembly Bill A2694; Senate Bill 1073), which was passed by the New Jersey Legislature on January 31, currently awaits Gov. Murphy's signature. The act notes that 10 percent of New Jersey's land area is covered with impervious surfaces. The bill received wide support, because, as it states, "New Jersey, in particular, is prone to pollution and flooding problems," which are "particularly acute in the 21 urban New Jersey municipalities that have combined sewer systems, which routinely overflow and discharge untreated wastewater and stormwater into the State's waters, contributing to water pollution and impairing the use and enjoyment of those waters."

The act would permit a county or municipality to establish a public stormwater utility for the purposes of "acquiring, constructing, improving, maintaining, and operating stormwater management systems in the county or municipality." Once a utility is established, a county or municipality could establish and collect "reasonable fees and other charges" to recover the stormwater utility's cost for stormwater management. Such "fees and other charges" may be billed to and collected from the "owner or occupant, or both, of any real property from which originates stormwater runoff which directly or indirectly enters the stormwater management system or the waters of the State" and are to "be based on a fair and equitable approximation of the proportionate contribution of stormwater runoff from the property." Farmland or land in agricultural use and assessed as such pursuant to the Farmland Assessment Act would be exempt from such fees or other charges. Presumably, such a fee would be based on the amount of impervious coverage a property has; however, the act provides for a partial fee reduction for properties that incorporate stormwater management strategies that exceed New Jersey Department of Environmental Protection or local stormwater control requirements.

A portion of the funds collected would be diverted to state and local coffers other than those of the stormwater utility. The lesser of 5 percent of such fees and charges or $50,000 is to be remitted to the state treasurer by each public stormwater utility for deposit into the Clean Stormwater and Flood Reduction Fund. Up to 5 percent of a surplus in annual revenue from a stormwater utility may

be transferred to and included in the local municipal budget.

While there is no doubt that the enhancement of stormwater infrastructure encouraged by the act would be a public benefit, particularly in reducing pollution from runoff, it is questionable whether the proposed act will actually make a difference in a state with some of the most aggressive stormwater regulations in the country. One of the arguments against the so-called "rain tax" is the existence of New Jersey's Stormwater Management rules, which regulate runoff through the Residential Site Improvement Standards in connection with residential applications as well as in connection with major developments and site plan applications. The Stormwater Management rules have been in effect since 2004.

It is likely that such fees will add another layer of cost for developers who already have to comply with stormwater management regulations to reduce runoff and sometimes make off-tract improvements to stormwater systems. The stormwater utilities that would be formed pursuant to the act can be compared to existing sewer authorities, which collect connection and usage fees; yet despite these funds, many sewer systems are antiquated. In such cases, despite the payment of sewer connection and usage fees, sewer authorities and municipalities still look to developers to repair or upgrade the off-tract sewer systems in connection with development approvals.

Gov. Murphy has not yet signed the act. If he does, it remains to be seen how many municipalities and counties will establish local stormwater utilities and fund them through local taxation.

Day Pitney Alert

February 28, 2019

Day Pitney Author(s) Christopher John Stracco Katharine A. Coffey Craig M. Gianetti

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Babies, Bathwater, etc. – The IRS Should Keep the Helpful Non-Reissuance Rules from the Reissuance Notices

The March 1 deadline for submitting comments on the proposed reissuance regulations to the IRS is coming up fast. We make a general comment here – the existing guidance contains helpful ancillary rules that aren't directly implicated by the core reissuance rules. The IRS should not exclude these helpful ancillary rules from the final regulations. They've proved helpful to issuers, and there's no policy reason to scrap them.

Continue Reading

By **Johnny Hutchinson on February 19, 2019**

The Public Finance Tax Blog

Squire Patton Boggs

Know the Situations When Munis Don't Offer Tax-Free Benefits.

Many fixed-income investors gravitate towards municipal debt as an investment option

because of the tax-free income; for some, this single benefit is enough to relinquish the potential for higher coupons on other alternatives like corporate debt or equity investments.

These alternatives may produce higher yields; however, the overall tax benefit with municipal debt is often enough to outweigh the higher yields offered on taxable debt. Most importantly, this tax benefit increases as an investor's tax bracket increases.

On the contrary, an investor purchasing municipal debt solely for its tax-free income benefit must be aware of situations where income from municipal debt holdings can be treated like normal interest income, creating a tax liability and cutting into the overall return of the security.

In this article, we will take a closer look at some of these situations and how investors can thoroughly assess their investment options before making any investment decisions.

Continue reading.

municipalbonds.com

by Jayden Sangha

Feb 20, 2019

Coalition of Governors Push to Restore State, Local Tax Deduction.

"This is politics masquerading as tax policy," New Jersey Gov. Phil Murphy said.

A coalition of governors from high-tax states hit hardest by a provision of the Republican tax overhaul said Friday they will join together to push Congress to restore the full federal tax deduction for certain state and local taxes.

The eight states are all led by Democratic governors, but New York Gov. Andrew Cuomo said they are also bound by their belief that the $10,000 cap on the so-called SALT deduction is fundamentally unfair. Cuomo said the 2017 GOP tax law hurts states that already pay more in taxes than they get back from the federal government. These states tax citizens to pay for much-desired services like education and health care, he said.

"This is politics masquerading as tax policy," said New Jersey Gov. Phil Murphy during a news conference at a National Governors Association meeting in Washington, D.C. "It is gutting our middle class. It is just plain wrong."

Along with New York and New Jersey, governors from Connecticut, Hawaii, Illinois, Oregon, Rhode Island and Washington state have joined the coalition. Many of these states are part of a federal lawsuit that challenges the change. Some, too, have attempted to pass tax workarounds through their legislatures to restore the deduction for residents, but the IRS has ruled those out-of-bounds.

Cuomo met with President Trump earlier in February about the issue, although the White House after the meeting tamped down expectations of a change of heart by the administration.

Now, the focus needs to be on lobbying Congress to make clear that restoring the full deduction should be a priority with a new Democratic majority in the House, Cuomo said. He acknowledged

that Republican Sen. Chuck Grassley, a key player on tax issues, a couple weeks ago indicated he would not support reworking the SALT cap.

“We need a change to the law. That has to happen in Washington,” Cuomo said. “It is on Speaker [Nancy] Pelosi’s radar screen.”

Murphy emphasized that there are proposals on the table, such as a bill introduced earlier this month by New Jersey Sen. Bob Menendez and others. In January, two New York House members introduced their own legislation to restore the full deduction.

Tax experts across the ideological spectrum have noted that the SALT problem hits higher-income taxpayers most deeply. The Urban-Brookings Tax Policy Center has estimated that 57 percent of the additional tax from limiting the deduction would be paid by the top 1 percent.

During the news conference, Cuomo emphasized that the state saw a $2.3 billion decline in income tax payments in December and January, a fact that he has tied to the SALT deduction limit. But tax experts interviewed by the New York Times suggested the revenue shortfall more likely was related to volatility in the stock market, for example, with high earners choosing to write off capital losses to reduce their tax burdens.

Route Fifty

By Laura Maggi,
Managing Editor

FEBRUARY 22, 2019

State and Local Individual Income Tax Collections Per Capita.

The individual income tax is one of the most significant sources of revenue for state and local governments. In fiscal year (FY) 2016, the most recent year of data available, individual income taxes generated 23.5 percent of state and local tax collections, just less than general sales taxes (23.6 percent).

The map below shows combined state and local individual income tax collections per capita for each state in FY 2016. Forty-one states and the District of Columbia levy broad-based taxes on wage income and investment income, while two states—New Hampshire and Tennessee—tax investment income but not wage income. Tennessee’s tax on investment income—known as the “Hall tax”—is being phased out and will be fully repealed by tax year 2021. Seven states do not levy an individual income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming.

Continue reading.

The Tax Foundation

Katherine Loughead

February 21, 2019

TAX - NEW YORK

Matter of Foreclosure of Tax Liens by Proceeding in Rem Pursuant to Article 11 of Real Property Tax Law by City of Utica

Supreme Court, Appellate Division, Fourth Department, New York - February 8, 2019 - N.Y.S.3d - 2019 WL 490992 - 2019 N.Y. Slip Op. 01020

After third party that owned parcel of real property on which respondent's automobile-parts business was located defaulted in "in rem" tax foreclosure proceeding commenced by city, default judgment was entered which, inter alia, awarded possession of parcel, as well as "all items of personal property thereon deemed abandoned," to city.

Respondent made application by order to show cause for order vacating, for lack of jurisdiction, that part of the judgment of foreclosure that deemed his personal property abandoned. The Supreme Court, Oneida County, denied application, and respondent appealed.

The Supreme Court, Appellate Division, held that:

- Respondent's application was not subject to the one-month limitations period set forth in the default judgment section of the statute governing foreclosure of tax liens, and
- The court in the tax foreclosure proceeding lacked jurisdiction to enter a judgment disposing of personal property.

One-month limitations period set forth in default judgment section of statute governing foreclosure of tax liens applies only to an application to reopen a default judgment with respect to a parcel of real property described in an underlying petition of foreclosure; it does not apply where the application seeks to vacate for lack of jurisdiction a provision in a judgment disposing of personal property not described in the petition.

Although Supreme Court may exercise in rem jurisdiction over real property in a proceeding to foreclose a tax lien, the court lacks jurisdiction to enter a judgment disposing of personal property; article 11 of Real Property Tax Law (RPTL), governing procedures for enforcement of collection of delinquent taxes, does not grant jurisdiction over personal property located on a parcel of real property that is the subject of an in rem tax foreclosure proceeding, nor does it permit the tax district to obtain a judgment awarding the tax district such personal property.

TAX - SOUTH CAROLINA

CSX Transportation, Inc. v. South Carolina Department of Revenue

United States District Court, D. South Carolina, Columbia Division - January 7, 2019 - F.Supp.3d - 2019 WL 117313

Railroad brought action against South Carolina Department of Revenue alleging that South Carolina's property tax scheme discriminated against railroads in violation of Railroad Revitalization and Regulatory Reform Act (4–R Act) by excluding railroad property from benefit of 15% cap to increases in appraised values under South Carolina Valuation Act, and seeking injunctive and declaratory relief.

Following bench trial, the United States District Court entered judgment in favor of Department. Railroad appealed. The Court of Appeals vacated and remanded.

On remand, the District Court held that:

- Appropriate comparison class to railroad consisted of the other commercial and industrial real property taxpayers within South Carolina, and
- State provided sufficient justification for Valuation Act's failure to extend cap to railroad.

Provision of South Carolina Valuation Act imposing 15 percent cap on increase in fair market value of real property attributable to a periodic countywide appraisal and equalization program constituted a limitation on increases on ad valorem property taxes in South Carolina and not an exemption from tax, and thus provision was subject to Railroad Revitalization and Regulatory Reform Act (4–R Act) prohibition on any tax that resulted in discriminatory treatment of a railroad; whether or not railroad would be allowed to benefit from 15 percent cap would affect railroad's property tax.

Appropriate comparison class to railroad consisted of the other commercial and industrial real property taxpayers within South Carolina, in railroad's action against South Carolina alleging violation of Railroad Revitalization and Regulatory Reform Act (4–R Act) through South Carolina Valuation Act's exclusion of properties valued by the unit valuation method from a general cap on permissible increases in appraised values of commercial and industrial real properties.

State provided sufficient justification for South Carolina Valuation Act's failure to extend general 15 percent cap on permissible increases in appraised values of commercial and industrial real properties to railroad, and thus failure to extend cap to railroad did not violate Railroad Revitalization and Regulatory Reform Act (4–R Act) prohibition on discriminatory tax treatment of railroad; a 20 percent equalization factor applied to railroads but not to commercial and industrial taxpayers, state law provided various tax exemptions for benefit of railroads, and because sale of commercial and industrial property triggered assessment that set fair market value on property without regard to 15 percent cap, lost value was recouped in whole or in part for tax base at time of sale.

Opportunity Zones Must Work for Working Businesses.

In the first quarter of 2018, we and our colleagues worked with our governors to designate our states' Opportunity Zones. No economic development program is perfect. But this new federal tax tool, which was introduced by over 100 bipartisan congressional co-sponsors, has great potential. We take our responsibility to utilize this new tool to strengthen the economic vitality of our communities and enhance the well-being of our citizens seriously. We selected zones based on the intent of Congress that this new federal capital gains tax incentive attract scarce equity capital to underinvested communities for two purposes: the development of brick and mortar projects and the growth of operating businesses. This program was not designed simply for investments in real estate. It was also created to foster entrepreneurial ventures, to strengthen manufacturers, to draw capital to businesses small and large, and to result in the production of jobs in these designated communities. As key stakeholders in the success of our states' Opportunity Zones, we want to ensure that the regulations the IRS delivers in the coming weeks reflect this same two-part intent.

The scale of need is vast. As recently as 2016, more than three-quarters of all U.S. counties still contained fewer places of business than before the recession, according to the Economic Innovation Group. If current trends continue, some of the country's most distressed census tracts may never recover the jobs they lost to the Great Recession. The status quo would have investors continue to

pour capital into the places already doing well. Opportunity Zones have the potential to change investor behavior by providing an incentive to take off blinders and consider investing in spaces and businesses that can bring new vitality and opportunity to places that have been left behind.

We and our peers – a dozen top state economic development officials – have written two letters to Treasury, the IRS, and the regulatory authorities summarizing our suggestions to ensure this new tax incentive delivers what both Congress and our governors have promised their constituents. We make four main recommendations.

First, Opportunity Zone investors should be able to invest in high-impact operating businesses that can generate jobs and wealth at scale by drawing revenue from outside of the community into it. Investors should be able to inject equity into manufacturers and e-commerce companies in addition to the restaurants and storefronts that also make up a community. For example, this means that the 50 percent gross income requirement should be interpreted to require that qualifying entities be active businesses as opposed to holding companies or patent boxes. But it should not require that income be majority derived from a single point of sale in an Opportunity Zone, which would disqualify most e-commerce companies, manufacturers, and other businesses with the potential to create significant numbers of new jobs and wealth for their communities. (The current set of proposed regulations seemingly require such predominantly localized sales.) We agree with proposals that allow businesses the necessary operational flexibility to qualify for these investments, such as the straightforward requirements that 70 percent of a qualifying business's tangible property be in an Opportunity Zone.

Second, the IRS and Treasury must demonstrate a basic understanding of what motivates investors to provide equity to operating businesses by writing rules and regulations that allow Opportunity Funds–the required vehicles for investment under this program–to create diverse investment portfolios. Successful Opportunity Fund managers will naturally seek to spread out their risk by investing in several businesses in case any of them fail. Diversification is particularly important in struggling communities where investors already view projects as riskier and returns are seen as less certain. Because sound funds will make multiple business investments, they will need flexibility in the time allowed to meet the law's twice annual "90 percent asset test" to ensure that the Fund managers can put together a strong portfolio of qualifying business investments that will attract and keep investors interested in zone communities.

Third, Opportunity Funds should be able to buy and sell assets without triggering tax liabilities for their partners that would undermine the 10-year tax benefit. Specifically, the rules should allow funds to reinvest interim gains in a timely manner without incurring a penalty or triggering a taxable event. Successful investing requires a degree of nimbleness to react to new developments. Investors will be reluctant to commit to holding a stake in a single company for 10 years given all the forces that could intervene during that period. Investors should be able to divest from less-than-successful companies if they keep their capital at work in Opportunity Zones. The IRS could consider establishing a minimum hold period for any individual investment in a zone, but requiring an investor to hold each individual business investment for 10 years (rather than simply committing to remain invested in the Fund for 10 years) will significantly undermine the ability to invest in operating businesses.

Finally, we encourage Treasury to adopt simple, unobtrusive reporting requirements to collect data on Funds and their investments. Such reporting will illuminate where the incentive has been successful and will help identify areas for improvement and modification in the future. These data will help us understand whether this program is incentivizing the investments intended by Congress.

We recognize that finalizing new regulations is never as simple as it seems, but by working together,

we are confident we can unleash the true potential of Opportunity Zones in these key communities.

THE HILL

BY STEFAN PRYOR, VALE HALE AND DON PIERSON, OPINION CONTRIBUTOR — 02/20/19 02:45 PM EST

THE VIEWS EXPRESSED BY CONTRIBUTORS ARE THEIR OWN AND NOT THE VIEW OF THE HILL

Stefan Pryor is the Rhode Island Secretary of Commerce. Vale Hale is Executive Director of the Utah Governor's Office of Economic Development. Don Pierson is Secretary of Louisiana Economic Development.

Distressed Cities Find Hope in Federal 'Opportunity Zones'

A new program may be a boon to struggling cities — if it targets the right ones.

York, Pa., grew up making things. The brick smokestacks that break up the skyline are inescapable reminders of its industrial past. Buildings that once housed factories employing hundreds of workers have now been converted into warehouses that employ only a handful of people, at wages that don't come close to rivaling those of their industrial predecessors.

Mayor Michael Helfrich grew up in York. He remembers when middle-class jobs were only a short walk away from the homes of the men and women who produced everything from Pullman cars to Pfaltzgraff dinner plates to York Peppermint Patties. Those companies are gone. Pullman succumbed to competition from Detroit automakers. Hershey's bought the York candy factory and moved production to its own plants, which eventually landed in Mexico in 2009. Pfaltzgraff was purchased in 2005 and its operations moved to China.

But most of the jobs haven't left because of competition or consolidation as much as they've left to escape York's taxes, which are almost three times the rate in surrounding York County. The taxes have led to a vicious cycle — innovation, development and flight — that has persisted for decades. "We used to build wealth in the city of York," Helfrich says. "In almost 50 years, we have not seen that. Our growth has been, 'Can you come here and give us some jobs?' Meanwhile, the wealth was going somewhere else. It wasn't building in York."

Continue reading.

GOVERNING.COM

BY J. BRIAN CHARLES | FEBRUARY 2019

Amazon HQ2 Was an 'Unfortunate Distraction' From 'Needy Communities'

The online retail giant's plans in New York attracted bad PR for a new federal program aimed at helping economically distressed areas like Long Island City.

Amazon's announcement last week that it would no longer build a corporate headquarters out of New York City was met with harsh criticism from many state and local leaders. Mayor Bill de Blasio condemned the online retail company, while Gov. Andrew Cuomo, also a Democrat, lambasted the progressive politicians whose attacks against Amazon ultimately killed the deal.

"Amazon chose to come to New York because we are the capital of the world and the best place to do business. However, a small group [of] politicians put their own narrow political interests above their community," Cuomo said in a statement shortly after Amazon's announcement.

But for backers of so-called opportunity zones, Amazon's withdrawal removes an unwelcome distraction from a burgeoning effort to attract new investment to low-income neighborhoods.

Opportunity zones were created as part of the 2017 federal tax overhaul. If private investors plop money into these economically distressed neighborhoods, they can shield portions of their capital gains tax liability. There are 8,700 of these zones scattered across the country. One of them is in Long Island City, Queens, in New York, where Amazon was going to locate one of its two new headquarters.

When Amazon made its HQ2 announcement in November, many people questioned the area's opportunity zone participation. If the neighborhood was attractive enough for the tech giant, then why did it need help from a federal investment program for distressed areas?

"When you first heard about the opportunity zone program, you said, 'Well this is helpful to poor people,'" says Timothy Weaver, an urban policy professor at the State University of New York at Albany. "But then you hear Amazon's name and that doesn't seem like something to help the poor."

On the same day Amazon announced its plans to move to Long Island City, Goldman Sachs announced that its opportunity zone fund was investing $83 million into the same neighborhood. The pairing of the two announcements, which Goldman Sachs said was a coincidence, led to sharp criticism of the opportunity zone program from the press.

