August 12, 2019

The Honorable David J. Kautter
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Michael J. Desmond
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

RE: Comments on Proposed Regulations Concerning Proposed Regulations Regarding Investing in Qualified Opportunity Funds (REG-120186-18)

Dear Assistant Secretary Kautter and Chief Counsel Desmond:

The undersigned organizations commend the Treasury and the IRS for their work on the proposed regulations titled, Investing in Qualified Opportunity Funds, under Section 1400Z of the Internal Revenue Code (the "Proposed Regulations").[1] The Opportunity Zone tax incentives that Congress added to the Code in section 1400Z are an important mechanism for job creation and real estate investment in low-income communities.

We generally support the rules described in the Proposed Regulations, and in particular appreciate the clarification in the first sentence of Prop. Treas. Reg. sec. 1.1400Z2(d)-1(d)(5)(ii)(B)(2), which provides that "[s]olely for the purposes of section 1400Z–2(d)(3)(A), the ownership and operation (including leasing) of real property is the active conduct of a trade or business." However, we are concerned that the immediately following sentence creates inappropriate uncertainty and confusion when it states "[h]owever, merely entering into a triple-net-lease with respect to real property owned by a taxpayer is not the active conduct of a trade or business by such taxpayer." We recommend that this second "merely" sentence be removed or at a minimum be clarified.

This second sentence creates factual uncertainty–for example, if a taxpayer built the building such that there was substantial construction activity, then a taxpayer should not be treated as having *merely* entered into a triple-net-lease. More importantly, we do not believe that the second sentence is necessary–if, as the first sentence of that subsection states, the "ownership and operation (including leasing) of real property" is the active conduct of a trade or business, and the taxpayer has already satisfied the QOZ requirements to substantially improve or newly place in service the property, it should not matter what type of lease the taxpayer enters into. The taxpayer has already brought both the construction jobs and the new physical improvements that the QOZ rules intended to encourage,[2] and the type of lease entered into does not improve or detract from the taxpayer's full satisfaction of the

[1] 84 Fed. Reg. 18652 (May 1, 2019).

[2] Congress intended to incentivize construction and job creation in QOZs, and the Conference Report makes that clear when it (1) directs Governors to "provide particular consideration to areas that . . . are currently the focus of mutually reinforcing state, local or private economic development initiatives to attract investment and foster startup activity" when nominating potential opportunity zones to the Secretary for certification and designation, (2) identifies "exclud[ing] from gross income the post-acquisition capital gains on investments in opportunity zone funds that are held for at least 10 years" as the "second main tax incentive" of the provision, and (3) instructs the Secretary, in its report to Congress on the opportunity zone incentives, "to include an assessment of the incomes and outcomes of the investments in those areas on economic indicators including job creation, poverty reduction and new business starts". H.R. Rep. No. 115-466, at 538-9 (2017) (Conf. Rep.).

intended QOZ goals with respect to real estate development in a QOZ. Moreover, the type of lease is often dictated by the tenant and is not under the control of the landlord.

For example, if a tenant seeks to move its big-box retail center, warehouse, or distribution facility to a QOZ the tenant is quite likely to demand that the lease be in the form of a triple-net-lease so that the tenant can ensure uniformity in operation of its facilities built in different regions by different landlords. The specific leasing requirements of the tenants simply have nothing to do with the landlord's achievement of the QOZ legislation goals of providing both new physical improvements (and related construction jobs) to a QOZ and providing a space for QOZ operating business to operate. As a result, we recommend that Treasury and the IRS delete the second sentence of Prop. Treas. Reg. sec. 1.1400Z2(d)-1(d)(5)(ii)(B)(2) when finalizing the Proposed Regulations.

We thank you for considering the above comments. We welcome the opportunity to discuss these in more detail.

For further questions, please contact Phillips Hinch, Vice President of Tax Policy, at phinch@icsc.org or (202) 626-1402.

Sincerely,

International Council of Shopping Centers
Institute for Portfolio Alternatives
NAIOP, the Commercial Real Estate Development Association

Cc: Jeffrey Van Hove, Senior Advisor, Regulatory Affairs
Krishna Vallabhaneni, Tax Legislative Counsel

John P. Moriarty, Acting Associate Chief Counsel, Income Tax & Accounting
Julie Hanlon-Bolton, Senior Counsel, Income Tax & Accounting

International Council of Shopping Centers
555 12th Street, N.W., Suite 660, Washington, DC 20004
+1 202 626 1400 • Fax: +1 202 626 1418 • www .icsc.org