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Unpacking The Final Opportunity Zone Regulations: Part 1

By **Tucker Thoni** (January 24, 2020, 5:37 PM EST)


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The qualified opportunity zone tax regime was enacted as part of the Tax Cuts and Jobs Act in December of 2017. The U.S. Department of the Treasury and the Internal Revenue Service proposed two sets of regulations in October 2018 and May 2019.

The final regulations were promulgated in December 2019, to be effective 60 days after publication in the Federal Register. However, the final regulations generally permit taxpayers to rely on either the proposed regulations or the final regulations for tax years that predate the effective date of the final regulations.[1]

This is part one in a two-part series highlighting important changes between the proposed regulations and the final regulations, as well as new provisions added to the final regulations, that could affect your investment under the new qualified opportunity zone tax regime.

The changes in the final regulations, discussed in this first article, were taxpayer friendly and appear to demonstrate that the Department of the Treasury and the IRS are supportive of the opportunity zone tax regime.[2] Some of the changes merely clarify unintended consequences resulting from the proposed regulations.

There is also a general trend in the final regulations of maximizing, to the extent permissible by Internal Revenue Code Section 1400Z-2,[3] the sources and quantity of capital gain eligible for deferral by investment into a qualified opportunity fund, called a QOF deferral.

Additionally, the changes discussed in this first article should increase taxpayer confidence in the tax benefits associated with investments into a qualified opportunity fund, or QOF.

Special 180-Day Period for Partners, S Corporation Shareholders, and Nongrantor Trust Beneficiaries

The proposed and final regulations provide that for owners of pass-through entities — including partnerships, S corporations, trusts, estates, etc. — the 180-day QOF investment period generally begins on the last day of the entity’s taxable year, but permit the owner to elect to have the 180-day window start on the date of the sale or exchange giving rise to the capital gain.[3]

The final regulations provide partners of a partnership, shareholders of an S corporation, beneficiaries of decedents' estates, and nongrantor trusts with an additional election to have the 180-day QOF investment period start on the due date of the entity's tax return without extensions.[4] This provision is not available for grantor trusts.

The additional date on which to start the 180-day QOF investment period for pass-through entities is a practical solution for owners of pass-through entities that are passive or limited within the entity, and who might not be apprised of the sales or exchanges occurring at the entity level, or the amount of capital gain that might be allocated to the owner from such sale or exchange — e.g., waterfall or targeted allocation provisions — until the entity files its tax return and sends the owner a Schedule K-1.

QOF Deferral of Inclusion Event Capital Gains

The preamble to the proposed regulations explains that capital gain recognized pursuant to an inclusion event[5] is only eligible for QOF investment if the taxpayer has disposed of its entire QOF investment because Section 1400Z-2(a)(2)(A) prohibits the QOF deferral of capital gain from a sale or exchange if a QOF election was previously made with respect to the same sale or exchange remains in effect.[6]

Moreover, an example in the proposed regulations appears to support the position that taxpayers must completely dispose of their QOF investment in order for such gain to be eligible for subsequent QOF deferral.[7]

In the preamble to the final regulations, the Department of the Treasury explains that although the gain from the inclusion event relates in part to gain from a sale or exchange for which there was a prior QOF deferral election in effect, the gain is no longer subject to that prior QOF deferral election when the inclusion event triggers an income inclusion.[8]

To that end, the final regulations adopt the position that gain arising from an inclusion event is eligible for subsequent QOF deferral even when the taxpayer retains a portion of its original QOF investment thereafter.[9]

Accordingly, taxpayers that have inclusion events with respect to only part of their QOF investment can elect QOF deferral for the gain recognized via the inclusion event and continue deferral of federal income taxation on such gains as well as the initial deferred gains included as part of the original QOF investment.

The position adopted by the final regulations should promote taxpayer confidence in QOF deferral by providing a mechanism to continue such deferral following an inclusion event. While there is arguably a statutory prohibition in Section 1400Z-2(a)(2)(A), there does not appear to be a strong policy reason for excluding capital gain recognized from an inclusion event from subsequent investment in a QOF.

This provision continues the trend demonstrated in the final regulations of the Treasury and the IRS maximizing the sources and quantity of capital gain eligible for QOF deferral.