Unlike Goldman Sachs, Amazon is too large to have qualified for an opportunity zone tax break. But the company nonetheless would have benefited from it being an opportunity zone, say Weaver and others. For instance, Goldmans Sachs had already planned to finance construction of apartments in Long Island City.

Now, with the Amazon move off the table, Weaver suggests the opportunity zone plan, at least in Long Island City, can move forward on its merits.

"I certainly think the HQ2 saga has been an unfortunate distraction at the expense of the thousands of needy communities nationwide that stand to benefit from thoughtful opportunity zone implementation," says John Lettieri, the president and chief executive officer of the Economic Innovation Group, the think tank that helped draft the opportunity zone language in the 2017 tax plan. That group, started by Napster founder and former Facebook executive Sean Parker, has spent more than five years trying to draw investment to economically depressed areas.

"There are outliers, but the national numbers aren't ambiguous: The vast majority of opportunity zones are facing an array of deep socioeconomic challenges," Lettieri says. "They deserve far more serious attention than they are getting."

Neither Lettieri or Weaver will speculate on whether Amazon's exit will have an impact on investment in the Long Island City opportunity zone. The program is still new. The rules governing opportunity zones are still subject to change, and the market conditions are always in flux, Lettieri

says.

And questions remain as to whether the program will deliver jobs or services as intended. Weaver has long been a critic of opportunity zones. His belief is that a tax incentive program like this one naturally will encourage those investments designed to deliver maximum returns. That means high-yield projects like real estate developments, but not other projects that could perhaps better serve distressed communities.

“The type of things we might want in these neighborhoods — schools, libraries or playgrounds — have nothing to do with investment and profit,” Weaver says.

GOVERNING.COM

BY J. BRIAN CHARLES | FEBRUARY 20, 2019 AT 12:23 PM

Recap of Feb 14 IRS Public Hearing on Opportunity Zones.

This past Thursday, February 14, the IRS Auditorium in Washington DC was packed to capacity with over 200 attendees as stakeholders spoke during the public hearing on proposed regulations: “Investing in Qualified Opportunity Funds” [REG-115420-18].

Hearing participants requested additional guidance on a wide variety of proposed regulations, with many suggesting improvements to the regulations that would allow for more flexibility — particularly in regards to business investment.

Podcast episode on the hearing

This IRS hearing was the focus of on a recent episode of the Opportunity Zones Podcast. Click here to listen to the recap.

Topics covered at the hearing

- Opportunity zone business qualification requirements
- 70% and 90% asset test requirements
- Community impact reporting and program effectiveness measurement
- Reinvestment of interim gains
- Substantial improvement test for operating businesses
- Multi-asset funds
- Combining Opportunity Zones with other credits (HTC, NMTC, and LIHTC)
- How land value exclusion could potentially lead to predatory activity
- Applying SBIC framework to Opportunity Zones
- Using Opportunity Zones for veteran housing
- Gentrification risks and potential for negative impact on minority communities
- How Section 469 would apply to investments made in qualified opportunity funds
- QOF asset sales
- Debt refinance proceeds
- Employee Stock Ownership Plans (ESOPs)
- Feeder partnerships
- Carried interest
- Interaction of Section 752 with qualified opportunity fund liabilities

- Grantor trust tax liability treatment
- Treatment of ground leases, specifically in regards to tribal land

Continue reading.

OpportunityDb

By Jimmy Atkinson

February 16, 2019

Wall Street, Seeking Big Tax Breaks, Sets Sights on Distressed Main Streets.

Distressed America is Wall Street's hottest new investment vehicle.

Hedge funds, investment banks and money managers are trying to raise tens of billions of dollars this year for so-called opportunity funds, a creation of President Trump's 2017 tax package meant to steer money to poor areas by offering potentially large tax breaks.

Little noticed at first, the provision has unleashed a flurry of investment activity by wealthy families, some of Wall Street's biggest investors and other investors who want to put money into projects ostensibly meant to help struggling Americans. The ranks of those starting such funds include Anthony Scaramucci, the New York hedge fund executive who served briefly as Mr. Trump's communications director.

Continue reading.

The New York Times

By Matthew Goldstein and Jim Tankersley

Feb. 20, 2019

When Are Tax Increment Revenues Federally Taxable?

Tax increment financing ("TIF") has had a long and effective history in Colorado. In many cities and towns throughout Colorado, TIF has successfully been used to help remediate environmental issues and spur development in blighted areas where market realities would have prohibited such progress. A great example of a successful TIF development project is Belmar, an open-air shopping center in Lakewood, Colorado, that previously contained a dilapidated shopping center with high vacancy rates. More to the point, the site contained a large chemical plume that was costly to remediate. But for the public-private partnership and the use of TIF, the successful Belmar redevelopment project would have never been feasible. Accordingly, TIF is an important governmental tool to encourage the type of development that supports a thriving community.

In Colorado, many large development projects that are supported by TIF are constructed with the help of a governmental district such as a metropolitan district, or other special improvement district, which has certain tax considerations and treatment that is different than a private developer. The

law is clear and undisturbed that most governmental districts can receive TIF revenues for eligible public improvements without, in most cases, a negative tax treatment.

However, not all development projects are of sufficient size and scope to justify the cost and complexity of forming a district, or don't lend themselves to the use of a district or tax-exempt municipal financing for other reasons. Instead, many developments are financed, constructed, owned and managed by private entities.

Prior to the Tax Cuts and Jobs Act of 2017 ("TCJA"), if a private entity was a corporation and received incremental tax funds as part of the project's financing, such revenues were not considered federal taxable income pursuant to the contribution to capital exclusion found in Section 118 of the Internal Revenue Code ("IRC"). Additionally, a private developer could (and still can) receive TIF as reimbursement for the construction of public infrastructure without immediate taxation of the TIF proceeds irrespective of whether or not the entity is a corporation. The issue that many private developers will have to resolve is that not all TIF revenues received by a private developer can be directly linked to or measured as reimbursement for the limited scope of public infrastructure recognized by the IRC and applicable case law. Many improvements and amenities that are generally considered "public" in the development world are not treated as such by the federal tax code. For those development expenditures by a private developer that are not recognized as public infrastructure costs but have appropriately received TIF revenues for reimbursable costs, will the developer now be taxed on such TIF revenues as ordinary income for the tax year in which the developer receives the TIF revenues? The answer remains unclear.

Historical Safe Harbor for Private Developers

The prior version of IRC Sec. 118 allowed the contribution of capital, such as the receipt of tax increment revenues, to be excluded in most circumstances from the definition of gross income for a corporation (this treatment did not apply to partnerships). Accordingly, before the TCJA, a private developer corporation could receive free land or monetary support from a governmental entity in order to incentivize the developer's real estate project. In the case of a contribution of land, the developer would, in most circumstances, receive a basis of zero in the property and, therefore, would pay taxes on the contributed property at the time of sale. In the case of the receipt of tax increment revenues, the revenues would, in most circumstances, reduce the basis in the property and improvements thereto. Accordingly, taxes were ultimately recovered, to some extent, by the sale; the impact of the incentive contribution, however, wasn't diminished at the outset of the development project by the immediate taxation of the tax increment revenues.

TCJA Changes to IRC Sec. 118

The TCJA gutted the ability of a corporation to exclude tax increment revenues from ordinary income in the tax year received by the private corporate developer entity by adding the following exclusion to the definition of "contribution to capital to the taxpayer" in Section 118 of the IRC: any contribution by any governmental entity or civic group (other than a contribution made by a shareholder). For example, a privately owned parking structure could, in certain circumstances, be funded with TIF revenues but would have to be received by a corporate developer entity as a contribution to capital pursuant to Sec. 118 of the IRC in order to avoid immediate taxation as ordinary income. With the TCJA changes to Sec. 118, it is likely that the foregoing scenario would result in a contribution that is immediately taxable as ordinary income.

The good news is that the revisions to Sec. 118 may not be applicable to many TIF revenues! While the Internal Revenue Service ("IRS") has not yet issued Treasury Regulations on this issue, the revised Sec. 118 provides the following exception:

"The amendments made by this section shall not apply to any contribution, made after the date of enactment of this Act by a governmental entity, which is made pursuant to a master development plan that has been approved prior to such date by a governmental entity." (emphasis added).

Accordingly, it is possible that urban renewal plans approved and in effect in Colorado as of Dec. 22, 2017, could be considered approved master development plans that are not subject to the revisions to Sec. 118. As such, private developers should work with their legal counsel to determine, in the absence of clear guidance from the IRS, whether the anticipated receipt of TIF revenues pursuant to an adopted urban renewal plan may be eligible for beneficial tax treatment under the former version of Sec. 118.

by Catherine Hildreth, Erik Jensen, and Carolynne White

February 7, 2019

Brownstein Hyatt Farber Schreck

Nothing Is Certain But Death, Taxes and Muni Bond Advantages

It's an annual reminder about the debt's obvious benefits.

If the last few days are any indication, the denizens of Wall Street either aren't as sharp as they seem or they're dreading the prospect of paying more in taxes. I say this because two of the most popular articles on the Bloomberg terminal this week boiled down to the simple fact that U.S. municipal bonds offer income that's exempt from federal taxes, and often state and local ones as well.

Consider the first article, "Invesco Money Manager Faces SALT Bite, Turns to This Tax Break." It chronicles Mark Paris's dismay that as a New Jersey resident, he's going to end up paying more in taxes because of the new $10,000 federal cap on state and local tax deductions. So what's the head of municipal strategies at Invesco going to do about it? Buy more tax-free munis, of course.

Just two days later, Bloomberg readers couldn't click fast enough on another article, "Your New York Taxes Are Too High? Muni Bonds May Offer an Answer." In it, Anthony Roth, chief investment officer of Wilmington Trust Investment Advisors, said some people in high-tax states like California, Connecticut, New Jersey, New York and Massachusetts would find that they owe more, which should boost demand for — you guessed it — tax-exempt municipal bonds.

Continue reading.

Bloomberg Opinion

By Brian Chappatta

February 14, 2019, 4:00 AM PST

TAX - WASHINGTON

Eyman v. Ferguson

Court of Appeals of Washington, Division 2 - January 23, 2019 - P.3d - 2019 WL 299767

Tax protester sought declaration that separate advisory votes were required for each tax increase in tax legislation.

The Superior Court dismissed the action. Protester appealed.

The Court of Appeals held that:

- Protester's appeal was moot;
- Public interest exception to mootness doctrine applied;
- Phrase "not subject to appeal" applied only to short description to be placed on ballot for advisory vote; and
- Protester's petition for declaratory judgment was untimely.

Tax protester's appeal from trial court's denial of his petition seeking declaration that a separate advisory vote was required for each tax increase enacted by tax legislation was moot, where the legislation had been voted on in a single advisory vote in which a majority of voters advised its repeal, so that the Court of Appeals could no longer provide effective relief.

Exception to mootness doctrine for matters of continuing and substantial public interest applied to tax protester's appeal from trial court's denial of his petition for declaratory judgment as untimely, in protester's action claiming that a separate advisory vote was required for each tax increase enacted by tax legislation; the content of a ballot and issues of statutory interpretation were generally matters of substantial public interest, the timeliness and appealability issues did not depend on the nature of the tax increases at issue, and whether separate advisory votes were required was an issue that would likely recur with each package of legislative tax increases.

Phrase "not subject to appeal," as used in statute governing the short description to be placed on a ballot for an advisory vote on tax legislation, applied only to the Attorney General's formulation of the short description and not to other matters such as a decision to consolidate multiple tax increases in a single advisory vote; the phrase was placed in the middle of a clause requiring the Attorney General to prepare a short description for an advisory vote, and the phrase only appeared in the short description statute and was not found in sections addressing other steps in the preparation of advisory votes.

Tax protester's petition seeking declaration that a separate advisory vote was required for each tax increase enacted by tax legislation was untimely after the Attorney General transmitted the short description for the advisory vote to the Secretary of State; statutes governing short descriptions and their filing and transmittal established that the transmitted description would be used in upcoming ballots, and any challenge necessarily affected the description and how it appeared in a ballot, so that allowing challenges after transmittal would have injected self-contradiction into the statutory scheme and potentially jeopardized timely preparation of ballots.

Municipalities Still Need To Play The Subsidies Game (Radio)

MUNIS IN FOCUS: Joe Mysak, Editor for Bloomberg Brief: Municipal Market, on infrastructure, Amazon, and high speed rail. Hosted by Abramowicz and Paul Sweeney.

Running time 06:00

Play Episode

Bloomberg Radio

February 15, 2019 — 11:30 AM PST

Your New York Taxes Are Too High? Muni Bonds May Offer an Answer.

- **Wilmington Trust's Roth sees munis as 'tail risk' hedge**
- **Filers in high-tax states may shelter more income in munis**

One of the most banal-sounding investments for U.S. investors may be one of the best opportunities, at least according to Anthony Roth, chief investment officer of Wilmington Trust Investment Advisors.

Roth is referring to the $3.8 trillion municipal bond market, which he calls one of the few places where investors can find a haven from the risks buffeting the market, and an area he expects to "hold up really well if we go through a down cycle."

Another draw for wealthy investors: the opportunity for residents of high-tax states to shelter more income, now that state and local property and income tax deductions are capped at $10,000. Roth expects overall tax refunds in 2019 to exceed those of 2018 by some $60 billion, but notes that some people in high-tax states like California, Connecticut, New Jersey, New York and Massachusetts will find that they owe more than ever. That could increase demand for municipal bonds on the margin, Roth said.

Muni finances are generally strong, with supply limited over the past year and tax receipts pretty healthy, said Roth.

"If you're careful with credit research, it's not hard to find high-quality muni issuers that have a very low chance of defaulting through the next credit cycle," he said. "If we're at the end of the cycle, just keeping your money intact and having a real positive return is not a bad result." He recommends that clients buy bonds with maturities between three and five years.

Munis are also attractive as a way to hedge tail risk, said Roth, which he defined as the chance of a significant drop in equities, perhaps accompanied by a recession. He isn't forecasting either in 2019, but if something like that does come to pass, "munis will hold up quite well because municipal balance sheets are generally very strong at this time, much more so than corporates," Roth said.

The after-tax returns for high-net-worth investors would be about 3 percent. "In an environment where inflation is 1.9 percent over the long term, getting a real return of more than 1 percent with very little risk, in order to wait out the cycle until things improve — that is not uncompelling," said Roth. "There aren't many places to hide today."

Bloomberg Wealth

By Suzanne Woolley

February 13, 2019, 6:43 AM PST

Amazon's Pivot Raises Scrutiny of Incentive Deals.

New York bills call for compacts with other states promising to not provide any company-specific subsidies

The collapse of Amazon.com Inc.'s plan to build a second headquarters in New York City has the potential to damp some states' willingness to offer tax breaks.

Spurred by Amazon's second-headquarters selection process, politicians and groups long opposed to incentive packages have launched legislative efforts to prohibit them in some states. In New York, bills proposed in the State Assembly and Senate call for compacts with other states promising to not provide any company-specific subsidies.

Recent pivots by large companies, including Foxconn Technology Group and General Electric Co. , will likely lead to increased attention to incentives tied to performance and timelines, with an emphasis on long-term commitments, said Jeff Finkle, president of the International Economic Development Council, a group that represents economic-development officials across the U.S.

Continue reading.

The Wall Street Journal

By Valerie Bauerlein, Kate King and Cameron McWhirter

Updated Feb. 15, 2019 3:57 p.m. ET

With Amazon Out of New York, Some Lawmakers Seek Multistate Ban on Corporate Tax Breaks.

Lawmakers in at least a half-dozen states are considering forming a compact in which they would agree to end efforts to lure companies with tax incentives.

- **SPEED READ:**
- **Legislatures in Florida, Illinois, New York and several other states are considering or may take up a version of the End Corporate Welfare Act, which would stop the practice of offering tax incentives designed to woo certain corporations to relocate.**
- **Supporters say such a multistate compact would end the "race to the bottom" of states trying to outbid one another in corporate giveaways.**
- **The effort is part of a backlash to the $2 billion in tax breaks promised to Amazon by New York and Virginia for its second headquarters.**

Amazon's yearlong, nationwide contest for its second corporate headquarters netted the internet retail giant more than $2 billion in promised tax breaks from New York state and Virginia. But after mounting public resistance to such "corporate welfare," Amazon announced Thursday that it will abandon its plans for New York City.

This, as the End Corporate Welfare Act is circulating in several states, including New York. The bill would essentially call a cease-fire on awarding tax incentives to certain companies by creating an

interstate compact of states that agree to end the practice.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | FEBRUARY 14, 2019 AT 5:05 PM

TAX - NEW YORK

Verizon New York, Inc. v. Supervisors of Town of North Hempstead

Supreme Court, Appellate Division, Second Department, New York - February 6, 2019 - N.Y.S.3d - 2019 WL 453961 - 2019 N.Y. Slip Op. 00925

Property owner filed actions against town, seeking refunds of special ad valorem levies for garbage and refuse collection services against certain "mass" properties, and town filed third-party actions against county and its board of assessors, seeking indemnification under county guaranty.

Following consolidation of actions, the Supreme Court, Nassau County, denied county's motion for leave to renew its opposition to property owner's motion for leave to renew its motion for summary judgment, denied county's successive motion for summary judgment, granted property owner's motion for summary judgment, and entered judgment in favor of town against county. County appealed.

The Supreme Court, Appellate Division, held that:

- County failed to offer new evidence in support of its motion to renew;
- County's reimbursement of town pursuant to county guaranty was not prohibited by state constitution's gift and loan clause; and
- County failed to make sufficient showing to warrant consideration of its successive motion for summary judgment.

IRS Notice Offers Good News for State Colleges and Universities (at Least for Now).

In January 2019, the Internal Revenue Service (IRS) issued Notice 2019-09, which provides interim guidance for Section 4960 of the Internal Revenue Code of 1986. As a reminder, Section 4960 imposes an excise tax of 21 percent on compensation paid to a covered employee in excess of $1 million and on any excess parachute payments paid to a covered employee. A "covered employee" is one of the organization's top-five highest-paid individuals for years beginning after December 31, 2016. An organization must determine its covered employees each year, and once an individual becomes a covered employee, that individual will remain a covered employee for all future years.

Of particular interest to state colleges and universities is the answer to Q–5 of the notice. It provides that the Section 4960 excise tax does not apply to a governmental entity (including a state college or university) that is not tax-exempt under Section 501(a) and does not exclude income under Section 115(l). What does this mean? Basically, if an institution does not rely on either of those statutory exemptions from taxation, the institution will not be subject to the excise tax provisions of Section

4960. This exclusion from Section 4960 means the institution could compensate its athletic coaches (or other covered employees) in excess of the $1 million threshold and not be subject to the 21 percent excise tax.

As we discussed previously, some institutions rely on political subdivision status for tax purposes. Importantly, the notice also provides that any institution relying on its political subdivision status to avoid taxation, as opposed to relying on either of the above-mentioned exemptions, will be subject to the Section 4960 excise tax if the institution is "related" to any entity that does rely on either of the exemptions.

Although the IRS's guidance is helpful in determining Section 4960's application to state colleges and universities, it appears not to reflect "Congressional intent." On January 2, 2019, the Committee on Ways and Means of the U.S. House of Representatives released a draft technical corrections bill that seeks to correct "technical and clerical" issues in the Tax Cuts and Jobs Act of 2017. The corrections bill seeks to clarify Section 4960's application by stating that any college or university that is an agency or instrumentality of any government or any political subdivision, or that is owned or operated by a government or political subdivision, is subject to Section 4960. Given the current state of affairs in Washington, D.C., we are not confident that the corrections bill's expanded application to state colleges and universities will ever come to fruition, but we will continue to monitor the situation.

by Taylor Bracewell & Robert Ellerbrock, III

February 6, 2019

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

NABL Suggests a Dozen Tax Tweaks for the Muni Market.

