I would like to discuss the comments made in Section VI of the attached draft comments entitled "Extensions with Respect to 30-Month Period for Making Substantial Improvements." (I believe the reviewers did a final round of revisions before submitting the final draft to your office, but the final draft was not circulated to the authors, so this is the most recent version that I have.) Specifically, I would like to address the desire for the creation of a safe harbor spending guideline with respect to the 30-month period for making substantial improvements and our request that an exception be made if a taxpayer fails to meet the 30-month deadline due to the project being located in a federally declared disaster area.

I anticipate this will take 5 minutes.

Thank you,

Adam

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TAX SECTION
State Bar of Texas

January ___, 2019

Via Federal eRulemaking Portal
at www.regulations.gov

Internal Revenue Service
CC:PA:LPD:PR (REG-1115420-18)

Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: *Comments on Proposed Regulations Concerning the Deferral of Gain Recognition on Amounts Reinvested in Qualified Opportunity Funds*

Dear Ladies and Gentlemen:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Department of the Treasury ("Treasury") and Internal Revenue Service (the "IRS" or "Service") in the Notice of Proposed Rulemaking (REG-115420-18, RIN 1545-BP03) issued on October 29, 2018 (the "Proposed Regulations"). The Proposed Regulations provide guidance regarding the application of Section 1400Z-2 of the Internal Revenue Code of 1986, as amended (the "Code") that was enacted on December 22, 2017 by Section 11011 of "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," Public Law 115-117 commonly referred to as the Tax Cuts and Jobs Act of 2017 (the "TCJA").

1414 Colorado Street, Austin, TX 78701
(512) 427-1463 or (800) 204-2222

January ___, 2019

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed comments on the Proposed Regulations.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

We commend Treasury and the Service for the time and thought that has been put into preparing the Proposed Regulations, and we appreciate being extended the opportunity to submit comments with respect to the Proposed Regulations.

Respectfully submitted,

Catherine C. Scheid, Chair
State Bar of Texas, Tax Section

COMMENTS ON PROPOSED REGULATIONS
CONCERNING THE DEFERRAL OF GAIN RECOGNITION ON AMOUNTS
REINVESTED IN QUALIFIED OPPORTUNITY FUNDS

These comments on the Proposed Regulations (the "Comments") are submitted on behalf of the Tax Section of the State Bar of Texas. The principal drafters of these Comments were Chris M. Goodrich, Vice Chair of the General Tax Committee, Adam C. Harden, Co-Chair of the Tax-Exempt Finance Committee, and Nathan Smithson, Co-Chair of the Partnership and Real Estate Tax Committee. Brandon S. Jones reviewed the Comments and made substantive suggestions. Jeffry M. Blair also reviewed the Comments and made suggestions on behalf of the Committee on Government Submissions ("COGS").

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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I. INTRODUCTION

These Comments are provided in response to Treasury's and the IRS's requests for comments on the Proposed Regulations concerning the deferral of gain recognition on amounts reinvested in qualified opportunity funds. Code Section 1400Z-2 was enacted on December 22, 2017 as part of the TCJA. Code Section 1400Z-2 permits the deferral of certain gains on the sale of property where such funds are invested in a qualified opportunity fund (a "QOF"). As a result of such deferral, taxpayers making permissible investments may be able to defer the taxation of capital gains until the earlier of the date that such investment is sold or exchanged or December 31, 2026. In order for such investment to be valid, substantially all of the fund's assets must be timely invested in appropriate property.

The Proposed Regulations were issued to provide taxpayers with guidance as to making determinations with respect to the types of gains that may be deferred, timing of investments and methods for determining qualification within the Code Section 1400Z-2 rules. We commend Treasury and the IRS for its efforts in issuing the Proposed Regulations. We also appreciate the opportunity to comment on the Proposed Regulations.

In response to the requests from Treasury and the IRS, we respectfully offer the comments and suggestions described below.

II. RECOGNITION OF PASSIVE ACTVITY LOSSES ON DISPOSITION OF INVESTMENT

Proposed Regulation Section 1.1400Z-2(a)-1(b)(5) provides that if Code Sections 1400Z-2(a)(1)(B) and (b) require a taxpayer to include in income some or all of a previously deferred gain, the gain so included has the same attributes in the taxable year of inclusion that it would have had if tax on the gain had not been deferred. The Proposed Regulations do not, however, describe how the deferral of passive activity losses under Code Section 469 coordinate with the gain deferral rules of Code Section 1400Z-2. This is particularly important where a taxpayer sells or otherwise disposes his or her entire interest in a passive activity in accordance with Code Section 469(g) (relating to the disposition of an entire interest in a passive activity investment) or Treasury Regulation Section 1.469-4(g) (relating to the disposition of substantially all of an interest in a passive activity investment) and reinvests proceeds from that disposition in qualified opportunity zone property.