Capital Gain Dividends From Regulated Investment Companies and Real Estate Investment Trusts

To facilitate investment in QOFs by regulated investment company, or RIC, and real estate investment trust, or REIT, shareholders receiving capital gain dividends, which had timing issues because the shareholders may not have the same taxable year as the RIC or REIT, the final regulations provide that the 180-day period to elect QOF deferral for RIC or REIT capital gain dividends generally begins at the end of the shareholder's taxable year in which the capital gain dividend would have otherwise been recognized.[10]

Alternatively, RIC and REIT shareholders can elect, under the final regulations, to begin the 180-day investment period on the day each capital gain dividend is paid.[11] For undistributed capital gain dividends, the shareholders can also elect for the 180-day period to begin on either the last day of the shareholder's taxable year or the last day of the RIC or REIT's taxable year.[12]

The approach adopted by the final regulations provides RIC and REIT shareholders great flexibility in timing QOF investments and maximizing the amount of capital gain dividends eligible for QOF deferral, which should encourage RIC and REIT shareholders to participate in the opportunity zone regime.

Capital Gains From Installment Sales

To provide flexibility under the opportunity zone regime for taxpayers recognizing gains through installment sales, the final regulations allow a taxpayer to choose whether the 180-day period to elect QOF deferral begins on (1) each date that a payment under the installment sale is received during the taxable year, or (2) the last day of the taxable year that the capital gain would be recognized under the installment method but for the QOF deferral.[13]

Accordingly, if a taxpayer receives multiple payments under an installment sale, there might be multiple 180-day periods for the tax year, or a single 180-day period at the end of the taxable year.

The final regulations clarify that capital gain recognized from an installment sale that was entered into prior to the effective date of the Tax Cuts and Jobs Act (i.e., Dec. 22, 2017) is capital gain eligible for QOF deferral.[14] The changes regarding installment sales follow a general trend in the final regulations of the Treasury and the IRS maximizing, to the extent permissible by Section 1400Z-2, the sources and quantity of capital gain eligible for QOF deferral.

QOF Deferral of Gain From Section 1231 Property

Section 1231 of the Internal Revenue Code generally governs the character of gains and losses from the sale or exchange of depreciable[15] or real property used in a trade or business and held for more than one year (Section 1231 property).[16]

At the end of each taxable year, a taxpayer aggregates gains and losses from each sale or exchange of Section 1231 property and if the aggregate gains exceed the aggregate losses, then the character of such net gain is deemed to be long-term capital.[17] Reciprocally, if the aggregate losses equal or exceed the aggregate gains during a taxable year, then the character of the net loss is deemed to be ordinary loss.[18]

Section 1231 is a taxpayer friendly provision, that in many respects furnishes a "heads the taxpayer wins, tails the IRS loses" scenario, as a net amount of Section 1231 gain is deemed to be capital while a net amount of Section 1231 loss is deemed to be ordinary.

While net Section 1231 gain for a taxable year has capital character, it was precarious under the proposed regulations to qualify such gain for QOF deferral for a couple reasons.[19] First, the proposed regulations only permitted taxpayers to defer net Section 1231 gain for the taxable year, if any.[20]

The aggregation of Section 1231 gains and losses occurs on the last day of the taxable year, so taxpayers were required to wait until the end of their taxable year to determine if they had any Section 1231 gain eligible for QOF deferral.[21]

Additionally, Section 1231(a)(4) provides that gains and losses from the sale or exchange of Section 1231 property are only taken into account for Section 1231(a)(1) aggregation purposes to the extent that those gains and losses are taken into account when computing gross income.

Section 1231(a)(4) created a circularity issue because gain subject QOF deferral is not taken into account when computing gross income. If a taxpayer attempted QOF deferral for all Section 1231 gains in a tax year, Section 1231(a)(4) would exclude the deferred gains from the Section 1231(a)(1) calculation. This would result in the character of all Section 1231 gains and losses being ordinary for the tax year, and therefore, not eligible for QOF deferral.

The practical effect of Section 1231(a)(4) was to limit Section 1231 gain eligible for QOF deferral to an amount that would, even after excluding the deferred gains, result in net Section 1231 gain, i.e., the remaining non-deferred Section 1231 gains exceed the Section 1231 losses for the taxable year.