NABL suggests a dozen tax tweaks for the muni market

WASHINGTON — The National Association of Bond Lawyers has a dozen suggestions for tax code tweaks that the Internal Revenue Service tax could make to benefit the municipal bond market, including clarification about the ability of local and state governments to engage in public-private partnerships.

None of the 12 requires congressional action and all are within the scope of the service's administrative powers, according to NABL.

Seven of the proposed changes relate toIRS Revenue Procedure2018-26, 2018-18 IRB 546 published last April regarding remedial actions to preserve the tax-advantaged status of bonds when non-qualified uses occur.

Five other NABL suggestions for are unrelated measures, including the ability of state and local governments to engage in public private partnerships.

All 12 were developed by an ad hoc committee of bond attorneys chaired by David Cholst, a partner at Chapman and Cutler in Chicago.

NABL President Dee Wisor sent the 35-pages of detailed suggestions and an accompanying two page

executive summary to IRS Commissioner Charles Rettig and nine other top officials of the IRS earlier this month.

“The revenue procedure did a number of good things,” Cholst said in an interview. “That’s the way we started our comments. One big part was the ability to remediate for direct pay bonds without actually calling in bonds or defeasing bonds. People realize there ought to be a way to say the bond doesn’t qualify anymore so I’m not going to ask for the subsidy payment.”

Many Build America Bond issuances had what Cholst described as “onerous call provisions such as a make-whole calls at a premium.”

“There is no reason from the U.S. government’s policy point of view why the bond should be called so long as they can stop making the tax subsidy,” he said.

The IRS revenue procedure also offered a cure for nonqualified uses that occur under long-term leases that’s similar to the cure for a sale of property that was financed by tax-exempt bonds.

The NABL letter suggests that the cure should include shorter term leases as well.

“If it works for a 20-year lease it ought to work for a 10-year lease as well,” Cholst said. “We don’t see a policy reason for it to be longer term.” NABL suggested there be no specific time limit.

The executive summary of the recommendations related to the 2018 IRS Revenue Procedure suggests that Treasury:

- Eliminate the double remediation that seems to be currently required by Rev. Proc. 2018-26 in the context of the remediation via removal of the tax advantage;
- Expand anticipatory remediation to apply to all permitted remedial actions;
- Make rules more consistent to avoid needless complexity;
- Limit required remediation to the amount of available funds created by the violation;
- Make the yield reduction mechanism of the Revenue Procedure more consistent with the arbitrage rules (and clearer at the same time);
- Modify the trigger for determining when nonqualified use occurs to be more consistent with Treas. Reg. §1.141-12; and
- Clarify the determination of the amount of nonqualified bonds resulting from a nonqualified use.

The other five recommendations propose that Treasury:

- Eliminate current expensive requirements, such as defeasance escrows, that do not further the purpose of the remediation provisions;,
- Expand the remedial action provisions to allow remediation of private payments;
- Add direct payment to the United States Treasury of taxpayer exposure as an alternative to redemption of nonqualified tax-exempt bonds;
- Expand anticipatory remedial action to cover all types of remediation otherwise available; and
- Provide more flexible remediation when a change in use preserves public access and some control over the financed facilities following the change in use.

The last recommendation is intended to make it easier for governments to engage in public private partnerships.

“If you do are doing something to improve public infrastructure that is going to be continued to be used by the public even though it is going to be privately used in some way….it shouldn’t require any additional actions,” Cholst said. “That’s really what’s going to allow the country to rebuild its roads

and bridges and other public structures."

Congress has the authority to enact legislation to also accomplish the same goal, but this administrative action by the IRS "would be more direct and easier to implement," he said.

BY SOURCEMEDIA | MUNICIPAL | 03:11 PM EST

By Brian Tumulty

OZ Overload.

Confusion is mounting over real estate's most buzzed-about federal program, but there still may be an excess of players trying to get in on the action.

It was a telling moment for those fixated on Opportunity Zones.

"Who the hell is EJF and their expertise as it relates to real estate?" Anthony Scaramucci asked on a December conference call to promote his $3 billion Opportunity Zone fund.

The rhetorical question seemed to be an attempt to reassure potential investors that EJF Capital would be a qualified partner for Scaramucci's firm, SkyBridge Capital. But the former White House communications director's swagger wasn't enough to move the needle — and the two hedge funds parted ways a month later.

SkyBridge attributed the split to concerns from its distribution partners that EJF didn't have enough experience managing real estate funds. "It's a difficult investment environment," the firm's president, Brett Messing, told *The Real Deal*. "People get more risk-averse. And being risk-averse means bringing your clients a track record and someone who might be a little more known for being associated with real estate."

Continue reading.

therealdeal.com

By Rich Bockmann and Eddie Small | Research by Yoryi De La Rosa and Kyna Doles

February 01, 2019 09:00AM

OZFramework.

We are committed to evaluating and amplifying the long-term outcomes benefiting those living and working in Opportunity Zones today.

About the Framework

The Opportunity Zones Reporting Framework is a voluntary guideline designed to define best practices for investors and fund managers looking to invest in Opportunity Zones. It includes a set of first principles and a detailed impact measurement framework.

Learn More and Download the Framework

Why Wall Street's Muni-Bond Desks Welcome the Tax-the-Rich Push.

- **Presidential hopefuls' plans include higher rates on wealthy**
- **Higher rates would likely boost demand for tax-exempt debt**

Politics aside, one corner of Wall Street is likely welcoming Democrats' talk of raising taxes on the rich.

Higher rates tend to be a good thing for the $3.8 trillion state and local government bond market, a haven for investors looking for income that's exempt from federal taxes. And progressive Democrats looking to define their party's platform ahead of next year's presidential election have made boosting rates on the wealthiest Americans a key part of their agenda, seeking to seize on discontent with rising income inequality.

If history is any guide, that might provide a boost to returns, at least temporarily. Municipal bonds outperformed Treasuries soon after the election of Bill Clinton, who raised the top marginal rate in 1993, according to Bloomberg Barclays indexes. The same thing happened under Barack Obama, when the expiration of previous cuts for the highest earners in 2013 was followed by a run of outperformance.

Continue reading.

Bloomberg Markets

By Danielle Moran and Claire Ballentine

February 4, 2019, 10:28 AM PST

Wisconsin Governor Promises to Close 'Dark Store' Tax Loophole.

Walmart, Target, and other big-box retailers around the U.S. are deploying "dark store theory" to slash property taxes. Now the state at the center of this fiscal threat may take action.

In November, CityLab investigated the practice of "dark store theory," the novel legal argument big-box retail chains like Walmart, Target, and Menards use to slash their property taxes by assessing active stores as if they were vacant. The practice has resulted in the loss of millions of dollars in taxable value to communities in Wisconsin, Michigan, Minnesota, Indiana, and beyond.

Now Wisconsin Governor Tony Evers is pledging to shut it down: His proposed state budget will close the "dark store" legal loophole.

CityLab's story was followed by additional reports about the issue by the New York Times, Slate, and others. These articles, and the practice itself, have generated vigorous debate about what big-box properties that proliferate across the urbanized U.S. should be worth.

Lawyers representing retailers say that big-box stores are effectively worthless at the point of sale, which should be reflected in the taxes they pay—even while the stores are still active. And many companies file repeat tax assessment appeals until municipalities capitulate. Tax assessors say that this argument defies common sense, and that the lost revenue will eventually force a heavier tax burden onto other homeowners.

State tax boards weighing the two sides have largely been split about who's right. And municipal finance experts have warned that fiscal havoc lies ahead for local governments across the U.S. if the issue isn't resolved by state tax laws.

The commitment to close the loophole by Evers, Wisconsin's newly elected Democratic leader, also follows statehouse lobbying by the Wisconsin League of Municipalities and the Wisconsin Counties Association, two groups representing the interests of local units that levy property taxes. In 2018, state lawmakers considered a bill that would have blocked the practice, but the measure failed to reach a vote.

"Having large big box stores have the property tax levied at a level as if the building is empty is absolutely a non-starter with me," he told reporters this week. "It should be fair for all and in order to do that we have to close that loophole."

Still, this element of Evers' budget proposal is likely to find a challenger in Wisconsin Manufacturers & Commerce, the trade group representing retailers that have benefited from this tax appeal tactic. And Indiana, the only state that has enacted legislation to combat dark store theory, has continued to see challenges by commercial property tax payers using the same type of argument.

To Robert Hill, a Minnesota-based attorney who is perhaps the nation's top lawyer propagating dark store theory on behalf of big-box stores, the issue is a matter of rebalancing the property tax burden that currently weighs too heavily on successful businesses. Corporations must defend themselves from being "discriminated against" by assessors, Hill told CityLab last year.

"We eat what we kill," he said. "We kill only because they need to be killed."

Evers' budget proposal is expected later this month.

CITYLAB

LAURA BLISS FEB 8, 2019

How Amazon's Booming NYC Neighborhood Got Tax Perks Meant for the Poor.

City officials aligned opportunity zones with potential sites. Retailer now says it won't take advantage of tax breaks.

The Amazon.com Inc. executives looked battered after more than an hour of questioning last week about their plans to build an office in New York. City Council members thrashed the retailer for its resistance to unions, working conditions at warehouses and its founder's wealth. The responses drew laughter from the balcony.

So when Jimmy Van Bramer, who represents the Queens neighborhood where Amazon decided to

locate its new office, raised the issue of a suite of generous tax breaks the project was eligible for, it was an opportunity to offer a satisfying answer.

“We will not be using the opportunity zone on this project,” Holly Sullivan, Amazon’s head of economic development, said at the Jan. 30 hearing.

Continue reading.

Bloomberg

By Caleb Melby and Lauren Leatherby

February 8, 2019, 2:00 AM PST Updated on February 8, 2019, 9:32 AM PST

Senators, House Members Request Clarity from Treasury on OZ Issues.

Seven U.S. senators and nine members of the House of Representatives – all original co-sponsors of the Investing in Opportunity Act, the forerunner of the opportunity zones (OZ) incentive – sent a letter Thursday to Treasury Secretary Steven Mnuchin, calling for further clarity on several issues related to the OZ regulations. Among other things, the letter asks Treasury to remove the requirement that an OZ business derive 50 percent of its gross income from active conduct of a trade or business in the qualified OZ, but simply require that it derive at least 50 percent of total gross income from the active conduct of its trade or business. The letter also seeks more timing flexibility for opportunity funds to make investments; says fund-level activity should not disallow the tax benefit to opportunity fund investors who don’t take distributions from the fund or sell their interest before the 10-year holding period, regardless of whether there is “churn” in the opportunity fund’s investments; and asks that future regulations include reasonable reporting requirements.

Learn more about OZs at the Novogradac 2019 Opportunity Zones Spring Conference, April 25-26 in Denver.

Friday, January 25, 2019

Airbnb Still Isn’t Collecting Local Taxes Everywhere.

While the company has stepped up collection efforts in recent years, a new report argues that local lawmakers should ensure Airbnb collects all lodging taxes.

More and more, when booking to stay in a house or apartment through Airbnb, a visitor will be charged a local or state tax, just like when staying at a hotel.

But this collection effort by the popular online hosting company isn’t universal. A new report that weighs the economic benefits and costs associated with short-term rentals through Airbnb argues it should be, saying local governments should insist that the tax regimes—and other regulations—are the same as for the hotels they compete with.

“If the lodging tax in a city is X percent, Airbnb should have to pay that full amount in a transparent way,” said Josh Bivens, research director at the Economic Policy Institute, in an email. “And if a

building is zoned for residential units and not short-term travel accommodations, then Airbnb shouldn't be allowed to offer full-apartment rentals in it."

Continue reading.

Route Fifty

By Laura Maggi,
Managing Editor

JANUARY 31, 2019

The Economic Costs and Benefits of Airbnb.

No reason for local policymakers to let Airbnb bypass tax or regulatory obligations

Summary
"The sharing economy" refers to a constellation of (mostly) Silicon Valley–based companies that use the internet as their primary interface with consumers as they sell or rent services. Because this term is "vague and may be a marketing strategy" (AP 2019), we refer to these firms less poetically but more precisely as "internet-based service firms" (IBSFs).

Economic policy discussions about IBSFs have become quite heated and are too often engaged at high levels of abstraction. To their proponents, IBSFs are using technological advances to bring needed innovation to stagnant sectors of the economy, increasing the quality of goods and services, and providing typical American families with more options for earning income; these features are often cited as reasons why IBSFs should be excused from the rules and regulations applying to their more traditional competitors. To skeptics, IBSFs mostly represent attempts by rich capital owners and venture capitalists to profit by flouting regulations and disguising their actions as innovation.

The debates about whether and how to regulate IBSFs often involve theories about their economic costs and benefits. This report aims to inform the debate by testing those theories. Specifically, it assesses the potential economic costs and benefits of the expansion of one of the most well-known of the IBSFs: the rental business Airbnb.

Continue reading.

Economic Policy Institute

By Josh Bivens • January 30, 2019

Did You Know That the Site of the Super Bowl, Mercedes-Benz Stadium in Atlanta, Georgia, Was Partially Financed Through Municipal Bonds?

Read more on EMMA.

Commentary: Super Bowl's Mercedes-Benz Stadium Has That New-Subsidy Smell.

Sunday's Super Bowl, a rematch 17 years in the making, harkens back to a thrilling 2002 title game between Tom Brady's underdog New England Patriots and the high-flying St. Louis (now-Los Angeles) Rams. But the host of this year's game, Atlanta's sparkling new Mercedes-Benz Stadium, reminds us of something less thrilling: the $1 billion or so that politicians give away in unnecessary public handouts to professional sports every year.

The $1.6 billion stadium was underwritten by $248 million in local bonds. Once taxpayers pay those off, they'll then write the NFL's Atlanta Falcons an annual check for stadium operations and upkeep. Our calculations suggest taxpayers will pay around $1.02 billion over the course of the deal. Combined with $77 million in sales tax rebates, infrastructure investments, and city-provided land, locals could be on the hook for over five times the initial $200 million estimate.

The story is the same in most other sports cities. And like other sports teams, the Falcons rake in buckets of money: corporate sponsorships ($900 million) and personal seat licenses ($267 million) could have paid for 75 percent of the stadium cost alone, not to mention annual revenue from season ticket sales ($550 to $3,850 per ticket), TV revenue and merchandise licensing ($256 million), stadium concessions, and other events held in the stadium.

There are only so many tax dollars to go around. Misspending them to enhance sports industry profits means that public services must be cut, taxes have to be higher, or both. Atlanta will spend about as much on the stadium as it would cost to employ an additional 300 Atlanta police officers or educate 2,900 public school students for 30 years.

Perhaps even worse, Americans from coast to coast share the burden. The income that lenders earn on the municipal bonds typically used to finance stadium construction is exempt from federal income taxes. That means the rest of us have to pay higher taxes (or see the federal deficit climb even higher) to make up for the shortfall.

A tax exemption for stadium subsidies may sound like small potatoes, but Brookings Institution researchers estimated the loophole was responsible for $3.7 billion in lost federal revenue between 2000 and 2014. President Obama tried to end it, as did House Republicans in last year's tax reform, but the sports industry won each time.

Lately there have been encouraging examples of taxpayers and principled political leaders standing up to the sports industry. Last fall local citizen groups in Austin and Seattle gathered signatures to force public referenda that would require popular votes on future stadium subsidies — which is meaningful, since 70 percent of Americans say they're against giving money to sports teams.

Meanwhile, a group of Atlanta taxpayers are challenging another tax exemption. Their lawsuit argues that even though the Falcons' stadium is built on publicly owned land, the fact that the team controls all events and revenue it generates means it should pay local property taxes. That could amount to $700 million over 30 years.

And in the Washington, D.C. area, Virginia Delegate Michael Webert has for the past two years partnered with Maryland Delegate David Moon and D.C. Council member David Grosso to advance perhaps the best idea of all: an "interstate compact" that would prohibit subsidies for a new Washington Redskins stadium. This would prevent their three governments from engaging in a

taxpayer-funded bidding war to attract the team.

If all 50 states were to sign on to a similar agreement, we could permanently end the subsidy war for sports teams. As a bonus, it would eliminate a major reason that leagues restrict the number of teams, so new franchises could expand into more cities.

Fans may be excited to experience the Super Bowl at Atlanta's new state-of-the-art facility, but they should remember that the money that subsidizes stadiums could go to much better purposes. Sunday's spectacle will show yet again that the NFL doesn't need — or deserve — public money.

By Michael Farren and Anne Philpot Tribune News Service (TNS)

Jan 28, 2019 Updated Jan 28, 2019

GFOA Members Lobby Congress on Muni Exemption.

WASHINGTON — Members of the Government Finance Officers Association are asking House lawmakers to sign onto a bipartisan letter seeking an assurance that any infrastructure legislation enacted this year won't jeopardize the tax exemption for municipal bonds.

More than 100 GFOA members who are attending their organization's winter meeting here are expected to visit members of Congress Tuesday. GFOA's goal is to get more than 218 House members, a majority of the chamber, to sign on to the letter, written by House Municipal Finance Caucus co-chairs Reps. C.A. "Dutch" Ruppersberger, D-Md., and Steve Stivers, R-Ohio.

The letter is addressed to House Ways and Means Committee Chairman Richard Neal, D-Mass., and ranking member Rep. Kevin, Brady, R-Texas.

Neal has been a longtime member of the Municipal Finance Caucus, but Brady has not and in late 2017 shepherded through his chamber legislation that proposed terminating tax-exempt private activity bonds and advance refundings as part of the Tax Cuts and Jobs Act.

The exemption for PABs was saved during conference negotiations with the Senate over the final tax bill, but the elimination of advance refundings remained in the final bill.

Emily Brock, director of GFOA's federal liaison center, told members of the debt committee Monday that preservation of the muni tax exemption should be their starting point in discussions with lawmakers.

GFOA also is asking its members — who represent local governments in places ranging from San Bernardino, Calif., and Rock Hill, S.C. — to ask House members to join the bipartisan Municipal Finance Caucus.

Legislatively in the muni bond area, GFOA's priorities include reinstatement of advance refundings and enhancement of what is being described as "bank eligible" bonds to lawmakers and their staffers.

Bank eligible bonds refers to what has been known in the muni industry as bank qualified or BQ debt.

The lobbying seeks to raise the limit for bank eligible bonds to $30 million per individual borrower

and link the limit to inflation so that smaller borrowers such as small airports and rural public cooperatives can finance their bonds through local banks.

The current limit for bank qualified debt is $10 million and it applies to conduit issuers rather than the individual borrowers.

The 2009 American Recovery and Reinvestment Act economic stimulus bill temporarily increased the bank eligible bonds limit to $30 million for borrowers so GFOA has examples of how it was used.

However, in the last Congress there was no House sponsor of a bill on bank qualified loans or bank eligible bonds. Two Democrats on the Senate Finance Committee — Sens. Robert Menendez of New Jersey and Ben Cardin of Maryland — sponsored a Senate version of the bill. Their bill also would allow individual small borrowers who are part of a larger pooled debt issue to place $30 million in bank eligible debt.

As part of the new legislative push, a three-member GFOA delegation was scheduled to meet Tuesday with the staff of Senate Finance Committee Chairman Charles Grassely, R-Iowa, to explain how an increase in the limit on bank eligible bonds might benefit small borrowers in Iowa.