While the proposed regulations provide that only net Section 1231 gain is eligible for QOF deferral, the final regulations adopt an approach that permits the gross amount of Section 1231 gains to be eligible for QOF deferral without netting the gains against any Section 1231 losses during the taxable year.[22]

The gross approach permits QOF deferral of gain from the sale or exchange of Section 1231 Property regardless of whether Section 1231(a)(1) would treat the gain as capital or ordinary in character; provided, however, any amount of gain from the sale or exchange of Section 1231 property that is recaptured as ordinary gain by Section 1245 or 1250 remains ineligible for QOF deferral.[23]

The character of Section 1231 gain subject to QOF deferral will be determined based on the net Section 1231 gains or losses during the tax year in which the deferred gain is subsequently recognized, which is the earlier of an inclusion event or Dec. 31, 2026.[24]

The final regulations also fix the circularity issue regarding the application of Section 1231(a)(4) by removing the aggregate gain or loss determination under Section 1231(a)(1) and adopting the gross approach discussed above.[25] Due to this change in policy, the final regulations provide that the 180-day period to elect QOF deferral starts on the day of the sale or exchange giving rise to the eligible Section 1231 gain.[26]

The gross approach to Section 1231 gains adopted by the final regulations should help foster participation in the opportunity zone regime by qualifying more gain as eligible for QOF deferral and providing clarity and practical solutions for taxpayers recognizing gain from the sale or exchange of Section 1231 property to elect QOF deferral.

Foreign Persons and Tax Exempt Entities

The final regulations clarify that individuals and entities not subject to US federal income tax, e.g., foreign persons or exempt entities, are not eligible for the tax benefits associated with QOF investments.[27] However, nonresident alien individuals and foreign corporations with capital gain that is effectively connected with a U.S. trade or business would be eligible for QOF deferral. Similarly, an organization that is subject to the unrelated business income tax imposed by IRC Section 511 has capital gain eligible for QOF deferral to the extent the gain would be included in computing the organization's unrelated business taxable income.

In contrast, capital gain of an eligible taxpayer who is not a United States person,[28] or who is treated as a resident of another country for purposes of an applicable income tax treaty, is not eligible for QOF deferral to the extent the capital gain is treated as exempt from Federal income tax under a provision of an applicable income tax treaty.[29]

To prevent the Department of the Treasury from being whipsawed by inconsistent or changing tax treaty terms with respect to the exemption of the capital gain subject to QOF deferral, the final regulations require that foreign eligible taxpayers, as a condition to QOF deferral, irrevocably waive[30] any treaty benefits that would exempt the deferred gain from Federal income tax at the time of subsequent recognition pursuant to an applicable U.S. income tax convention.[31]

For partnerships electing QOF deferral, the final regulations provide an exception to the general requirement that gain must be subject to Federal income tax to be eligible for QOF deferral, as Treasury determined it would be "unduly burdensome" for partnerships to make that determination.[32] However, the final regulations include an anti-abuse provision that permits the IRS to disregard a partnership formed or availed to circumnavigate the general rule requiring eligible gains to be subject to Federal income tax.[33]

FIRPTA Nonrecognition Provision

A nonrecognition provision is defined in IRC Section 897(e)(3) as any provision of the code for "not recognizing gain or loss." Similarly, Treasury Regulation Section 1.897-6T(a)(2) defines a nonrecognition provision as any code provision "which provides that gain or loss shall not be recognized."

The final regulations clarify that QOF deferral is not a nonrecognition provision for purposes of Section 897(e) and Treasury Regulation section 1.897-6T because an election under that provision generally defers, rather than prevents altogether, the recognition of gain.[34] Accordingly, FIRPTA withholding applies to capital gain subject to QOF deferral.

Partial Inclusion Events and Basis Step-Ups

The proposed regulations are somewhat ambiguous regarding the status of a QOF investment following a partial inclusion event, which Treasury acknowledged "could be read to suggest that all inclusion events cause interests in a QOF to cease to be qualifying investments even if only a partial inclusion of a QOF investment.[35]

The final regulations clarify that following an inclusion event, a QOF investment continues to be qualified to the extent of the remaining capital gain subject to QOF deferral.[36]

For example, if a taxpayer invests $1 million of eligible capital gain in a QOF and the taxpayer has an inclusion event with respect to $250,000 of the investment in year two, the taxpayer is still eligible to receive a five-year basis increase of $75,000 (10% of its remaining deferred gain of $750,000) and a seven-year basis increase of $37,500 (5% of its remaining deferred gain of $750,000).

The election under Section 1400Z-2(c) to step up the basis of a taxpayer's remaining QOF investment to fair market value remains available following an inclusion event, so long as the taxpayer continues to hold a qualified investment in the QOF.[37]

10-Year Basis Step-Up for Asset Sales

The proposed and final regulations provide that a QOF taxed as a partnership or S Corporation can elect to exclude some or all of the gain from a sale or exchange of qualified opportunity zone business property, or zone property, upon satisfaction of the 10-year holding period requirement.[38]

The final regulations extend the ability to make the Section 1400Z-2(c) election upon an asset sale to qualified opportunity zone businesses, or QOZBs, which the proposed regulations only permit for QOFs.[39] The final regulations clarify that when a QOF holds multiple assets, including multiple QOZBs, the QOF can make the election for each asset even if the assets are disposed of in separate transactions occurring at different times after the 10-year holding period requirement.

The final regulations also clarify that upon an asset sale, the fair market value basis step up functions to exclude all types of gains and losses — including, for example, depreciation recapture under Sections 1245 and 1250 — except for gains and losses from the sales of inventory in the ordinary course of business,[40] but sets forth two requirements: (1) the taxpayer must make the Section 1400Z-2(c) election on its tax return for each year that gain from an asset sale is excluded,[41] and (2) the QOF is deemed, solely for purposes of determining the amount of a QOF owner's qualifying investment and non-qualifying investment, to distribute the net proceeds from the asset sales on the last day of the QOF's tax year.[42]

This is an overwhelmingly taxpayer friendly provision, which was somewhat unexpected, as many practitioners expected a recapture-like mechanism to prevent a fair market value basis step-up to the extent that the taxpayer claimed ordinary deductions for depreciation of such asset. However, the final regulations do not provide a mechanism to make gains that would otherwise be recaptured as ordinary, if recognized, ineligible for the gain exclusion furnished by the 10-year holding period fair market value basis step-up (other than sales of inventory).[43]

The 10-Year Holding Period Basis Step-Up and Debt

The proposed regulations provide that, if a taxpayer sells or exchanges a qualifying investment in a QOF partnership held for at least 10 years, and the taxpayer makes the election described in Section 1400Z-2(c), "the basis of the partnership interest is adjusted to an amount equal to the fair market value of the interest, including debt."[44] The fair market value of the partnership interest is determined at the time of sale or exchange.

The Department of the Treasury and the IRS acknowledge that the "including debt" language needed clarification, and so, the final regulations clarify that the basis of a QOF partnership interest is adjusted to an amount equal to its net fair market value, plus the partner's share of partnership debt relating to that interest, so that the partner would recognize no gain or loss on a sale or exchange of the QOF partnership interest after the 10-year holding period requirement.[45]

The final regulations instruct that the fair market value cannot be less than the partner's allocable share of nonrecourse debt in accord with Section 7701(g).[46] The final regulations direct that, in the case of a sale or exchange of QOF S corporation shares, the basis is adjusted to an amount equal to the fair market value of the shares immediately prior to the sale or exchange.[47]

The proposed regulations provide that, if the basis of a taxpayer's QOF partnership interest is adjusted under Section 1400Z-2(c), the bases of the QOF partnership's assets also are adjusted immediately prior to the sale or exchange.[48] The adjustment is calculated in a manner similar to a Section 743(b) adjustment as if the transferor partner had purchased its interest in the QOF partnership for an amount of cash equal to the fair market value of the partnership interest immediately prior to the sale or exchange, assuming that a valid Section 754 election had been in place.[49]

The final regulations clarify that the asset basis adjustment applies to any partnership, including lower-tiered partnerships, owned by a QOF partnership.[50] The final regulations remove the requirement from the proposed regulations that an actual Section 754 election must be in effect and also add a savings clause instructing that to the extent that rules for Sections 743(b) and 755 operate in a manner that results in the recognition of gain or loss for a QOF partner under a valid Section 1400Z-2(c) election, the basis adjustments are deemed to be made in a manner that would eliminate any gain or loss.[51]

The clarifying changes regarding debt allocation were necessary to conform the QOF regime with Sub-chapter K. The changes made regarding Section 754 elections and the savings clause should promote taxpayer confidence that a tax free exit will be available for a QOF investment held for 10 years regardless of (1) whether it is structured as an asset sale or stock sale, or (2) whether the partnership documents provide the necessary election.