GFOA also wants its members to ask lawmakers to support permanent repeal of the excise tax on so-called Cadillac health plans enjoyed by member of some public employee unions. A bipartisan bill introduced last week, H.R. 748, by Rep. Joe Courtney, D-Conn., to do that already has 41 cosponsors, including 18 Republicans.

The Cadillac tax was one of the revenue raisers included in the Affordable Care Act.

By Brian Tumulty

BY SOURCEMEDIA | MUNICIPAL | 01/28/19 01:27 PM EST

TAX - LOUISIANA

Board of Supervisors of Louisiana State University v. 2226 Canal Street, L.L.C.

Court of Appeal of Louisiana, Fourth Circuit - December 19, 2018 - So.3d - 2018 WL 6683220 - 2018-0254 (La.App. 4 Cir. 12/19/18)

Owners of properties, that had been expropriated by a university and Veterans Administration for construction of new medical facilities following Hurricane Katrina, moved to release monies remaining in registry of the court pursuant to a settlement agreement and city opposed contending that the monies were owed as property taxes.

The District Court granted the release. City appealed.

The Court of Appeal held that the property owners were entitled to withdraw the funds from court registry under settlement agreement.

Property owners were entitled to withdraw funds from court registry under settlement agreement; property owners had settled after expropriation of their properties to build medical facilities, and only remaining monies were those earmarked for alleged property taxes, but settlement provided that property owners were entitled to withdraw any remaining funds to the extent permitted by law, and there was no express exclusion pertaining to taxes.

TAX - INDIANA

Daw v. Hancock County Assessor

Tax Court of Indiana - December 5, 2018 - N.E.3d - 2018 WL 6498872

Property owners filed petition for review of Indiana Board of Tax Review's determination that declined to address their annexation and storm-water claims and that they failed to show that assessment of their property should be changed.

The Tax Court held that:

- Town's storm-water charges were taxes, rather than user fees;
- Board's decision was a final determination;
- Claims arose under Indiana's tax law; and
- Property owners failed to establish a prima facie case for a reduction of assessment of their property.

Town's storm water charges were taxes, rather than user fees, as required for property owners' appeal from Indiana Board of Tax Review's determinations on their annexation and storm-water claims to be an original tax appeal within the jurisdiction of the Tax Court; town imposed storm-water charges on nearly all the real property within its corporate boundaries, owners of that property received bills for the charges either on a monthly basis with the billing statements for their other town services or biannually with their property-tax bills, and property owners could not decline the service or control the extent to which the service was used.

Indiana Board of Tax Review's decision with respect to property owners annexation and storm-water claim was a final determination, as required for property owners' appeal from the decision to be an original tax appeal within the jurisdiction of the Tax Court, even though Board determined that it lacked the statutory authority to address the claims; decision ended the administrative process with respect to those claims and ultimately compelled the property owners to challenge that determination by filing an appeal with the Tax Court.

Property owners annexation and storm-water claims arose under Indiana's tax law, as required for property owners' appeal from Indiana Board of Tax Review's determinations on the claims to be an original tax appeal within the jurisdiction of the Tax Court, even though claims did not challenge the collection of taxes directly; claims could arise under Indiana tax laws if they challenged earlier steps in the taxation or assessment process.

Property owners failed to establish a prima facie case for a reduction of assessment of their agricultural property, even though they applied an alternative valuation methodology as allowed under the guidelines of the Department of Local Government Finance; property owners failed to show that they actually converted property's decreased crop production capacity into a value or that their valuation method comported with generally accepted appraisal principles

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In the Zone.

A new federal program may be a boon to distressed cities – if it targets the right ones.

York, Pa., grew up making things. The brick smokestacks that break up the skyline are inescapable

reminders of its industrial past. Buildings that once housed factories employing hundreds of workers have now been converted into warehouses that employ only a handful of people, at wages that don't come close to rivaling those of their industrial predecessors.

Mayor Michael Helfrich grew up in York. He remembers when middle-class jobs were only a short walk away from the homes of the men and women who produced everything from Pullman cars to Pfaltzgraff dinner plates to York Peppermint Patties. Those companies are gone. Pullman succumbed to competition from Detroit automakers. Hershey's bought the York candy factory and moved production to its own plants, which eventually landed in Mexico in 2009. Pfaltzgraff was purchased in 2005 and its operations moved to China.

But most of the jobs haven't left because of competition or consolidation as much as they've left to escape York's taxes, which are almost three times the rate in surrounding York County. The taxes have led to a vicious cycle — innovation, development and flight — that has persisted for decades. "We used to build wealth in the city of York," Helfrich says. "In almost 50 years, we have not seen that. Our growth has been, 'Can you come here and give us some jobs?' Meanwhile, the wealth was going somewhere else. It wasn't building in York."

Along with the commercial exodus came an exodus of residents. York's population declined by almost a third from 1950 to 2000. It has since inched back up as families pushed out by rising rents in New York and Philadelphia, or those fleeing crime in Baltimore, have landed in the city. But with unemployment approaching 9 percent, York is now a place with epidemic levels of poverty. More than one-third of the city's residents live in poverty, a higher rate than in Baltimore or Philadelphia and twice the poverty rate in New York City.

Nonetheless, Helfrich has high hopes that a new federal incentive package might bring business back to York. So-called opportunity zones, an incentive with bipartisan support, were included in the 2017 federal tax law to lure capital from Wall Street to struggling cities and towns across the country. The Economic Innovation Group (EIG), a D.C. think tank launched by Sean Parker, the founder of Napster and former president of Facebook, worked for four years on the incentive, which is meant to fix a problem that has been evident to economists and mayors for years but has eluded a solution.

That problem worsened when the recession officially ended in mid-2009. The ensuing recovery was uneven. The economic expansion was led by a handful of urban hubs, the rock stars of the recovery. Austin, Los Angeles, New York City, San Francisco, Washington, D.C., and their surrounding metro areas were far outpacing most of the country in job growth. From 2010 to 2017, nearly half of the job growth occurred in the nation's largest 20 metro areas. About half of the net increase in business establishments across the country from 2007 to 2016 took place in either D.C. or New York City. A generation ago, the opposite was the case. Job growth in the 1990s was led by rural and suburban counties, not urban centers. What the post-recession economy has favored — an educated workforce, density and an established startup culture — has left places like York far behind. "The rising tide," says John Lettieri, president and CEO of EIG, "isn't lifting all the boats."

Lettieri, Parker and their colleagues created a blueprint they hoped would help even out jobs and wealth creation across the country. Investors had gotten fat on Wall Street bets. Much of their newfound money was sitting idle. If those funds could be shielded from capital gains, EIG theorized, they could be moved off Wall Street and invested in new ventures in other places.

Their idea was to allow investors to reduce their capital gains exposure in exchange for investment in certain low-income Census tracts to be designated as opportunity zones. For a place to qualify as an opportunity zone, at least 20 percent of its residents have to live in poverty, or the earnings of the

residents have to be below 80 percent of the area's median income. In return for their money, investors would be able to reduce the capital gains tax liability on their investment by 10 percent if they left their money in the zone for five years. If they didn't move the money for seven years, they would receive a 15 percent reduction in capital gains taxes. If they kept it there 10 years, they would receive a 15 percent reduction in capital gains taxes and escape any liability on gains that came from investment in the zone. Congress bought into the idea. U.S. Treasury Secretary Steven Mnuchin estimated that $100 billion in capital would move off Wall Street as a result of the program.

Governors were allowed to mark 25 percent of the qualifying Census tracts in their states as opportunity zones. In June, the Treasury Department certified more than 8,700 zones across the United States and Puerto Rico. The exact rules are still being set, but investors needed to have their money in the opportunity zone funds by Dec. 31 to take full advantage of the benefit.

Helfrich pounced on the chance to leverage the tax incentives in opportunity zones, hoping they would be enough to overcome the high taxes in the city. He worked closely with Gov. Tom Wolf, himself a York native, to designate five city Census tracts as opportunity zones. As the deadline approached in December, only a handful of investors showed interest in York's opportunity zones, and most of those weren't large private equity firms from outside the city, but local investors.

York's problem attracting outside investment to its opportunity zones has been even more frustrating considering where capital was moving. An opportunity zone fund targeting Chicago raised $105 million in 17 hours in November. When Amazon announced it had picked Long Island City, in the New York borough of Queens, as one of two sites to host the company's second headquarters, investment sprinted to the opportunity zone that would be adjacent to the tech giant. Goldman Sachs, for example, announced it was putting $83 million into a real estate deal nearby.

Like York, Long Island City was once an industrial hub. The red neon Pepsi-Cola sign on the banks of the East River lit up the front of a bottling plant that churned out thousands of sodas each day. In the 1920s, the boom from industry lured the Bank of Manhattan to build a tower in Long Island City at the foot of the newly constructed Queensboro Bridge. When the bank opened in 1927, it was the tallest building in the borough, a title it would hold for 63 years. The surrounding square near the foot of the cantilever bridge was dubbed the Times Square of Queens.

Long Island City's fortunes turned, just as they did in York. The bottling plant closed in 1999. The Bank of Manhattan branch was abandoned. The hands on the tower clock stopped ticking. And the slow and steady economic decline took its toll on the residents. As the factories emptied out, the demographics of the surrounding neighborhood shifted. The neighboring housing project went from a mix of white and black working-class people to largely poor residents, according to New York City's own estimates, and almost exclusively black and Latino.

But unlike York, Long Island City has recovered in the last decade. With Manhattan and Brooklyn rents choking the wallets of the city's young professionals, it has become one of the hottest places in the city for renters, especially affluent white renters. From 2010 to 2015, Long Island City was tied for first place among neighborhoods in New York in its influx of white residents. Median home prices went up 51 percent in the last six years. And rents in the neighborhood are the highest in Queens, according to the real estate firm Zillow.

The old Bank of Manhattan tower is slated to be transformed into office and retail space with a luxury apartment complex right next door. Amazon will make an area already attractive to affluent professionals even more attractive. The company is kicking in $2.5 billion in real estate investment in the neighborhood. But since poverty persists in Long Island City, especially in the housing projects, the area was certified as an opportunity zone in June. The designation allowed Goldman

Sachs to cash in on its real estate deal. The company called the timing of its announcement, on the same day as Amazon declared that it would move to Long Island City, a coincidence. And perhaps it was, but analysts see a trend in the actions of major investors. “If you look at the behavior of the real estate industry,” says Timothy Weaver, an urban policy assistant professor at the University at Albany, “it is amassing vast amounts of money and directing money to take advantage of the policy.” To critics, opportunity zones are threatening to bestow huge grants on communities that don’t really need them.

Opportunity zones are the latest in a long series of efforts by the federal government to direct investment to impoverished areas. Since the New Deal, the government has been trying to jumpstart economic growth in portions of the country where the economy was faltering. In the 1970s, the Department of Housing and Urban Development launched Community Development Block Grants and Urban Development Action Grants to revive struggling cities. Those programs were popular with the progressive administrations and congresses that dominated federal politics during that period.

Also in the 1970s, Republicans, led by U.S. Rep. Jack Kemp, began proposing market-driven solutions to the same problems, referring to them most often as enterprise zones. Nearly all of these solutions were based on tax incentives or the loosening of economic regulations. Slightly different versions, under different names, were created and enacted by Democrats in the Clinton and Obama years. But the percentage of Americans living in poverty remained nearly unmoved through all the decades. Equally troubling was the increase in those living in extreme poverty. The number of Americans whose earnings equal less than 50 percent of the federal poverty line has more than doubled in the last 40 years, according to the Census.

Opportunity zones borrows a bit from the playbooks of the previous plans. But there are some significant changes. The market-driven solutions of the last 40 years have been in line with conservative supply-side economic policies. Investment, goes the theory, drives the economy. Cut taxes and investors will use their capital to make more money and, in turn, create jobs. Democrats in the 1980s and 1990s were largely skeptical of supply-side economics. The party insisted that market-driven programs include local hiring and local contracting provisions to make sure jobs were created in the community and the gains made by investors were shared with local businesses. For example, the empowerment zones that were established under the Clinton administration gave businesses a tax credit for hiring employees who lived in the zones. No such provisions exist in the opportunity zone program, despite backing from some prominent Democrats. Urban policy analysts see the program as an unbridled supply-side program. “It’s almost a purer version of the original vision,” Weaver says. “What happened with the empowerment zones and the enterprise zones is that Congress made compromises that watered them down.”

While companies aren’t required to hire a certain number of local employees, firms must have 70 percent of their tangible assets (property, materials and goods for sale) within the zone, a regulation designed to keep large retailers such as Amazon and Walmart from cashing in on the tax break. Even so, critics still characterize the program as too wide and unrestricted, noting that hot markets such as Chicago, Los Angeles and New York have already shown the most visible successes. Even their poorer neighborhoods are seen as better bets. That’s why Long Island City, not York, Pa., is attracting so much investment. And what critics fear is that the feverish investment in hot markets will lead to displacement of low-income residents. “If these investments are going to be luxury hotels and real estate investments it’s not going to help low-income people,” says Chris Edwards, director of tax policy studies at the Cato Institute. “It’s more likely to displace them.”

When EIG designed opportunity zones, the drafters expected that real estate would be — and in their estimate, should be — the first place for investors in the zones to put their money. Businesses would need offices, and workers would need housing. Gentrification was a concern, so the program

included a condition that a developer buying a piece of real estate must make an equal investment in improving the property. If developers paid $1 million for a property in a city, they were required to make $1 million in improvements.

However, in the rules released by the IRS in October, the value of the land was taken out of the calculation for necessary improvements on a property. So only the structure, if there is one, will be factored into the amount of improvement necessary to qualify under the program. In York, Helfrich is worried that investors might see his city as a place to buy up real estate and not invest in businesses. Developers have long been buying factories in the city and converting them to condominiums and loft apartments. “We are very aware of the potential pitfalls of this program,” Helfrich says. “Our city wants to attract job-providing businesses and discourage those who want to gentrify the neighborhoods in our city.”

Despite the market-driven underpinnings behind opportunity zones, libertarian-leaning conservatives are critical of the plan. For one thing, they insist, allowing governors to pick the areas of investment politicizes the program. The original zone map proposed for York included residential neighborhoods. But a lobbying effort by elected officials convinced the governor to move the zones to commercial areas where city leaders wanted the investment to go.

Another concern is that by lumping cities like Chicago, New York and Washington, D.C., with places such as Akron, Ohio; Clarksdale, Miss.; and York, the program is only encouraging more investment in superstar cities. “If you look in Los Angeles and New York City, many of the places that are labeled opportunity zones are places where investment is already happening,” says Weaver, the urban policy professor. “And investors are going to get tax breaks on investments that were going to happen anyway.”

Not only are the zones in the less attractive markets forced to compete with places such as Long Island City for investment, but the smaller markets are also competing with each other. “There are more than 8,000 Census tracts with the same tax advantage,” says Brett Theodos of the Urban Institute. It’ll be hard for these eager supplicants to distinguish themselves from one another. It would be simpler, he says, to play it safe and invest in Chicago, New York or Seattle.

Then there’s the issue of the Treasury Department rules. One of them states that 50 percent of the gross income generated by a business in a qualified opportunity zone must result from sales made within the zone. That would essentially disqualify all but retail and real estate investment. Lettieri of EIG has been critical of the 50 percent gross revenue rule, saying that if it remains in effect, opportunity zones will fail to spur the kind of economic activity that can revive the areas the program was designed to serve. “The No. 1 outcome we should be driving for here is to support new businesses,” Lettieri says. “The gross income rule is damaging to businesses unless you are a laundromat or hardware store who doesn’t sell anything online.”

The public comment period for the Treasury rules closed Dec. 14. EIG submitted comments in opposition to the 50 percent rule, but as of publication, it was still in the tax code.

The combined result of all this is that Helfrich is fielding only a handful of calls from outside investors. Still, there is some interest. John McElligott is the founder and CEO of York Exponential, a robotics firm that programs, designs and constructs its robots in York. On the day Governing visited the robotics plants, McElligott was set to meet with angel investors about the company’s expansion. McElligott wants to construct a $136 million robotics campus on a parcel of land called the Northwest Triangle. Gov. Wolf gave the company $6 million toward the project, but York Exponential is looking to investors for the rest of the capital to create what the CEO believes will transform York into a tech hub for hardware and manufacturing. “We are not going to be a research and

development community," McElligott says. "York is going to be less Facebook and more Ford."

The campus, McElligott hopes, will be the tipping point in York's renaissance. Once the new facility is operating, he believes other firms will come to York to compete either in building robots or building the materials to support his businesses' growth. As the opportunity zone program was being developed, McElligott traveled to Washington, D.C., at least once a month to lobby on behalf of York's interest.

The proposed York Exponential campus won't die if the 50 percent gross revenue rule remains in place. McElligott is confident his investors will stick with his vision whether or not they reap the benefits of a tax break. But that might not be the case for the tech firms Helfrich and McElligott would like to see orbiting the campus when it is complete. "The program under the 50 percent rule encourages you to create a pizza shop," McElligott says. "We are trying to create jobs." McElligott and Helfrich want what they describe as middle-income jobs, not retail or restaurant employment. In 2017, retail paid an average of $14 an hour, or roughly $30,000 a year, if the employee worked 40 hours a week and received paid leave, according to the Bureau of Labor Statistics.

Even if the Treasury Department removes the 50 percent rule, investors will need some handholding if they are to see places such as York as genuinely appealing targets. None will want to lose the gains made on Wall Street in a risky business proposition. "Naturally the capital in this program is going to flow to real estate," says Steve Waters, founder and CEO of SMB Intelligence, a firm that provides local government with data and information on how to grow their small business sectors. "It's only going to flow to businesses if it's directed."

Many potential investors are looking to the Treasury right now to finalize the rules governing the program. "Investors are champing at the bit to invest in opportunity zones," says Rebecca Mitich, a partner with Husch Blackwell, a law firm that specializes in using tax credits to develop real estate. "There are huge New York private equity funds and giant fund managers who are ready to go but still want additional guidance to proceed.

Lettieri believes the rules for the program are not set in stone. He and others expect more rules, perhaps a revision of the 50 percent gross revenue rule, to come in the spring. And even as the real estate activity around opportunity zones has been red hot, at what appears to be the expense of commercial business applicants, Lettieri and other backers of the opportunity zone idea believe business capital will begin to come off the sideline in 2019 as the program is better defined. If that doesn't happen and the zones remain largely a benefit for real estate development, their creators believe they won't reinvigorate communities like York. "Real estate is the floor, not the ceiling," Lettieri says. "If the road ends with real estate, that is a big shortcoming."

GOVERNING.COM

BY J. BRIAN CHARLES | FEBRUARY 2019

Adviser: EPA Letter to IRS on Opportunity Zones Merits Attention

The Tax Cuts and Jobs Act of 2017 introduced the concept of Opportunity Zones (OZs) to promote long-term investment in qualifying areas. Since the law was passed, the IRS has designated some 8,700 Qualified Opportunity Zones (QOZs) across the United States, including many in key parts of the city of Cleveland.

The OZ program has garnered significant attention in the real estate community, both locally and nationwide, as it essentially allows for a) deferral of capital gains, upon reinvestment of gains in QOZ areas, until the earlier of the sale of the asset or Dec. 31, 2026; b) a partial exclusion (up to 15%) of original capital gains deferred, based on the term of ownership of the asset through 2026; and c) a 100% exclusion of capital gains through 2047 on further appreciation of qualified assets held for at least 10 years — sometimes referred to in the industry as the "juice." The juice provides enormous potential for tax savings of appreciated property.