QOF Decertification Rule

The final regulations include a provision that permits a QOF to self-decertify, which becomes effective the first day of the month following the month in which the QOF determines to decertify.[52] The Treasury Department and the IRS are developing additional instructions regarding QOF self-decertification including instructions regarding the time, form and manner of QOF self-decertification.[53]

The preamble to the final regulations announces that the Treasury Department and the IRS intend to propose guidance regarding when involuntary decertification would be warranted.[54] The final regulations include a rule providing that the decertification of a QOF, whether voluntary or involuntary, is an inclusion event.[55] The self-decertification provisions were necessary, as the proposed regulations did not address how to unwind a QOF investment, and should promote taxpayer confidence in the opportunity zone program.

Special Rule for Partnership Utilizing Alternative Valuation Method

For purposes of determining compliance with the 90% asset test applicable to QOFs pursuant to Section 1400Z-2(d)(1), the Proposed and final regulation permit QOFs to choose between the following valuation methods: (1) the applicable financial statement method (so long as the QOF had an applicable financial statement), or (2) the alternative valuation method.[56]

Under the alternative valuation method set forth in the proposed regulations[57], the value of each asset that is owned by a QOF is deemed to be its unadjusted cost basis[58] in the asset.[59] The final regulations restrict the use of the alternative valuation method to use in valuing assets that are acquired by purchase or constructed for fair market value by the QOF.[60] Comparatively, the final regulations deem the value of any asset that the QOF did not purchase or construct for fair market value to be equal to the asset's fair market value.

Property Constructed, Manufactured or Produced

In order for tangible business property to qualify as zone property, the proposed regulations require, in addition to several other requirements, that the property be purchased, as defined in Section 179(d)(2), by a QOF or QOZB.[61] This raised the question of whether a QOF or QOZB could construct zone property. Paradoxically, the proposed regulations provide for the working capital safe harbor[62] to apply to tangible business property being constructed by a QOZB.[63]

The final regulations clarify that tangible property is not disqualified from constituting zone property solely because the property is manufactured, constructed, or produced, rather than purchased by a QOF or QOZB.[64] However, to qualify as zone property, the tangible property must be manufactured, constructed, or produced by the eligible entity with the intent to use the property in its trade or business.[65] In addition, the materials and supplies used for the construction of the qualified opportunity zone business property must be zone property. [66]

Clarifying that zone property could be manufactured, constructed or produced by the eligible entity was practical and expected, as it furthers the purposes of the opportunity zone regime — i.e., to encourage the investment of new capital in one or more opportunity zones and to increase the economic growth of such opportunity zones.[67] There does not appear to be a valid policy reason for distinguishing between property that is purchased by a QOF or QOZB and property that is manufactured, constructed, or produced by a QOF or QOZB, as the use of either within an opportunity zone should bring in new capital that could increase economic growth.

For purposes of the asset tests imposed on QOF and QOZBs[68], the entity must determine when self-constructed property will be deemed to be acquired.[69] The final regulations provide, for purposes of the asset tests, that self-constructed property is deemed to be acquired on the date physical work of a significant nature begins.[70]

Physical work of a significant nature does not include preliminary activities such as planning or designing, securing financing, exploring or researching, and will depend on a facts and circumstances analysis.[71]

The final regulations also provide a safe harbor to determine when physical work of a significant nature begins, i.e., the date on which more than 10% of the total cost of the finished property is paid or incurred by the QOF or QOZB, excluding the cost of land and preliminary activities such as planning and designing, securing financing, exploring or researching.[72]

Special Rule for Sponsorship Sales of Zone Property

The final regulations add rules to address the qualification of zone property purchased and repurchased in certain sponsor-like arrangements. With regard to these arrangements, the final regulations provide that real property purchased by a QOF or QOZB will not constitute zone property if at the time of the purchase there was a plan, intent or expectation for the real property to be repurchased by the seller of the real property for an amount of consideration other than the fair market value of the real property at the time of the repurchase by the seller.[73]

Presumption of Market Rate for Unrelated Leases

The proposed regulations instruct that, to qualify leased property as zone property, the terms of the lease must be market rate at the time the lease is entered into — i.e., the terms of the lease reflect common, arms-length market pricing in the locale determined in accordance with the regulations under Section 482.[74] The proposed regulations apply this market-rate requirement indiscriminately to all leases regardless of whether the parties were related or unrelated.[75]

While not removing the blanket market-rate lease requirement, the final regulations set forth a rebuttable presumption that the terms of a lease are market rate for leases between unrelated parties.[76] The final regulations clarify that tangible property leased from state and local governments and Indian tribal governments is not considered a related party lease for purposes of the market rate requirement.[77]

The rebuttable presumption of market rate is beneficial for QOF and QOZBs that intend to lease zone property, which will be more relevant for operating businesses than landlords, by removing the requirement that the QOF or QOZB perform a Section 482 analysis with respect to the lease. The change should promote taxpayer confidence that the terms of their property leases will be respected as market rate for zone property determination purposes, so long as such lease is with an unrelated party and the terms are not patently unreasonable to a degree that would rebut the presumption.