The Treasury Department issued initial OZ program regulations on Oct. 19, 2018. The regulations provide a variety of parameters to qualify for favored tax treatment under the law, including deadlines for reinvestment of capital gains and deployment of funds. Among other things, the regulations and accompanying revenue ruling state, in effect, that as to real estate investments, either a) the investor must "substantially improve" the real estate, which may be done by doubling the tax basis of the building only, without regard to the value of the land; or b) the "original use" of the subject property must "commence" with the applicable investment.

In the context of "substantial improvements" to property, the land value is not counted. Based on the foregoing, the cost of environmental remediation of land would likely not be taken into account and the funds applied to remediation would not qualify for special treatment under the OZ program.

The "substantial improvement test and the "original use" test have garnered much comment and attention from industry and lobbying groups, as well as from inside the administration, in order to allow investors more direction and leeway in qualifying under the program.

Of perhaps greater interest, on Dec. 18, 2018, the U.S. EPA, through its Office of Brownfields and Land Revitalization (OBLR), issued a letter to the IRS asking for clarification of the above tests, primarily in the context of brownfields remediation. The purpose of the OBLR request is to spur redevelopment of brownfield and other underutilized sites by expanding the breadth and impact of the OZ program.

Specifically, the EPA submitted the following requests:

1. Allow remediation costs to be counted toward substantial improvements. The OBLR recommended that final IRS guidance should clarify that funds applied to environmental remediation (including assessment, cleanup and other site preparation costs) should qualify under the program and should be considered when evaluating the "substantial improvement" test under the regulations.

2. Allow deployment of funds over time. The OBLR asked the IRS to take into account the extended time period necessary for remediation projects and to allow for deployment of funds during the entire period of cleanup. Specifically, the EPA suggested the "stacking" of a 30-month window for cleanup, in addition to the 30-month window for vertical construction in the existing regulations.

3. Allow carryover of gains. The OBLR asked the IRS to enable gains realized from the sale of remediated property to be carried over into other QOZ property. This would allow an investor to complete remediation, sell the remediated property to a vertical developer and reap the ongoing benefits of the OZ program.

4. Allow brownfields cleanup to constitute "original use." The OBLR also asked that the term "original use" be defined so it automatically applies to properties that are characterized as brownfield sites under the CERCLA. This would go a long way toward simplifying the analysis for investors as to whether the OZ program applies to a project.

5. Allow reuse of vacant, underutilized or land bank property to constitute “original use.” Beyond brownfields, the OBLR also recommended that the definition of “original use” should include property that is underutilized or vacant for a period of one year or more and property foreclosed upon and held by a local government or land bank. OBLR further suggested that the underutilized test may apply to the entire property or to “a portion thereof … which is used only at irregular periods or intermittently.” This would provide flexibility as to qualified redevelopment of partially shutdown facilities.

These recommendations, if adopted, would have important implications for real estate investors. For example, an investor could qualify under the program, under the original-use test, based on “underutilization” of the asset for at least one year. Also, an investor who purchases impacted properties and performs remediation and site preparation could take advantage of the program without conducting their own vertical or other redevelopment. Rather, the investor could complete sufficient remediation activities, sell the remediated property and reinvest the proceeds in other QOZ property, with a carryover of tax advantages. In addition, a redeveloper who performs both remediation and vertical development could count the remediation costs toward satisfying the “substantial improvement” test.

At this time, the real estate community awaits further IRS guidance, which has been delayed by the partial government shutdown. Many other important issues concerning the regulations persist. The final regulations will significantly alter the financial analysis of investment in sites located within OZ areas.

Crain’s Cleveland Business

Thomas J. Coyne

January 19, 2019 04:00 AM

Coyne is practice group leader of the National Real Estate Practice Group of Thompson Hine LLP.

Hawkins Advisory: Final TEFRA Hearing & Approval Regulations

The Internal Revenue Service has issued final regulations amending and modernizing the so-called TEFRA public notice, hearing and approval requirements applicable to tax-exempt private activity bonds.

The attached Hawkins Advisory discusses these final regulations.

Potential Flaws of Opportunity Zones Loom, as Do Risks of Large-Scale Tax Avoidance.

The 2017 tax law created a new tax break to encourage investment in low-income areas (“opportunity zones”) but, as high-profile Wall Street, Silicon Valley, and real estate investors rush to profit from it, critics are raising sensible concerns about the policy:

- The law enabled state policymakers to designate relatively affluent areas as opportunity zones,

which could divert investment from truly disadvantaged communities.
- While the new tax break enables investors to accumulate more wealth, it includes no requirements to ensure that local residents benefit from investments receiving the tax break. Thus, this tax break could amount to a "subsidy for gentrification" in many areas instead of, as intended, for providing housing and jobs for low-income communities.[1]
- Potential loopholes in the law and an initial set of proposed Treasury regulations — which investors are now lobbying to re-shape — could enable investors to secure the tax benefits while generating little real economic activity in the opportunity zones. The scope of potential tax avoidance — an issue that hasn't received enough attention to date — will become clearer as Treasury finalizes its first set of regulations and releases additional guidance on how to comply with the law.
- The new tax break will cost an estimated $1.6 billion in lost federal revenue over ten years, according to Congress' Joint Committee on Taxation,[2] but the costs could be significantly higher after the first decade because, as explained below, some of the most generous tax benefits extend far into the future.[3] Moreover, the extent to which the $1.6 billion figure accounts for large-scale tax avoidance isn't clear.

Continue reading.

CENTER ON BUDGET AND POLICY PRIORITIES

BY SAMANTHA JACOBY

JANUARY 11, 2019

States See a Slip in Tax Collections That's Not Totally Unexpected.

The federal tax overhaul and stock market volatility help to explain some recent income tax revenue trends.

Income tax collections in December were short of expectations and prior year levels in New York, California and other states, Moody's Investors Service noted in a brief last week.

The trend is not entirely surprising and underscores the uncertainty state revenue forecasters face as taxpayer behavior changes in response to the 2017 federal tax overhaul, and recent stock market volatility potentially shakes up collections tied to capital gains.

"We expected to get a lower number in December," John Hicks, executive director of the National Association of State Budget Officers, said by phone on Friday as he discussed income tax collections. "As to whether it's so low that it's a problem: Don't know yet."

"Revenue estimators will say, particularly with personal income tax, there's a lot of uncertainty around taxpayer behavior," he added.

States in December 2017 saw personal income tax revenues swell. The uptick has been widely attributed to high-income taxpayers making early payments so they could claim tax breaks that would be curtailed under the changes to federal tax law enacted that year.

So, in other words, because income tax revenues in December 2017 were unusually high, it makes sense that December 2018 collections would be lower by comparison.

At the same time, how the 2017 federal tax overhaul will affect state income tax revenues in the long run is still coming into focus.

In New York gross personal income tax collections were not only $2.8 billion less than a year earlier, according to the Moody's brief, but also $500 million shy of the state's revenue forecast. Total gross personal income tax revenues in New York through December were down about 1.6 percent for the same period during the prior year.

State income tax collections around December are generally seen as a barometer of how income tax receipts will stack up when they're totaled up in April, Moody's points out.

NASBO has said previously that in fiscal 2018 states funded on average nearly 46 percent of their budgets with income taxes.

California, Massachusetts and New Jersey were among the other states that reported lower than anticipated income tax collections in December, according to Moody's. In California, for instance, receipts for the month were down $4.7 billion from the prior year.

Hicks said that running up to December, personal income tax growth was generally strong across the country. "It's not to say that people aren't watching closely," he added.

A key factor affecting state income tax revenues in the December-January timeframe are what's known as "estimated payments," which are typically made by taxpayers with sizable income from sources other than wages—like stock market gains.

Moody's says January collections could make up for the slide in December income tax revenue in some states, but also highlighted that New York reduced its personal income tax forecast for its current budget cycle and future years.

"We expect continued uncertainty to cloud state revenue forecasts in fiscal 2020," the brief from the ratings agency says. Analysts there added: "It will take the passage of time and more missed revenue forecasts for state revenue analysts to capture new trends."

Route Fifty

By Bill Lucia,
Senior Reporter

JANUARY 27, 2019

Disputes Over State Taxes on Railroad Fuel Simmer Before Supreme Court.

The court on Monday asked for the U.S. government to submit views on an Alabama case.

Alabama for about a decade now has been battling in court over whether a tax the state levies on the diesel fuel that railroads purchase to power their locomotives discriminates against the industry and is therefore in violation of federal law.

In the latest chapter of this long-running dispute, two linked petitions concerning the same case are pending before the U.S. Supreme Court. So far, the high court hasn't decided to hear the matter. But on Monday justices asked for the Trump administration to submit views on it.

Alabama's lawyers describe the case as the "de facto bellwether" for other related disputes.

They add that state and federal courts across the federal 11th Circuit, which covers Alabama and Georgia, have stayed over 30 actions in the two states for tax refunds and injunctions while awaiting resolution in the case, which pits Alabama against CSX Transportation, Inc.

The Alabama legal fight hinges on claims by CSX, one of the nation's largest rail carriers, that the state discriminates against it by requiring railroads to pay a 4 percent sales and use tax on diesel purchases. In contrast, trucks and interstate water carriers are exempt from the tax.

Alabama says eight railroads have sued seeking refunds for tax payments on fuel totaling about $24 million, not including interest, and that CSX stopped paying the state tax in 2011. Most of the state's sales and use tax revenue goes to fund public schools, the state adds.

It also notes that CSX is seeking to clawback similar taxes in Georgia totaling upwards of $34 million.

CSX agrees there are public dollars at stake.

But the company says the state "ignores the victim of its illegal taxing scheme" and that "the railroads have been in the past, and continue to be, beleaguered by what Congress determined was 'widespread, long-standing and deliberate' discriminatory state and local taxation."

Claims Under the '4-R Act'

The federal law at the center of the controversy is the Railroad Revitalization and Regulatory Reform Act, or "4-R Act."

Enacted in 1976, it prohibits three types of state tax practices related to property taxes. The law also contains a clause that blocks states from imposing other types of taxes that discriminate against rail carriers under the jurisdiction of the federal government.

On two other occasions, Alabama's fuel tax feud with CSX has reached to the Supreme Court—most recently in late 2014.

That time around, the court sent the case back to the 11th U.S. Circuit Court of Appeals to determine whether Alabama could justify the tax exemptions for trucks and water carriers, like barges.

In the wake of the ruling, Alabama now says the Supreme Court should hear the case to "definitively" clarify whether and when sales and use tax exemptions violate the 4-R Act.

The state's petition asking the court to take up the case describes how railroads, citing the federal law, began bringing litigation in the 1990s against state taxes on diesel fuel. These claims began in Alabama in 2008, with seven rail carriers filing four lawsuits.

"States have been waiting for an answer for more than 20 years; years we have spent litigating cases that have cost taxpayers millions of dollars," the state's filing with the Supreme Court says.

"Granting review to answer the decades-old question thus provides the opportunity to resolve multiple pending cases and prevent new ones."

The railroad says it's inaccurate to characterize the case as the culmination of two decades of

litigation because there has not been a string of prior cases with unsettled questions about when tax exemptions for water carriers are justified.

CSX, in a linked "cross-petition," is asking the Supreme Court to review the portion of the 11th Circuit decision related to trucks if it green-lights the state's petition focused on water carriers.

While truckers don't pay the sales and use tax on fuel in Alabama, they do pay a 19 cent per gallon state excise tax on diesel, along with a roughly 24 cent per gallon federal tax. Cargo vessels traveling in and out of the state on waterways don't pay a state fuel tax in Alabama, but do pay a per gallon federal tax of about 29-cents.

Fuel for CSX trains is not subject to any of those taxes, the state court filing notes. Alabama says that between 2007 and 2016 its state and local taxes for train fuel totaled about 23-cents per-gallon.

The company counters that while water carriers pay no Alabama state fuel taxes, CSX in Birmingham and Montgomery, where it buys most of its fuel in the state, faces a combined state and local tax rate of 10 percent, and statewide owes about $5 million in the tax costs annually.

The state's tax exemption for fuel used by water carriers dates back to 1939 and the state says that, while it's not entirely clear, it was likely enacted to comply with federal laws and court decisions.

"Alabama did not exempt water carriers to disadvantage trains," its court petition says.

The state also makes a case that the federal government has jurisdiction over waters used for interstate shipping, and because vessel operators pay federal fuel tax to support projects and policing on those waters, states should be able to forego taxing fuel for ships.

CSX argues that the federal taxes are "irrelevant" and points out that the 11th Circuit rejected arguments tied to the fact that shipping on interstate waters is within the federal domain.

The company says in the 1970s, when lawmakers passed the 4-R Act, many railroads were on the brink of financial collapse, partly due to state and local tax burdens, and that the federal law was meant to help boost competition between freight trains and other types of haulers.

"The Eleventh Circuit's water carrier ruling does just that," the company says. "A state should not be heard to complain of 'lost tax revenue' from its own discriminatory tax."

The 11th Circuit ruling, which preceded the current petition and cross-petition before the Supreme Court, gave Alabama two options to fix the discrimination it found: stop collecting sales and use taxes on fuel from the railroad, or revoke the water carrier exemption.

Under the first option, CSX would pay zero taxes on fuel in the state, Alabama says. With the second, it would face a total tax burden in the state for diesel of about 23 cents per gallon, while for trucks the figure would be around 47 cents, and for barges about 52 cents.

Use of Tax Proceeds

Another company, Illinois Central Railroad Co., on Jan. 2, filed a petition asking the Supreme Court to hear a similar but separate case dealing with a Tennessee tax law.

In the Illinois Central case, the company is asking the court to consider whether a state fuel tax on diesel for trains, that truckers are exempt from, discriminates against railroads under the 4-R Act. The 6th U.S. Circuit Court of Appeals upheld the tax, deeming it "roughly equivalent" to the fuel

taxes that motor carriers do pay in the state.

Illinois Central zeros in on the idea that the way tax revenues are spent can factor into whether a tax is discriminatory. Sure, truckers pay fuel taxes in the state, the railroad says, but that money helps pay for highway construction and maintenance, which they benefit from.

Railroads on the other hand, according to Illinois Central, receive "minimal direct benefit" from the fuel taxes they pay and must pony up for their own infrastructure, like tracks and bridges.

This gives an advantage to trucking firms, the company claims. Illinois Central says the case presents the court with a chance to resolve whether the way a state uses tax revenue is relevant when it comes to determining if a tax is allowable under the 4-R Act.

CSX's cross-petition, urging the Supreme Court to weigh in on the 11th Circuit's blessing of Alabama's diesel sales and use tax exclusion for trucks, features similar arguments.

Alabama's lawyers say the court should grant the railroad's cross-petition to resolve questions about the "truck issue" as well.

They also say the Illinois Central case does not present the same issues surrounding the justification for the water carrier exemption and that the court should take its case instead. "The one it knows best," the state adds, "and thanks to Alabama's acquiescence to CSX's cross-petition, the only one that tees up all necessary issues."

Route Fifty

By Bill Lucia,
Senior Reporter

JANUARY 14, 2019

States are Betting on Revenue from Sports Betting This Year.

Bill Bradley did not like sports betting. The former New York Knicks star forward felt it sent the wrong message to young athletes and undermined the integrity of the game. So when Bradley transitioned from the basketball court to the U.S. Senate, he championed a nationwide ban on sports betting.

It was not, perhaps, the most likely of causes for a Senator from New Jersey, home of Atlantic City, and then-Rep. Bob Torricelli was chagrined. To Sen. Bradley's dismay, Torricelli engineered a carveout for New Jersey, with a grandfather clause that allowed continuing sports book operations in a handful of states that already allowed them, including Nevada.

However, a stalemate in the state legislature prevented New Jersey from legalizing sports betting in the narrow window granted them by the new federal law, the Professional and Amateur Sports Protection Act (PAPSA) of 1992. And so it came to pass that, two and a half decades later, a new generation of New Jersey politicians would unmake Bradley's legacy, winning a victory in the Supreme Court to strike down PAPSA and open the door to state legalization—and of course taxation—of sports betting.

Continue reading.

The Tax Foundation

by Jared Walczak

January 25, 2019

Time May Be Running Out For Texas Property Tax Abatements.

The Texas state legislature must decide whether or not to extend the ad valorem property tax abatement program currently authorized under state law. The program is currently set to expire on September 1, 2019. Local tax abatements are not without their detractors, and the decision to extend the existing program could impact the viability of future renewable energy and other energy developments across the state.

Background: Chapter 312 Property Tax Abatement Program

Chapter 312 of the Texas Tax Code currently permits local taxing units to enter into agreements with property owners providing for the abatement of ad valorem property taxes, provided that the property owner makes specified improvements or repairs to the property. These agreements are entered into between a property owner and a local county, city, special taxing district or other authority such as a water district or a hospital district. The state law authorizes and establishes certain guidelines for the abatement agreements, with the precise terms of the abatements negotiated and agreed to by the local taxing authority and the taxpayer. Any agreement must be approved by a vote of the members of the governing body of the local taxing unit.

Currently, the Chapter 312 abatement program is set to expire on September 1, 2019. The expiration of the program would not impact abatement agreements that have already been executed, but would prohibit local taxing units from entering into any new agreements after the expiration date. The term of an abatement agreement is limited to a maximum of 10 years by the statute, so property owners who have executed agreements prior to the potential expiration of the program could potentially still benefit from the abatement program for a number of years past this expiration date.

School districts, whose ad valorem property tax rates are typically greater than those of the other local taxing units, are prohibited from entering into abatement agreements under Chapter 312. However, Chapter 313 of the Texas Tax Code provides for a similar incentive with respect to ad valorem taxes levied by local school districts. Unlike Chapter 312, which provides for the abatement of property taxes, Chapter 313 allows school districts and property owners to enter agreements to limit the appraised value of property for ad valorem property tax purposes. Chapter 313 is currently set to expire on December 31, 2022, barring any legislative action to extend the expiration date.

Texas Legislative Session and Proposals

The Texas legislature began its session on January 8, 2019, and the session is scheduled to end on May 27. Pre-filing of bills for the 2019 session opened on November 12, 2018. Three pre-filed bills addressing the pending expiration of the Chapter 312 abatement program would extend the program for an additional term of 10 years. The bills introduced to date include Texas H.B. 360 and Texas H.B. 499, filed by Republican State Representatives Jim Murphy and Angie Button,

respectively, as well as Texas S.B. 118, filed by Democratic State Senator Royce West. As currently drafted, the bills do not contain any provisions creating any additional limitations or carve-outs from the abatement program.

> **Eversheds Sutherland Observation:** Tax abatement agreements have been offered by local taxing jurisdictions across Texas to taxpayers in a wide range of industries and for diverse types of projects. Lobbyists and trade groups are currently presenting arguments on both sides of the debate regarding extension of the Chapter 312 abatement program. In particular, a number of groups have expressed opposition to granting tax abatements to renewable energy projects, including wind and solar farms. Taxpayers who are contemplating a project in Texas or who have already begun acquiring or developing such a project should be mindful of the pending expiration of this abatement program and seek to execute any abatement agreements in advance of September 1, 2019. Eversheds Sutherland will continue to monitor any developments regarding the extension or modification of the Chapter 312 abatement program and provide updates of any significant developments.

January 24, 2019

Eversheds Sutherland (US) LLP

Real Estate Investors See Riches in a Tax Break Meant to Help the Poor.

Land deals in eligible tracts from Bronx to Oakland jump 62%.

In a former warehouse on a dimly lit street in the South Bronx, developers sipping Puerto Rican moonshine listened as a local official urged them to capture a new U.S. tax break by rebuilding the decaying neighborhood.

In Alabama, a young lawyer quit his job after seeing the same tax break's potential to help one of the nation's poorest states. He now spends his days driving his Hyundai from town to town, slideshow at the ready, hoping to connect investors with communities.

And on a conference call with potential clients, a prominent hedge fund executive pitched investments in a boutique hotel in Oakland, which he described as San Francisco's Brooklyn. The project is eligible for the same tax break, designed to help the poor.

Continue reading.

Bloomberg

By Noah Buhayar and Caleb Melby

January 15, 2019

TAX - ILLINOIS

Love v. Fulton County Board of Tax Assessors

United States Court of Appeals, Seventh Circuit - December 17, 2018 - 911 F.3d 424

Citizens, who own real property and pay ad valorem taxes in the county, filed petition for writ of mandamus and other relief against county board of tax assessors, individual tax board members, and board's chief appraiser, alleging the board failed to exercise its duty to diligently investigate and determine whether stadium lessee was subject to ad valorem property taxation, and seeking temporary and permanent injunctive relief, to enjoin defendants from recognizing stadium property as tax exempt, and a declaration that taxable leasehold interest had been transferred to lessee, rather than a non-taxable usufruct.

The trial court granted defendants' motion to dismiss for failure to state a claim, and then dismissed other pending motions as moot. Citizens appealed.

The Court of Appeals held that:

- Citizens failed to rebut the presumption that the trial court followed the law and limited its consideration to the amended petition and attached exhibits in ruling on defendants' motion to dismiss for failing to state a claim on which relief could be granted;
- Citizens failed to allege that county board of tax appraisers and other defendants failed entirely to conduct an investigation and reach a decision regarding the ad valorem tax status of stadium lessee's interest in new football stadium, as required to state a mandamus claim;
- Sovereign immunity clearly barred the plaintiffs' declaratory and injunctive relief claims against the board and other defendants in their official capacities; but
- The doctrine of official immunity did not operate to bar suits for declaratory or injunctive relief against county officers in their individual capacities.

TAX - NEW YORK

Sznajderman v. Tax Appeals Tribunal of State

Supreme Court, Appellate Division, Third Department, New York - January 3, 2019 - N.Y.S.3d - 2019 WL 80639 - 2019 N.Y. Slip Op. 00007

Article 78 was initiated to review Tax Appeals Tribunal determination sustaining a notice of deficiency.

The Supreme Court, Appellate Division, held that evidence was sufficient to support determination that investment in gas and oil partnership was an abusive tax avoidance transaction.

Evidence was sufficient to support Tax Appeals Tribunal's determination that overall financing structure of gas and oil partnership artificially inflated partners' actual capital contributions, allowing large tax deductions based upon intangible drilling costs derived through inflated turnkey contract, and thus that taxpayer's investment in partnership was an abusive tax avoidance transaction; collateral agreement had effect of satisfying the principal of taxpayer's subscription note by payment of only 15% of the face value, which was to be used to purchase bonds that were used to pay off the principal of the subscription note, taxpayer only paid interest paid sporadically, and turnkey contract's price bore no relationship to reasonably projected or actual drilling costs but instead was correlated with promised 250% tax deduction.

Opportunity Zones Shine Bright in Phoenix, AZ - but Need Off-Market Data.

Commercial real estate professionals will know there's no avoiding Opportunity Zones these days, especially in hot markets like Phoenix. The popular government program sets out to stimulate low-income and underdeveloped communities across the nation by offering generous incentives on capital gains to investors and developers. Of the 144 designated census tracts across the state of Arizona, 61 are located in the greater Phoenix area. Considering the rewards at stake, the local commercial real estate community is keen, with more sophisticated funds already capitalizing on market trends. But, resources are limited, and as more players enter Phoenix's Opportunity Zone market, competition is beginning to intensify. How can investors and developers successfully surpass others for valuable assets?

The advent of commercial real estate technology and democratization of off-market data has allowed the commercial real estate community to streamline and simplify their Opportunity Zone search experience. Access to the entire pool of property across the nation, including Phoenix's qualified census tracts, provides commercial real estate professionals an easier way to find potential investments. Then, when looking at Phoenix's hottest submarkets like industrial and multifamily, users can analyze individual asset data to empower stronger, smarter deal-making.

How Off-Market Data Helps

As investors and developers race to find valuable properties for investment in Phoenix Opportunity Zones, off-market data is now more beneficial than ever. In the age of digital disruption, it's no longer enough to rely solely on "on-market" listed properties. Instead, off-market data, which includes an area's total asset stock, can empower simpler, more strategic due diligence. Off-market data aggregation tools, like Reonomy, give users the advantage of finding high-demand properties faster, long before the less-sophisticated competition does.

More importantly, robust off-market platforms arm investors and developers with the information they need to make stronger decisions to usher in more flexible deals. For Opportunity Zone deal-making, specifically, granular building and transactional information can give users an edge on the competition. Ownership and portfolio information enable them to reach decision-makers directly, rather than getting stonewalled by gatekeepers and LLCs. In all, it's the comprehensive depth and breadth of off-market data that opens doors for investors interested in Opportunity Zone investments.

Uncovering Phoenix's Potential

Using off-market data, what particular Phoenix markets should commercial real estate professionals explore? Industrial and manufacturing had a strong 2018; the sector hit an all-time high since 2007 with approximately 6.9 million square feet under construction throughout the metro. Phoenix's positive economic growth lends itself to extremely low vacancy rates (7.3%) and an increase in rent prices, which have steadily increased to an average $7.2 per square foot.

According to Reonomy data, more than 6,800 commercial properties are located in Phoenix's designated Opportunity Zones. Nearly 3,000 of these properties are categorized as industrial and include a myriad of assets, spanning from aircraft hangars to sprawling warehouses. For those interested in capitalizing on Phoenix's industrial advancement, there's plenty of potential in the area's nominated census tracts. Users who utilize off-market data platforms, like Reonomy, can explore this information further, by customizing their search experience source the properties that

best match their preferences and ensure the highest return on investment (ROI).

Additionally, Phoenix's strong job and population growth are attracting multifamily investments across the city. Globe Street reports the need for more multifamily units will likely attract land investment and development deals throughout the first few months of 2019. Big-name buyers have already begun investing in Phoenix's promising multifamily sector, with companies like LaSalle Investment Management and TruAmerica expanding their portfolios throughout the city. These high-yielding multifamily investments might prove lucrative in the years to come, especially in Phoenix's Opportunity Zones where ROI can be maximized.

Current Reonomy off-market data indicates that there are 1,280 multifamily assets located throughout Phoenix's Opportunity Zones, including duplexes, triplexes, and general multifamily communities. Reonomy data also indicates another 2,600 land parcels in qualified census tracts. While 953 of these are zoned for industrial properties, over 1,211 are zoned for residential purposes, giving developers a wide-ranging scope of property options for consideration.

These numbers provide a broad overview of the options in Phoenix's Opportunity Zones, but it's the depth of the off-market data that truly empowers smart investment decisions for stronger deal enablement. Commercial real estate technology like Reonomy allows users to dive deeper into individual asset details to explore physical, transactional and owner information. This granular intel ultimately enables investors and developers to strike more flexible, personal deals with decision-makers before the competition does.

There's no doubt Arizona's capital city will continue to garner attention from investors and developers. With Opportunity Zones in the picture now, off-market data is essential for simplified prospecting and stronger deal facilitation.

AZBIGMEDIA.COM

REAL ESTATE | 14 Jan | RICHARD SARKIS

Richard Sarkis is Co-Founder & CEO of Reonomy, a commercial real estate data and analytics platform. For a simpler approach to searching for Opportunity Zones in Phoenix, try the Reonomy platform for free, here.

The NJ Local Property Tax Appeal Filing Deadline Remains Inviolate And Cannot Be Circumvented By Use Of The Intervention Tool.

In *Farmland Dairies, Inc. v. Borough of Wallington*, N.J. Super. App. Div. (per curiam) (unpublished decision) (35-2-7909), the Appellate Division upheld the decision of the Tax Court in denying an unrelated neighboring property owner's efforts at intervening in a pending local property tax appeal between the property owner and the Borough. The court concluded that the intervention application of the putative intervenor was out of time and barred by the statute of limitations. Although all residents of municipalities have standing and maintain the right to pursue tax appeals as "aggrieved" parties under the statute, including those related to their neighbor's properties, any such contests must nonetheless comply with the statutory filing deadline.

The New Jersey Supreme Court has consistently recognized the necessity of complying with filing deadlines in the area of taxation. The statutory scheme establishing the court's jurisdiction in this area is "one with which continuing strict and unerring compliance must be observed." See McMahon

v. City of Newark, 195 N.J. 526, 546 (2008). Indeed, our Supreme Court has declared that the "failure to file a timely appeal is a fatal jurisdictional defect." F.M.C. Stores v. Borough of Morris Plains, 100 N.J. 418, 425 (1985). The Supreme Court has also explained that strict adherence to statutory filing deadlines is of particular concern in tax matters, given "the exigencies of taxation and the administration of local government." F.M.C. Stores, 100 N.J. at 424. The Legislature "has attempted to set out a well-organized time-table for the purpose of enabling a municipality to ascertain the amount of taxable ratables within the jurisdiction in order that it might adopt a responsible and fairly accurate budget." Id. at 425. "By incorporating a strict deadline in [the statute], the Legislature intended to ensure that municipalities receive timely notice that a particular property's valuation is subject to challenge." Prime Accounting Dept. v. Township of Carney's Point, 2013 N.J. Lexis at *31.

After previously remanding the matter to the Tax Court for further proceedings concerning the timeliness and propriety of the putative intervenor's application for permissive intervention, the Appellate Division made it plain, mindful of the above-referenced well-settled jurisprudence, that any effort to intervene must, in the first instance, be timely pursued and that the annual tax appeal filing deadline will effectively wait for no one.

Although as demonstrated above, the inviolate nature of this statutory deadline is plain, the court's decision here may have been made easier by the attendant distasteful nature of a case involving an unrelated party's efforts at meddling with pending litigation between the real parties in interest (the actual owner of the property in question and the municipality).

by Carl Rizzo

January 17, 2019

Cole Schotz

IRS Releases Final TEFRA Regulations: Orrick

On December 28, 2018, the U.S. Department of the Treasury released final regulations (the "Final TEFRA Regulations") regarding the requirements for public notice, hearing, and approval of qualified private activity bonds under Section 147(f) of the Internal Revenue Code. The Final TEFRA Regulations replace temporary regulations under Section 103(k) of the Internal Revenue Code of 1954 (the "Existing TEFRA Regulations") by finalizing rules set forth in proposed regulations issued in September 2017 (the "2017 Proposed Regulations") with a few notable improvements and clarifications. [The main changes to the Existing TEFRA Regulations implemented and/or confirmed by the Final TEFRA Regulations include:

- *Shortening Notice Period to Seven Days.* Under the Final TEFRA Regulations a notice of public hearing is presumed reasonable if published no fewer than seven days in advance of the hearing. This is shorter than the 14 days presumed reasonable under both the Existing TEFRA Regulations and the 2017 Proposed Regulations.
- *Deadlines Related to Public Approval.* The Existing TEFRA Regulations do not impose any specific restriction on the period of time between a TEFRA hearing and the required public approval.

    - *Period Between TEFRA Notice and Public Approval.* The Final TEFRA Regulations do not impose any specific restriction on the permitted time between the TEFRA Notice

and the required public approval. The preamble to the Final TEFRA Regulations confirms that a period of one year between the TEFRA notice and the public approval is reasonable and acknowledges that a period of more than one year also may be reasonable in some circumstances.
- *Period Between Public Approval and Issuance of Bonds.* For bonds not issued pursuant to a plan of financing, the Final TEFRA Regulations follow the 2017 Proposed Regulations in providing that public approval is timely only if it occurs within one year before the issue date of the bonds. The Final TEFRA Regulations are clear that the one-year clock begins running on the date of the approval, not the date of the hearing.

- *Allowing Website Publication by Governmental and On-Behalf-Of Issuers.* The Final TEFRA Regulations allow the notice requirement to be satisfied with a posting on the approving governmental entity's website or, in the case of on-behalf-of issuers, with a posting on the on-behalf-of issuer's website. Publication of notice in a newspaper is no longer required (but is still permissible). Notably, the Final TEFRA Regulations eliminated the requirement in the 2017 Proposed Regulations that website publication was only permitted with "reasonable alternative notice" by other means to accommodate potential residents with no internet access.

    - *Location of Website Posting.* For issuers with complex, multipage websites, the Final TEFRA Regulations require a public notice to be posted on the issuer's "primary public website" in an area used to inform residents about events such as public meetings.
    - *Maintenance of Records.* Issuers are required to maintain records demonstrating that notices posted to a website satisfied the above requirements and, therefore, must develop procedures for capturing and retaining the time and content data of the applicable website.

- *Expanding Definition of "Project" to Include Non-Proximate Sites Used in Integrated Operations.* One of the few burdensome requirements added by the 2017 Proposed Regulations was that the notice of public hearing must identify the maximum principal amount of bonds to be allocated to each "project" specified in the notice — rather than just stating the amount of bonds for all projects in the aggregate. The Final TEFRA Regulations retain the dollar-breakout requirement.Following the 2017 Proposed Regulations, the Final TEFRA Regulations define "project" as land, building, equipment and other property "located on the same site, or adjacent or proximate sites used for similar purposes." The Final TEFRA Regulations also provide, however, that capital projects or facilities that are used in an "integrated operation" may be treated as the same "project" even if not located on the same site or adjacent or proximate sites.

    - *Practical Compliance Considerations.* The requirement of the 2017 Proposed Regulations to assign a maximum principal amount to each project caused concern among issuers and bond counsel. Although the Final TEFRA Regulations permit an "insubstantial deviation" of 10% above the stated maximum principal amount specified for each project, the lack of specificity around the terms "proximate" and "integrated operation" will likely lead to conservative practices in specifying projects and stating expected amount of bonds.

- *Permitting Supplemental Public Approval.* The Final TEFRA Regulations retain the welcome provision in the 2017 Proposed Regulations that, in certain unforeseen and unexpected circumstances, a supplemental public approval may be obtained after bonds are issued but before proceeds are spent on a use not set forth in the original TEFRA notice.

- *Clarifying that General Partner Is a Beneficial Party of Interest.* The Existing TEFRA Regulations require that the TEFRA notice to include the name of the initial owner, operator, or manager of the facility. The 2017 Proposed Regulations provided that the notice may comply by naming a significant true beneficial party of interest for the initial owner or user. The Final TEFRA Regulations provide that the general partner of the partnership that owns the facility is a beneficial party of interest that may be named in the TEFRA notice.
- *Special Rules.* The Final TEFRA Regulations confirmed and clarified various rules in the 2017 Proposed TEFRA Regulations that relate to the approval requirements for working capital financings, pooled financings with qualified 501(c)(3) bonds, single-family housing bonds, student loan bonds, airport bonds, and high-speed rail bonds.

Effective Date. The Final TEFRA Regulations apply to bonds issued pursuant to a public approval occurring on or after April 1, 2019. Because the effective date is keyed to the date of the approval rather than the date of the public notice or the date of the bond issue, the Existing TEFRA Regulations apply to notice content, hearings, and approvals for bonds issued after April 1, 2019, provided that the approvals were obtained before that date.

by Andrea Ball, Charles Cardall, Richard Moore & Aviva Roth

January 8, 2019

Orrick, Herrington & Sutcliffe LLP

IRS Releases Proposed Regulations Consolidating Guidance on Reissuance of Tax-Exempt Bonds: Mintz, Levin

On December 31, 2018, the Department of Treasury and Internal Revenue Service released long-awaited proposed regulations (the "Proposed Regulations") that address when modifications to the terms of tax-exempt bonds are treated as an exchange of existing bonds for newly issued (or "reissued") bonds for purposes of section 103 and sections 141 through 150 of the Internal Revenue Code and when an issuer's acquisition of its bonds results in such bonds ceasing to be outstanding for federal tax purposes. The Proposed Regulations (found at https://www.govinfo.gov/content/pkg/FR-2018-12-31/pdf/2018-28370.pdf) are intended to unify and clarify existing guidance.

Background

If, after tax-exempt bonds are issued, an issuer and bondholder agree to significantly modify the terms of the bonds, the original bonds may be treated for federal tax purposes as having been exchanged for newly issued modified bonds. Additionally, if an issuer or its agent acquires and resells a bond, the bond may be treated as having been retired upon acquisition and replaced with a newly issued bond upon resale. The replacement of the old bond with the newly issued bond is commonly referred to as a "reissuance". Reissuance of a bond is significant because it is treated as a current refunding for tax purposes and the continued tax-exemption of the bond after the reissuance date must be reassessed by reference to tax law requirements and factual circumstances in effect as of the reissuance date. In addition, a reissuance may result in the realization of tax loss or gain as of the reissuance date by the holder of the reissued bond.

Tender option bonds and variable rate demand bonds have certain characteristics that raise

reissuance questions. The Proposed Regulations are expected to replace existing guidance in Notice 88-130 and Notice 2008-41 related to tender option bonds and variable rate demand bonds and to conform Treasury Regulations Section 1.1001-3, which generally governs modifications to debt instruments, to the special rules in the Proposed Regulations.

Proposed General Rules for Retirement of Tax-Exempt Bonds

Under the Proposed Regulations, a tax-exempt bond is treated as retired (i.e., no longer outstanding for federal tax purposes) if a significant modification occurs under Regulations Section 1.1001-3, if the issuer or an agent acquires the bond in a manner that liquidates or extinguishes the holder's investment in the bond, or if the bond is otherwise redeemed (for example, paid at maturity or upon an optional or mandatory redemption). Notably, under the Proposed Regulations, "issuer" is defined to mean the actual issuer of the bonds or any related party rather than the conduit borrower. This means that acquisition of a bond by a conduit borrower would not result in the retirement of that bond.

Exceptions to the General Rules

The Proposed Regulations provide three exceptions to the general rules. The first two exceptions relate to "qualified tender bonds" and the third applies to all tax-exempt bonds. A "qualified tender bond" is defined as a tax-exempt bond that (i) bears interest during each authorized interest rate mode at a fixed interest rate, a qualified floating rate or an objective rate, (ii) bears interest unconditionally payable at periodic intervals of no more than one year, (iii) has a stated maturity date that is not later than 40 years after the issue date of the bond, and (iv) includes a qualified tender right. A "qualified tender right" is defined as the right or obligation of a holder of the bond to tender the bond for purchase that (i) is available on at least one date before the stated maturity date, (ii) has a purchase price equal to par plus any accrued interest, and (iii) is followed by the issuer or remarketing agent either redeeming the bond or using reasonable efforts to resell the bond within 90-days from the date of tender for a purchase price of par plus any accrued interest.

Under the first exception in the Proposed Regulations, both the existence and exercise of a qualified tender right are disregarded when applying Regulations Section 1.1001-3 to a qualified tender bond. Accordingly, an interest rate mode change that occurs pursuant to the terms of a qualified tender bond does not cause the bond to be reissued because the qualified tender right is ignored and the issuer's election to change the interest rate mode is considered the exercise of a unilateral option, which under Regulations Section 1.1001-3 is not treated as a modification.