This concludes part one of a two-part summary highlighting important changes between the proposed regulations and the final regulations, and new provisions added to the final regulations. Part two of this summary will address a number of safe harbors and rules aimed at (1) simplifying the qualification of certain types of tangible property as zone property[78] and (2) keeping tangible property qualified as zone property. [79]

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[1] Treas. Reg. §§ 1.1400Z2(a)-1(g); 1.1400Z2(b)-1(j); 1.1400Z2(d)-1(e); 1.1400Z2(d)-2(e); 1.1400Z2(f)-1(d). But see Treas. Reg. § 1.1400Z2(c)-1(f) (permit only the final regulations).

[2] The Department of the Treasury and the IRS are not always on the same page with Congress regarding tax policy issues — see e.g., the ongoing battle regarding conservation easements — so the congruence between the legislative branch and executive agencies is a good sign for the viability of the opportunity zone regime.

[3] Treas. Reg. § 1.1400Z2(a)-1(c)(8)

[4] Treas. Reg. § 1.1400Z2(a)-1(c)(8)(iii)(B)

[5] Or upon the hard inclusion deadline of 12/31/2026, which is not technically an inclusion event. Treas. Reg. § 1.1400Z2(b)-1(b).

[6] Treas. Reg. § 1.1400Z2(a)-1(b)(2)(ii).

[7] Treas. Reg. § 1.1400Z2(a)-1(b)(4)(ii)(Ex. 4).

[8] I.R.C. § 1400Z-2(a)(2)(A); Preamble to final regulations at 43.

[9] Treas. Reg. § 1.1400Z2(a)-1(b)(11)(ii), (iv).

[10] Treas. Reg. § 1.1400Z2(a)-1(e).

[11] Id.

[12] Id.

[13] Treas. Reg. § 1.1400Z2(a)-1(b)(11)(vii).

[14] Id.

[15] Purusant to I.R.C. § 167.

[16] I.R.C. § 1231(b). There are exceptions, for example, property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business.

[17] I.R.C. § 1231(a)(1). Section 1231(a)(1) merely determines the character of gains or losses from the sale or exchange of Section 1231 Property, it does not determine the actual amount of gain or loss recognized by the taxpayer.

[18] See I.R.C. §§ 64, 1221, 1222, and 1231(a)(2).

[19] Prop. Treas. Reg. § 1.1400Z2(a)-1(b)(2)(iii).

[20] Id.

[21] Moreover, Section 1231 contains a byzantine system of preaggregation and post-aggregation recapture rules that can change the character of what would otherwise be capital gain under the Section 1231 rules into ordinary income generally due to the taxpayer recognizing Section 1231 ordinary losses in prior tax years.

[22] Treas. Reg. § 1.1400Z2(a)-1(b)(11).

[23] Treas. Reg. § 1.1400Z2(a)-1(b)(11)(iii)(A).

[24] Treas. Reg. § 1.1400Z2(a)-1(b)(11)(iii)(B)(C).

[25] Id.

[26] Treas. Reg. § 1.1400Z2(a)-1(b)(11)(iii)(B).

[27] Treas. Reg. § 1.1400Z2(a)-1(b)(13).

[28] I.R.C. § 7701(a)(30).

[29] Treas. Reg. § 1.1400Z2(a)-1(b)(11)(ix).

[30] In accordance with IRS forms and instructions.

[31] Treas. Reg. § 1.1400Z2(a)-1(b)(11)(ix)(2).

[32] Preamble to final regulations at 27.

[33] Treas. Reg. § 1.1400Z2(f)-1(c)(2).

[34] Treas. Reg. § 1.1400Z2(a)-1(e).

[35] Preamble to final regulations at 63. See Prop. Treas. Reg. §1.1400Z2(b)-1(g)(2) ("The increases in basis under section 1400Z-2(b)(2)(B)(iii) and (iv) only apply to that portion of the qualifying investment that has not been subject to previous gain inclusion under section 1400Z-2(b)(2)(A).")

[36] Treas. Reg. §1.1400Z2(b)-1(g)(2).

[37] It is noted that an inclusion event necessarily affects this basis step up differently. The five and seven year basis step ups are based on the amount of deferred capital gain, so an inclusion event that reduces the deferred capital gain should correspondingly reduce the basis step ups. Comparatively, the 10-year election under Section 1400Z-2(c) is based on the fair market value upon disposition, and an inclusion event may or may not reduce the fair market value of the taxpayer's interest in the QOF.

[38] Prop. Treas. Reg. § 1.1400Z2(c)-1(b)(2)(ii)(A)(1).

[39] Treas. Reg. § 1.1400Z2(c)-1(c).

[40] Treas. Reg. § 1.1400Z2(c)-1(b)(2)(ii).

[41] Treas. Reg. § 1.1400Z2(c)-1(b)(2)(ii)(D).

[42] Treas. Reg. § 1.1400Z2(c)-1(b)(2)(ii)(B).

[43] I.R.C. § 1400Z-2(c).

[44] Prop. Treas. Reg. § 1.1400Z2(c)-1(b)(2)(i).

[45] Treas. Reg. § 1.1400Z2(c)-1(b)(2)(i).

[46] Id.

[47] Treas. Reg. § 1.1400Z2(c)-1(b)(2)(ii)(B).

[48] Prop. Treas. Reg. § 1.1400Z2(c)-2(b)(2)(i).

[49] Prop. Treas. Reg. § 1.1400Z2(c)-1(b)(2)(i).

[50] Treas. Reg. § 1.1400Z2(c)-1(b)(2)(i).

[51] Treas. Reg. § 1.1400Z2(c)-1(b)(2)(i), (ii).

[52] Treas. Reg. § 1.1400Z2(d)-1(a)(2)(iv)(3).

[53] Treas. Reg. § 1.1400Z2(d)-1(a)(2)(iv)(3)(i)-(ii).

[54] Preamble to final regulations at 129. Treas. Reg. § 1.1400Z2(d)-1(a)(2)(iv)(4).

[55] Treas. Reg. § 1.1400Z2(b)-1(c)(15).

[56] Prop. Treas. Reg. § 1.1400Z2(d)-2(b).

[57] Prop. Treas. Reg. § 1.1400Z2(d)-2(b)(3).

[58] Determined under I.R.C. § 1012.

[59] Or I.R.C. § 1013 (with regard to inventory).

[60] Treas. Reg. § 1.1400Z2(d)-1(b)(4).

[61] Prop. Treas. Reg. § 1.1400Z2(d)-1(c)(4)(i)(A).

[62] Prop. Treas. Reg. § 1.1400Z2(d)-1(d)(5)(iv).

[63] Prop. Treas. Reg. § 1.1400Z2(d)-1(d)(5)(iv)(A), (ix).

[64] Treas. Reg. § 1.1400Z2(d)-2(b)(1)(iii).

[65] Id.

[66] Id.

[67] Id.

[68] Treas. Reg. §§ 1.1400Z2(a)-1(b)(4); 1.1400Z2(d)-1(d)(1)-(2).

[69] Treas. Reg. § 1.1400Z2(d)-2(b)(1)(iii)(B).

[70] Id.

[71] Id.

[72] Treas. Reg. § 1.1400Z2(d)-2(b)(1)(iii)(C).

[73] Treas. Reg. § 1.1400Z2(d)-2(b)(1)(ii).

[74] Prop. Treas. Reg. §§ 1.1400Z2(d)-1(c)(4)(i)(B)(2), (d)(2)(i)(B)(2)

[75] Id.

[76] Treas. Reg. § 1.1400Z2(d)-2(c)(2)(ii).

[77] Treas. Reg. § 1.1400Z2(d)-2(c)(2)(iii).

[78] See infra sections Shorter Vacancy Period for Original Use, Brownfields as Original Use, Property Involuntary Transferred to Government, Method of Calculating Substantial Improvement Requirement, Safe Harbor for Tangible Property Being Substantially Improved, New 62-Month Safe Harbor, Additional Time for Tangible Property in Disaster Zones, and Real Property Straddling Opportunity Zones.

[79] See infra sections Clarity on Treatment of Inventory, Moveable Tangible Property under 70% Use and Asset Tests, and 90% Holding Period Tests.