Under the second exception in the Proposed Regulations, the acquisition of a qualified tender bond by the issuer or its agent does not result in retirement of the bond if the acquisition is pursuant to the operation of a qualified tender right and the bond is not held by the issuer or its agent for more than 90 days after the date of tender. In other words, if a qualified tender bond is tendered to an issuer, the issuer or its agent can hold the bond for up to 90 days before remarketing it without causing a reissuance of the bond. As noted above, a conduit borrower or its agent can hold such a bond indefinitely before remarketing without causing a reissuance.

The third exception under the Proposed Regulations applies to all tax-exempt bonds, not just qualified tender bonds. Under this exception, the acquisition of a tax-exempt bond by a guarantor or liquidity facility provider acting on the issuer's behalf but unrelated to the issuer does not result in retirement of the bond if the acquisition is pursuant to the terms of the guarantee or liquidity facility.

Consequences of Retirement

If a bond is treated as retired pursuant to the Proposed Regulations due to a deemed exchange, the modified bond is treated as a new bond issued in exchange for the original bond. If a bond is treated as retired pursuant to the Proposed Regulations following the acquisition of the bond by the issuer or its agent, (i) if the issuer resells the bond, the bond is treated as a new bond issued on the date of resale, or (ii) if the issuer does not resell the bond, it simply ceases to be outstanding for federal tax purposes. If the bond is treated as a newly issued bond, it will generally be treated as a current refunding bond which must be retested for qualification as a tax-exempt bond under sections 103 and 141 through 150 of the Internal Revenue Code. Potential negative consequences for the issuer include a change in yield for purposes of arbitrage and rebate, acceleration of any required rebate calculation and payment and change-in-law risk.

Optional Application

The Proposed Regulations will be effective 90 days after they are published (following comments and any revisions) as final regulations in the Federal Register but they may be applied to events and actions taken with respect to tax-exempt bonds that occur before that date.

Comments and requests for a public hearing must be received by March 1, 2018.

by Christie L. Martin

January 11, 2019

Public Comment on Reporting Requirements in Proposed Opportunity Zone Regulations.

Abstract

The Department of Treasury solicited comments as part of the process for the proposed rule "Investing in Qualified Opportunity Funds, IRS REG-115420-18." As the IRS considers revisions to Form 8996, we recommend they consider including additional Fund- and transaction-level reporting requirements. Following precedent from prior economic development incentives and programs, nonburdensome reporting requirements would answer questions of "who", "what", "when", "where", and "how much" for each Opportunity Zones investment. Without collecting this basic information, it will be difficult for IRS to fulfill its statutory evaluation obligations for Opportunity Zones.

DOWNLOAD PDF

The Urban Institute

by Brett Theodos & Brady Meixell

December 28, 2018

Judge Rules on Constitutionality of Tax Credit Bonds.

The small oil companies and banks holding more than $800 million in refundable tax credits scored a victory Wednesday when an Alaska Superior Court judge threw out a lawsuit challenging the state's plan to sell bonds to pay off those credits.

Judge Jude Pate granted the State of Alaska's motion to dismiss the suit filed by former University of Alaska regent Eric Forrer arguing against the constitutionality of the bond scheme contained in House Bill 331 that the Legislature approved last spring.

In making the ruling, Pate concluded that Forrer and his attorney, Juneau lawyer Joe Geldhof, failed to state a claim upon which the court could grant relief on the grounds that HB 331 "passes constitutional muster."

Forrer filed the suit in May, contending the plan to sell the "tax credit bonds" falls outside the tight sideboards the Alaska Constitution puts on the state's ability to incur debt. He also said in interviews and through court filings that the plan amounts to a de-facto dedication of general fund money to pay the bond debt because not making the payments would have grave consequences on the state's credit rating and future finances.

Attorneys with the Legislative Legal Services office also questioned the legality of the tax credit bonds while HB 331 was being debated. A competing legal opinion by former Attorney General Jahna Lindemuth declared the bill was constitutional.

Geldhof said Friday morning that Forrer will appeal Pate's ruling to the Alaska Supreme Court.

The state Constitution generally limits the Legislature from bonding for debt to general obligation, or GO, bonds for capital projects, veterans' housing and state emergencies. In most cases the voters must approve the GO bond proposals before the bonds are sold.

State corporations can also sell revenue bonds, but those are usually linked to a corresponding income stream and only obligate the corporation to make payments, not the State of Alaska as a whole.

HB 331 allows the Revenue Department to set up the Alaska Tax Credit Certificate Bond Corp. specifically for the purpose of issuing the 10-year bonds.

State attorneys contended the plan is legal because the bonds would be "subject to appropriation" by the Legislature, which the bond buyers would be aware of, and therefore would not legally bind the state to make the annual debt payments.

New Attorney General Kevin Clarkson and Revenue Commissioner Bruce Tangeman praised Pate's order in a formal statement from the Department of Law.

"With this tax credit bond program, we are following through in paying down the tax credits, so industry and the financial markets know we are open for business. This will bring more stability to state finances and help the business community to get the economy back on track," Tangeman said.

Tangeman also said in a brief interview earlier Thursday that the state would be working to release $100 million originally approved in the current fiscal year budget for companies that chose not to participate in the bond plan.

"It's a high priority to cut that $100 million loose," he said, noting even if HB 331 is upheld at the Supreme Court it will take several months to execute a large bond sale.

State officials initially planned to hold the sale last August, but it was put off given the looming lawsuit would almost certainly require high interest rates on the bonds, if they could be sold at all. That situation could remain if Forrer appeals Pate's ruling as expected.

Pate, in a narrow but lengthy ruling, wrote that while the policy implications of selling the bonds can be debated, those issues are not the courts' to decide, noting that HB 331 has provisions that allow credit holders to sue the Tax Credit Certificate Corp., but not the State of Alaska, if the bonds aren't paid through appropriations by the Legislature.

"An examination of the bond transaction in HB 331 demonstrates the presence of both an effective non-appropriations clause and the shield of an independent state corporation," he wrote. "These two features sufficiently ensure that HB 331 does not create any debt that is legally enforceable against the State."

Hatched by former Gov. Bill Walker's administration as a way to pay off the large tax credit obligation — expected to be upwards of $1 billion when the final tax credit certificates are applied for — HB 331 would allow the companies and banks holding credits to get their money relatively quickly instead of possibly waiting for the state to pay them off over years of appropriations according to current statute.

Until Walker vetoed $200 million worth of the credits in the 2016 budget while facing a deficit of more than $3 billion, the Legislature had always paid off the full credit balance each year.

To get paid sooner the credit holders would have to accept a discount of up to 10 percent less than the face value of the certificates. The state Department of Revenue would then use the difference between the credit values and the discounted amount actually paid to cover the borrowing costs.

Forrer, Geldhof and others skeptical of the plan have also questioned the economics of it.

Supporters of the tax credit bonds insist it is a way to restart investment by small producers and explorers in Alaska's oil and gas fields that has been slowed by three years of credit payment amounts at levels below what was applied for as the Legislature and the administration debated how to resolve the state's large budget deficits.

The credits were largely issued to small exploration companies that did qualifying work, but they were then often used as collateral for loans issued by investment banks to support additional exploration work. A commonly used credit for explorers with no production and no tax liability had the state paying 35 percent of the cost of qualifying work in cash.

When the earned credits weren't paid off in full in the fiscal years 2016-18 state budgets, as had previously been done, the banks holding them mostly stopped lending into the Alaska oil sector.

In one unique instance, the Department of Revenue in October 2015 issued a $22.5 million tax credit-backed loan to a holding company set up by the state-owned Alaska Industrial Development and Export Authority. The loan was made because the authority had not received payment on its investment in a small North Slope oil development spearheaded by Brooks Range Petroleum Corp. — payment that was supposed to come from tax credits paid by Revenue for work Brooks Range had performed.

Forrer and Geldhof rebut that the new corporation would not have any revenue of its own — which Pate acknowledged in his order — but would rely on legislative appropriations from the general fund. According to Geldhof, Pate incorrectly applied a prior Alaska Supreme Court decision involving a lease-purchase agreement that does not apply to this case.

“Everybody’s admitting that, well, if a future Legislature doesn’t use general funds to give this phony shell corporation the money to pay back the bond holders there’ll be enormous consequences through Moody’s and the other ratings agencies and Alaska’s credit rating will take a hit and there is recourse,” he said.

Permitting the state to invoke the subject to appropriation language and set up pass-through corporations for the use of selling bonds sets a dangerous precedent, Geldhof argued further.

“It’s going to be all bets are off and the State of Alaska will start incurring fantastic debt,” he said, later adding, “It’s a recipe for running this place like Illinois or Venezuela.”

Pate acknowledged this argument, but wrote that, “the court should not engage in second guessing the wisdom of the legislature’s fiscal policy decisions, even when those decisions may have a negative impact on the State’s credit rating.”

The judge also pointed to prior court rulings that “concerns regarding the state’s credit rating do not create legally binding debt.”

While he disagrees with Pate’s ruling on multiple fronts, Geldhof said he appreciates the effort that went into it. During oral arguments in October Pate said he would issue a decision in early November, but the 44-page order wasn’t published until Jan. 2.

“As an attorney I at least want to know the judge heard my argument. He clearly did because he labored on it,” Geldof commented

Alaska Journal of Commerce

By: Elwood Brehmer

01/03/2019

IRS Cancels Meeting on Opportunity Zones Rules Due to Shutdown.

Those interested in the economic development program have been closely tracking the guidelines.

Citing the partial federal government shutdown, the Treasury Department on Monday cancelled a hearing scheduled for later this week on rules for the Opportunity Zones program.

The department said a new date for the postponed Jan. 10 meeting would be set once its appropriations are restored. Treasury released proposed rules for the economic development initiative in October.

Investors and others were eager for Treasury to issue guidelines for the program so that more investments could start to flow through it.

While the current proposed regulations provided substantial insights into how the program would work, they also left some key questions about it unanswered. And dozens of written comments offering feedback on the rules, from parties ranging from nonprofits to investment firms, have been submitted in recent weeks.

On Tuesday, the partial government shutdown was in its 18th day, with Democratic lawmakers and President Trump unable to break an impasse over the president's demands for billions of dollars to build a wall on the nation's southern border with Mexico.

Created by the sprawling 2017 federal tax overhaul, the Opportunity Zones program offers tax breaks to investors who funnel capital gains into special funds that are supposed to invest the money into eligible census tracts that are economically distressed—the "zones."

When the Treasury Department released the draft rules last October, the department said it anticipated issuing a second round of guidance before the end of the year.

But, as of Tuesday, the White House Office of Information and Regulatory Affairs had not publicly reported that any additional Opportunity Zones rules were under review.

Dec. 28 was the deadline for written comments on the draft rules released in October.

The online federal docket for the regulations shows that at least 145 comments had been received.

One group that submitted feedback is the Florida Housing Coalition. The nonprofit suggested Treasury set performance measures and reporting requirements for the program, and that it should take steps to prevent "predatory or speculative" purchases of vacant land.

Another example of the comments is from Ovation Partners, an investment adviser that manages more than $500 million of assets. The firm is seeking greater clarity on timing requirements for investing gains from partnerships into the funds that can invest in the zones.

Treasury says the new date for a hearing on the proposed rules will be set no earlier than two weeks from the date a notice announcing it is published in the Federal Register. This week's meeting was going to be held at an IRS building in Washington, D.C.

Route Fifty

By Bill Lucia,
Senior Reporter

JANUARY 8, 2019

TAX - WASHINGTON

End Prison Industrial Complex v. King County

Supreme Court of Washington - December 27, 2018 - P.3d - 2018 WL 6802651

Objector brought declaratory judgment action against county, challenging county's assessment of increased property taxes.

The Superior Court, King County dismissed action as untimely. The Court of Appeals reversed.

After grant of review, the Supreme Court of Washington held that:

- Proposed measure for increase in property taxes sufficiently described taxation structure which county later implemented, and therefore ten-day time limit for challenging measure's ballot title applied;

- Challenges to a ballot title based on failure to comply with statute requiring a ballot title for a levy lid lift to contain an express statement in certain circumstances must be raised during the statutory ten-day time limit for challenges to a ballot title; and
- Challenges to a ballot title based on failure to comply with statutory accuracy and clarity requirements must be raised during the statutory ten-day time limit for challenges to a ballot title.

TAX - MICHIGAN

Petersen Financial LLC v. City of Kentwood

Court of Appeals of Michigan - November 20, 2018 - N.W.2d - 2018 WL 6070702

Property owner brought action against county treasurer and city, seeking declaration that special tax assessments on the property had been extinguished under the General Property Tax Act (GPTA) by foreclosure.

The Circuit Court granted defendants' motion for summary disposition. Property owner appealed.

The Court of Appeals held that:

- Circuit court, rather than Michigan Tax Tribunal (MTT), had jurisdiction over property owner's challenge to special assessments, and
- Defendants were engaged in exercise or discharge of a government function under the governmental tort liability act (GTLA), and thus were entitled to immunity on property owner's slander of title action.

Circuit court, rather than tax tribunal, has jurisdiction to consider a challenge to a tax assessment based not on the validity of the assessment per se, but on peripheral issues relevant to enforcing a tax assessment, and which does not require any findings of fact but only construction of law.

Circuit court, rather than Michigan Tax Tribunal (MTT), had jurisdiction over property owner's challenge to special assessments, where the owner did not challenge factual basis or amount of the assessments on his land, which arose from special assessment agreements entered into by prior owner, but argued that the assessments were extinguished under the General Property Tax Act (GPTA) by judgment of foreclosure on the property.

Property owner's challenge to an amendment to voluntary special assessment/development agreement between prior property owner, city, and others was contractual in nature, and thus circuit court, rather than Michigan Tax Tribunal (MTT), had jurisdiction over the issue; the amendment was recorded after a judgment of foreclosure on the property and property owner's challenge to the amendment asserted that it was not supported by consideration and against public policy.

County treasurer and city were engaged in exercise or discharge of a government function under the governmental tort liability act (GTLA) in attempting to collect extinguished special assessments, and thus were entitled to immunity on property owner's slander of title action after city and treasurer attempted to collect on special assessments, entered into by prior property owner, after foreclosure had extinguished the debts; city was authorized to assess and collect such assessments.

How to Make Opportunity Zones Work in Chicago.

The Urban Institute looks at how local leaders can get the most out of a new federal program designed to boost investment in struggling neighborhoods.

Opportunity Zones! Are they good or bad?

The answer to that question may depend in part on whether or not you buy the premise that tax incentives are the most effective way to successfully uplift economically depressed areas. And even if you do, at this moment, a lot hinges on the final rules governing the program, which was unveiled as part of the 2017 tax reform as a way to lure investment to neglected neighborhoods and left-behind cities. It also depends on exactly how local governments choose to implement it.

In a new brief, the Urban Institute's Brett Theodos and Brady Meixell use the case of Cook County, Illinois, to illustrate how local leaders could get the most out of their brand-new zones. Their big takeaway: Understanding the nuances between the selected areas will go a long way in maximizing the benefits of this program.

Continue reading.

CITY LAB

TANVI MISRA JAN 10, 2019

How Chicago and Cook County Can Leverage Opportunity Zones for Community Benefit.

Abstract

Local officials, impact investors, and philanthropy have important roles to play in helping communities access Opportunity Zone financing that benefits current residents, especially those with low or moderate incomes. Using Chicago and Cook County as a case study, we identify steps these actors can take to attract helpful, and limit harmful, investments. We find that the Opportunity Zones selected in Chicago and Cook County broadly fulfilled the incentive's spirit, targeting areas that were more economically distressed. Going forward, it will be necessary to leverage available policy and philanthropic levers to compel private action in line with community interests.

DOWNLOAD PDF

The Urban Institute

by Brett Theodos & Brady Meixell

January 10, 2019

As Big Retailers Seek to Cut Their Tax Bills, Towns Bear the Brunt.

Wauwatosa, Wis., is chockablock with malls. Some of the stores are challenging their property taxes,

arguing that their assessment should be based on the sale price of vacant stores in other places.

WAUWATOSA, Wis. — With astonishing range and rapidity, big-box retailers and corporate giants are using an aggressive legal tactic to shrink their property tax bills, a strategy that is costing local governments and school districts around the country hundreds of millions of dollars in lost revenue.

These businesses — many of them brick-and-mortar stores like Walmart, Home Depot, Target, Kohl's, Menards and Walgreens that have faced fierce online competition — maintain that no matter how valuable a thriving store is to its current owner, these warehouse-type structures are not worth much to anyone else.

So the best way to appraise their property, they contend in their tax appeals, is to look at the sale prices on the open market of vacant or formerly vacant shells in other places. As shuttered stores spread across the landscape, their argument has resonated.

To municipalities, these appeals amount to a far-fetched tax dodge that allows corporations to wriggle out of paying their fair share.

Continue reading.

The New York Times

By Patricia Cohen

Jan. 6, 2019

The Shutdown Can't Stop the Release of the Final TEFRA Regulations: Squire Patton Boggs

The most recent partial shutdown of the federal government has halted many operations of the U.S. Department of the Treasury, including those of the Internal Revenue Service. The shutdown has, however, evidently left untrammeled the Treasury Department's ability to promulgate regulations. On Friday, December 28, the Treasury released final regulations under Internal Revenue Code Section 147(f) regarding the public notice, hearing, and approval requirements that apply to qualified private activity bonds (the "Final TEFRA Regulations"). The Final TEFRA Regulations put into final, effective form the proposed TEFRA regulations that were issued on September 28, 2017 (the proposed TEFRA regulations are available, and are analyzed, here). The promulgation of the Final TEFRA Regulations allows the IRS and Treasury to check-off a perennial item on their annual priority guidance plan, and during a shutdown of the federal government, no less. That's dedication. For a brief summary of the Final TEFRA Regulations, hit the jump.

Continue Reading

The Public Finance Tax Blog

By Michael Cullers on December 30, 2018

Squire Patton Boggs

The Proposed Reissuance Regulations: The Thirty Years' War Continues - Squire Patton Boggs

Johnny Hutchinson could tell you, from memory, that the Defenestration of Prague occurred on May 23, 1618, and it precipitated the Thirty Years' War, which ended on May 15, 1648 upon the ratification of the first of a series of peace treaties that comprised the Peace of Westphalia.

In 1988, 370 years after the Defenestration of Prague, the IRS began its campaign of guidance regarding the reissuance for federal tax purposes of tax-exempt bonds (specifically, qualified tender bonds) with the issuance of Notice 88-130. 20 years later, in 2008, the financial crisis and collapse of the auction rate securities market compelled the Service to update this guidance, which it did by releasing Notice 2008-41. On the very last day of 2018, more than 30 years after commencing this line of guidance (a period longer than the Thirty Years' War), the IRS and Treasury released proposed regulations that, if finalized, would unify and complete the rules for determining whether tax-exempt bonds have been reissued for federal tax purposes (the "Proposed Reissuance Regulations").

The Proposed Reissuance Regulations will take effect 90 days after they are published as final regulations in the Federal Register, but issuers of tax-exempt obligations can elect to apply the Proposed Reissuance Regulations now. Alternatively, issuers can apply either Notice 88-130 or Notice 2008-41. Dealer's choice. Comments and requests for a public hearing on the Proposed Reissuance Regulations must be received by the Treasury on or before March 1, 2019. A brief summary of the Proposed Reissuance Regulations follows the jump.

Continue Reading

The Public Finance Tax Blog

By Michael Cullers on December 31, 2018

Squire Patton Boggs

Treasury Finalizes PAB Reg, Proposed Re-Issuance Reg.

WASHINGTON – Treasury and the Internal Revenue Service took two-long awaited regulatory steps important to the municipal market on New Year's Eve with publication of a finalized public notice requirement for issuing private activity bonds and a proposed regulation clarifying when tax-exempt bonds require re-issuance.

The Federal Register publication of the finalized PAB regulation takes effect April 1 but part of it can be implemented by issuers immediately.

The final regulations simplify the public notice and approval requirements for PAB issuance to require publication on an issuer's website seven days prior to a public hearing.

Proposed regulations issued in September 2017 would have required a longer notice period of 14 days and publication at a second location such as a community bulletin board.

The regulations do not – as some in the muni industry requested – drop the requirement for a public hearing if there are no advance requests to speak at the hearing nor does it allow hearings to be held by teleconference or webcast.

Mike Bailey, public finance attorney at Foley & Lardner in Chicago and a board member of the National Association of Bond Lawyers, described the final regulations as "a welcome development."

"They were, in many ways, responsive to the comments," Bailey said. NABL requested that the public notice requirement be reduced to seven days.

Although the effective date is April 1, Bailey said issuers will need to update their procedures by mid March.

Charles Samuels of Mintz Levin, counsel to the National Association of Health & Educational Facilities Finance Authorities, described the final regulations as "a mixed bag of improvements beyond the status quo and some disappointments."

"The trick is to take advantage of the new technology that exists since the original rules were published as well as to minimize the burden and the resources spent by state and local governments and issuers while, of course, complying with the requirements of the law," Samuels said in an email.

The rule overall has received praise from practitioners because it marks a long-overdue update to the 1982 Tax Equity and Fiscal Responsibility Act (TEFRA) that first imposed the public notice and approval requirement for PABs, which at the time were limited to industrial development bonds.

The Tax Reform Act of 1986 greatly expanded the types of projects and financings for which PABs can be used.

The final regulations take into account tax law changes that have expanded the kinds of PABs that can be issued and technological changes that have occurred such as ubiquitous use of the Internet. A proposed update of the public notice requirements in September 2008 was never finalized and the new regulations finalized Monday were proposed in September 2017.

The proposed re-issuance regulation, however, may be more significant because it would be the first reissuance regulation covering the tax-exempt bond market.

It would consolidate a number of Treasury notices – such as 88130 and 2008-41 – which were issued during the 2007-2011 financial crisis.

Vicky Tsilas, a partner at Ballard Spahr who worked on both regulations as head of branch 5 in the chief counsel's office of the Internal Revenue Service, said she considers the proposed re-issuance regulation to be very important.

"That is a major regulation, Tsilas said. "Before this regulation got published, there were no re-issuance regulations for bonds. So the only regulation you had for bonds, but it didn't quite cover all types of bonds, was under Section 1001 whether something was a significant modification.''

Tsilas said the IRS has had drafts of a re-issuance regulation dating back to 1994. "I can't tell you proud I am that I worked on that regulation that actually made it out the door because it took so many years to actually get a regulation for bonds out," said Tsilas, who left the IRS in the spring of 2018.

The final public notice regulation for PABs was noncontroversial, according to Tsilas, who said she

was “surprised at how long it took for them to get out.”

By Brian Tumulty

BY SOURCEMEDIA | MUNICIPAL | 01/02/19 07:05 PM EST

Final Private Activity Bond Public Approval Regulations Streamline Notice Requirements: Mintz, Levin

On December 31, 2018, the Department of the Treasury and the Internal Revenue Service released final regulations (the “Final Regulations”) relating to public approval requirements for tax exempt private activity bonds. The Final Regulations update and streamline implementation of the public approval requirement for tax exempt private activity bonds provided in section 147(f) of the Internal Revenue Code and are largely an improvement over the existing regulations that date back to 1983.

Timing and Dissemination of Reasonable Notice

The most significant improvements in the Final Regulations over the existing regulations and proposed regulations released in September 2017 (“Proposed Regulations”) are in the required timing and methods of notice of public hearing. In response to numerous comments received, the Final Regulations reduce the required notice period from 14 days to 7 days. Notice is now presumed reasonable if given no fewer than 7 calendar days before the hearing.

In addition to the newspaper and radio notices in the existing regulations, the Final Regulations also allow for postings on a governmental unit’s public website and, in response to comments received, eliminate the requirement set forth in the Proposed Regulations for an alternative method of obtaining the information in a website notice. In addition, the Final Regulations provide that public notice may be posted on the public website of either the issuer or the approving governmental unit.

Content of Reasonable Notice

The content requirements for reasonable public notice in the Final Regulations are a mixed bag. The public notice must include a general functional description of the project or projects, the maximum stated principal amount of bonds to finance each project, the name of the initial owner or principal user of the projects and a general description of the project locations. The Final Regulations follow the Proposed Regulations in allowing the Issuer to describe the category of bonds being issued and the type and use of the project or projects rather than providing more specific project information. For example, “exempt facility bonds financing an airport pursuant to section 142(a)(1) of the Internal Revenue Code”, “qualified small issue bonds, as defined in section 144(a) of the Internal Revenue Code, financing a manufacturing facility ” and “qualified 501(c)(3) bonds, as defined in section 145 of the Internal Revenue Code, financing a hospital facility and working capital expenditures” would all be sufficient project descriptions. This eliminates the need for the detailed project descriptions that are currently used.

However, if an issue finances and/or refinances multiple projects, the notice and approval must include the maximum stated principal amount of bonds to be issued for each project and this has raised some issues, particularly for large system financings with many projects and many locations. The Final Regulations generally retain the definition of “project” set forth in the Proposed Regulations and “project” generally means one or more capital projects or facilities, including land, buildings, equipment and other property, to be financed with an issue that are located on the same

site or adjacent or proximate sites used for similar purposes. In rejecting a commenter suggestion to allow an aggregate maximum amount to finance all projects of the issue, the Final Regulations note that Treasury and IRS "have determined that the relative principal amounts within an issue to be spent on each separate project are relevant information for this public approval process". Interestingly, the Final Regulations add back a concept from the existing regulations that says projects on different sites may be treated as part of the same project if used in an integrated operation. This had been eliminated from the Proposed Regulations as being too difficult to determine and will potentially be helpful for projects located at various sites. It is unclear, however, how useful this provision will be given the clear description in the summary description that lumping multiple projects together is not giving adequate notice of scope of project and potential impact on a particular community.

The requirement to provide a maximum bond amount by project location may be particularly troublesome with refundings. With bonds issued to refund bonds of many series that had themselves been issued to refinance many prior series, it gets very complicated to try to figure out amounts by project and location for each prior series. A comment to allow a refunded bond issue to only provide an overall project refinancing amount was rejected.

Hearing

An in-person hearing is required. Webinar or teleconference methods were rejected as being "not sufficiently reliable, publicly available, susceptible to public response or uniform in their features and operation". A commenter's suggestion to allow issuers to cancel a hearing was also rejected.

Insubstantial Deviations and Curing Substantial Deviations

Like timing and dissemination of notice, the expanded description of what is an insubstantial deviation and the new ability to cure a potential substantial deviation with a subsequent approval are substantial improvements over the existing regulations. A deviation in actual principal amount allocated for a project is insubstantial under the Final Regulations if it is no more than 10% greater than the maximum amount in the notice or is any amount less. Overestimating the maximum principal amount of bonds allocated for each project should, therefore, be the norm. In addition, any amount used to finance working capital directly associated with any project specified in the notice is an insubstantial deviation and any deviation in the name of an owner or user of the project named in the notice is an insubstantial deviation if the parties named in the notice and the actual parties are related parties on the issue date of the bonds.

All deviations that are not specifically treated as insubstantial deviations in the Final Regulations will need to be analyzed based on all the facts and circumstances. In the event a deviation is determined to be substantial, a new public approval can cure the deviation. In order to take advantage of the supplemental public approval, the issue must have had a valid public approval and the issuer must have reasonably expected there would be no substantial deviation on the issue date, the substantial deviation must be as a result of unexpected events or unforeseen changes in circumstances that occur after the issue date, and the supplemental public approval must be obtained prior to using proceeds of the bonds in a manner or amount not provided for in the original public approval.

Application Date

The Final Regulations apply to bonds issued pursuant to a public approval occurring on or after April 1, 2019.

An issuer may apply the provisions related to deviations in public approval method in whole but not in part to bonds that are issued pursuant to a public approval that occurs prior to April 1, 2019. However, in order to take advantage of the supplemental public approval, it appears that the original public approval would have to have met the requirements of the Final Regulations. This will not always be the case, particularly for large system financings with projects at multiple locations that did not specify amounts by project in the original notice.

by Christie L. Martin

January 4, 2019

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Happy New Year! IRS Celebrates with Two Regulatory Notices for the Tax-Exempt Bond Community.

The Internal Revenue Service celebrated New Year's Eve this year by issuing two rule-making notices of interest to the tax-exempt bond community, on the topics of public approval of private activity bonds and reissuance.

The first notice contains final regulations on the public approval requirement of section 147(f) of the Internal Revenue Code, 26 U.S.C. §147(f). You can access a copy of the final regulations here.

The final regulations on section 147(f) make several significant modifications to the proposed regulations, which were published by the Service on September 28, 2017 (read our prior analysis of the 2017 proposed regulations here). Some of the key highlights of the final regulations are as follows:

- **7-Day Notice Period:** The current regulations, at 26 C.F.R. §5f.103-2, require that the public notice be given at least 14 days before the date of the public hearing. The IRS had previously issued proposed regulations in 2008, shortening this requirement to 7 days, but went back to 14 days in the 2017 proposed regulations. The stated reason for this decision was a reference in the legislative history to a 14-day notice period. However, in response to comments to the 2017 proposed regulations, the IRS has determined to restore the 7-day notice period, as the statutory text makes no mention of a 14-day notice period.
- **Website Notices:** The current regulations require that the notice must be published in a newspaper or announced by radio or television broadcast. The 2017 proposed regulations introduced website notices, but required that the issuer offer to residents without access to the Internet an alternative method for obtaining the information contained in the website notice. The final regulations drop this "alternative notice" requirement. Therefore, a notice that is published solely through the governmental unit's website will satisfy the public notice requirement of section 147(f). The notice must appear in an area of the government's website that is used to inform residents about events affecting the residents.
- **Deviations and Ability to Cure:** The 2017 proposed regulations introduced the concept of insubstantial deviations, that is, deviations from the notice and public approval that are so minor as to not cause the notice and public approval to fail to meet the requirements of section 147(f). Additionally, for deviations that were substantial, the 2017 proposed regulations afforded issuers the opportunity to cure the resulting violation through a supplemental notice and hearing that met the requirements of the regulations. The final regulations largely implement these concepts as

originally proposed.
- **Effective Date and Retroactive Use:** The final regulations are generally effective April 1, 2019. However, the IRS in response to comments it received agreed to afford issuers the option of retroactively applying the "deviation" provisions (including the ability to cure) to any bond issued pursuant to a public approval that occurred prior to April 1, 2019. This presents an excellent opportunity for issuers of bonds with faulty public approvals to reduce their audit risk.

The second New Year's Eve notice from the IRS contains proposed regulations on the reissuance of tax-exempt bonds, particularly qualified tender bonds. You can access a copy of the proposed regulations here. The proposed regulations follow the guidance previously provided by the IRS in Notices 88-130 and 2008-41, related to qualified tender bonds. Each of those Notices will be rendered obsolete once the regulations are finalized.

The proposed regulations are not intended as a departure from previous guidance. Thus, the proposed regulations, like the Notices before them, provide that the existence or exercise of a qualified tender right of a qualified tender bond will not, in and of itself, result in a reissuance for tax purposes. And, the terms "qualified tender bond" and "qualified tender right" carry meanings substantially similar to the definitions that were ascribed to these terms in the Notices.

The IRS is requesting that any comments to the proposed regulations or requests for a public hearing in connection with them be delivered by March 1, 2019.

by Timothy Horstmann

January 4, 2019

McNees Wallace & Nurick LLC

Bill to Restore Full State, Local Tax Deduction Emerges in New Congress.

The "SALT" deduction was curbed by the GOP-backed tax law passed in late 2017.

Two New York lawmakers in the U.S. House have re-introduced a bill to fully restore a federal tax deduction for state and local taxes that was significantly scaled back under the massive federal tax overhaul that was enacted a little over a year ago.

Rep. Nita Lowey, a Democrat who now chairs the House Appropriations Committee, introduced the legislation on Thursday, with Rep. Peter King, a Republican, signing on as a co-sponsor. The bill has been referred to the tax-writing Ways and Means Committee.

It would eliminate a $10,000 cap the 2017 GOP-led tax code revamp imposed on the federal income tax deduction for state and local property, income and sales taxes that households pay. Lowey and King sponsored a nearly identical two-page bill in the last Congress.

"Repealing the SALT deduction was a callous move designed to target New York taxpayers," Lowey said in a statement.

The bill she is backing is apt to face long odds in the Senate, which is still controlled by Republicans.

The limits imposed on the so-called "SALT" deduction drew strong opposition from groups

representing cities, counties and mayors, as well as congressional lawmakers in higher-tax states, such as New Jersey and New York.

But capping the deduction promises to raise around $650 billion for the federal government over 10 years, providing a key revenue boost to partially offset other policy changes, including the corporate and individual rate cuts, that were core elements of the tax law.

One of the main arguments state and local groups made against eliminating or curtailing the SALT deduction, is that it would make it harder for states and localities to impose and raise their own taxes to help pay for projects and services.

The thinking goes that residents would become more resistant to state and local taxes because they would no longer be able to write-off the expense on their federal tax returns.

Experts at the Urban-Brookings Tax Policy Center have noted that, in 2018, 96 percent of the additional tax from the limitation of the SALT deduction was expected to fall on the top 20 percent of taxpayers and 57 percent on the top one percent.

Lowey represents New York's 17th congressional district, which is located north of New York City in the lower Hudson River valley and includes part of Westchester County. The median household income in the district was about $96,100 in 2017 Census Bureau estimates show.

That's higher than the median household income for all of New York, which Census estimates for 2013 to 2017 peg at around $62,000.

King's district is located on Long Island and includes portions of Nassau and Suffolk counties. The estimated median household income there in 2017 was about $97,300.

Route Fifty

By Bill Lucia,
Senior Reporter

JANUARY 4, 2019

Eliminating the SALT Deduction Cap Would Reduce Federal Revenue and Make the Tax Code Less Progressive.

Rep. Nita Lowey (D-NY) and Rep. Peter King (R-NY) introduced a bill in the House of Representatives to repeal the $10,000 cap on the state and local deduction (SALT). The SALT deduction cap was introduced as part of the Tax Cuts and Jobs Act as a means to broaden the individual income tax base and partially fund reductions in statutory tax rates. Repealing this provision of the TCJA would reduce federal revenue by more than $600 billion over the next 10 years. It would also almost exclusively provide tax relief to the top 20 percent of income earners, the largest tax cut going to the top 1 percent of earners.

Under previous law, individuals who itemized their deductions could deduct the amount of state and local taxes against their federal taxable income. The taxes individuals could deduct included state and local individual income taxes (or sales taxes), real estate taxes, and personal property taxes. The amount individuals could deduct was unlimited.

The TCJA broadened the tax base by limiting the amount individuals could deduct in state and local taxes to $10,000. For high-income taxpayers, this cap increased federal taxable income. By itself, this provision would increase federal tax liability. However, high-income taxpayers also received offsetting tax cuts, such as lower statutory tax rates, a much larger Alternative Minimum Tax Exemption, and a reduction in the corporate income tax. On net, these taxpayers tended to have a lower liability under current law, even with the capped SALT deduction.

Continue reading.

The Tax Foundation

by Kyle Pomerleau

January 4, 2019

Opportunity Zones: What We Know and What We Don't.

Key Findings:

- The Tax Cuts and Jobs Act created the Opportunity Zones program to spur investment in economically distressed census tracts. Opportunity zones reduce capital gains taxes for individuals and businesses who invest in qualified opportunity zones.
- Opportunity zones were estimated to cost $1.6 billion in revenue from 2018-2027. New regulations stipulate that the program's benefits would continue through 2047, meaning the program's revenue impact could increase over time depending on how many investors utilize the program.
- Research suggests place-based incentive programs redistribute rather than generate new economic activity, subsidize investments that would have occurred anyway, and displace low-income residents by increasing property values and encouraging higher skilled workers to relocate to the area.
- While opportunity zones present certain budgetary and economic costs, it is unclear whether opportunity zone tax preferences used to attract investment will actually benefit distressed communities.

Introduction

The Tax Cuts and Jobs Act (TCJA) created the Opportunity Zones program to increase investment in economically distressed communities. The program provides preferential capital gains treatment for investments within designated low-income census tracts. Policymakers hope opportunity zones will unleash investment in low-income communities throughout the country.[1]

This analysis describes opportunity zone program incentives, reviews both academic and government evidence on the effects of place-based incentive programs, and discusses possible outcomes for opportunity zone residents. Overall, we find opportunity zones will present certain budgetary and economic costs to taxpayers and investors, but based on evidence from other place-based incentive programs, we cannot be certain opportunity zones will generate sustained economic development for distressed communities.

Continue reading.

The Tax Foundation

January 8, 2019

TAX - LOUISIANA

Filmore Parc Apartments II v. Foster

Court of Appeal of Louisiana, Fourth Circuit - November 7, 2018 - So.3d - 2018 WL 5830453 - 2018-0359 (La.App. 4 Cir. 11/7/18)

Taxpayer filed petition to recover ad valorem taxes, alleging that it provided public housing and, therefore, was exempt from ad valorem taxation.

The District Court granted summary judgment for parish assessor. Taxpayer appealed. The Court of Appeal reversed and remanded. On remand, the District Court denied in part and granted in part assessor's motion for summary judgment and denied in part and granted in part taxpayer's cross-motion for summary judgment. Assessor appealed, and taxpayer filed answer.

The Court of Appeal held that:

- Fact issues remained as to whether certain units were entitled to public use exemption, but
- Remaining units were not entitled to public use exemption.

Genuine issues of material fact as to whether housing units for very low-income and extremely low-income tenants that were subject to Section 8 rent subsidies were utilized in a way that was dedicated and open to the public, or used in a way that benefited the general public, and as to the use of revenue generated from the units, precluded summary judgment for tax assessor as to issue of whether the units were entitled to public use exemption from ad valorem taxation, in proceeding on taxpayer's petition to recover taxes paid under protest.

Low-income housing units were not entitled to public use exemption from ad valorem taxation; the units were not subject to Section 8 housing assistance program contract restrictions, the units were fully occupied during the tax year, and the units generated income to subsidize units for very low-income and extremely low-income tenants that were subject to Section 8 rent subsidies.

TAX - OHIO

Kohl's Illinois, Inc. v. Marion County Board of Revision

Supreme Court of Ohio - November 6, 2018 - N.E.3d - 2018 WL 5839296 - 2018 -Ohio- 4461

County board of revision and school board sought judicial review of a decision of the Board of Tax Appeals adopting an appraisal valuation that reduced the value of owner's property.

The Supreme Court of Ohio held that Board properly applied collateral estoppel to preclude relitigation as to covenant that prohibited valuation complaints.

Non-enforceability of a covenant in a tax-increment-financing (TIF) agreement that purportedly prohibited property owner from contesting county auditor's valuations of the property was actually determined in a prior decision of the Board of Tax Appeals, and thus the Board properly applied collateral estoppel to preclude school board's attempt to relitigate the issue in owner's subsequent appeal to the Board contesting the property's valuation; the prior decision included a finding that

the proponents of applying the covenant failed to prove that they were entitled to its enforcement, the prior decision made no statement about retaining jurisdiction in remanding to county board of revision, and Board's remand order did not call for county board to reconsider whether to enforce the covenant.