Consider for example a situation in which (i) a taxpayer has significant depreciation deductions from a passive activity that were previously suspended in accordance with Code Section 469, (ii) the taxpayer sells all or substantially all of the property used in that passive activity, which results in both depreciation recapture and capital gain, and (iii) the taxpayer reinvests in qualified opportunity zone property an amount of cash equal to that capital gain. Proposed Regulation Section 1.1400Z-2(a)-1(b)(2)(i)(A) would permit the deferral of capital gain, but not the depreciation recapture. If the capital gain was not deferred under Code Section 1400Z-2, the taxpayer would have been entitled to deduct the previously suspended depreciation deductions against his or her depreciation recapture.

Code Section 469(g)(1)(A) requires that all gain or loss realized on the disposition of the taxpayer's entire interest in any passive activity be recognized before the suspended passive losses derived from that investment may be deducted. Taken literally, if Code Section 469(g)(1)(A) continues to suspend the passive losses due to the deferral of the capital gains, the taxpayer could be treated as recognizing the depreciation recapture under Code Section 1400Z-2 but continuing to have the original depreciation deductions suspended under Code Section 469. We respectfully submit that this result would be inconsistent with the purposes of both Code Sections 469 and 1400Z-2. Accordingly, in context of the foregoing example, we respectfully request clarification as to how Code Section 469(g)(1)(A) and Treasury Regulation Section 1.469-4(g) should be applied if capital gain is temporarily excluded pursuant to Code Section 1400Z-2(b).

We believe there are four alternative solutions to provide the clarity needed:

1) Treat capital gain as recognized (within the meaning of Code Section 469(g)(1)(A)) upon the sale of the passive activity investment but temporarily exclude such gain under Code Section 1400Z-2(b). All gain would be treated as recognized (i.e., both the capital gain and the depreciation recapture), and the suspended depreciation would be permitted to be deducted in the same year as the depreciation recapture. Code Section 1400Z-2(b) specifically states that in determining the amount of gain to be included in income under Code Section 1400Z-2(a)(1), gain is "excluded" rather than being subject to "nonrecognition." This language is in contrast to the language used in Code Section 1031(a)(1) where "no gain or loss shall be recognized." In addition, Code Sections 1400Z-2(b)(2)(B)(iii) and (iv) refer to the capital gain as being deferred rather than being unrecognized.

2) Clarify the Proposed Regulations to indicate that the sale of a passive activity investment would still qualify as a disposition of an interest in a passive activity under Code Section 469(g)(1)(A) and Treasury Regulation Section 1.469-2T(c)(2)(i)(A)(2) since the suspended deductions relate to depreciation and the depreciation recapture would be recognized.

3) Clarify the Proposed Regulations to indicate that the sale of a passive activity investment would constitute a partial disposition within the meaning of Treasury Regulation Section 1.469-4(g), thereby "unsuspending" the depreciation deductions associated with the disposition of assets.

4) Expand Proposed Regulation Section 1.1400Z-2(a)-1(b)(5) to state: "for purposes of section 469(g), the gain realized from the disposition of a taxpayer's entire interest in any passive activity will be considered to be fully recognized even if a portion of that gain is invested in a qualifying opportunity zone fund." This would incentivize passive investors to move their money into opportunity zone funds.

III. MEETING THE "SUBSTANTIALLY ALL" TEST FOR QUALIFIED OPPORTUNITY ZONE BUSINESS QUALIFICATION

Proposed Regulation Section 1.1400Z-2(d)-1(d)(1)(i) states that, for a trade or business to be a qualified opportunity zone business, substantially all of the tangible property owned or leased by the trade or business must be qualified opportunity zone business property (as defined in Proposed Regulation Section 1.1400Z-2(d)-1(d)(2)). Proposed Regulation Section 1.1400Z-2(d)-1(d)(3) states that the substantially all requirement is met if at least 70% of the tangible property owned or leased by the trade or business is qualified opportunity zone business property (as defined in Proposed Regulation Section 1.1400Z-2(d)-1(d)(2)). The Treasury Department and the IRS requested comments regarding the phrase "substantially all" in Proposed Regulation Section 1.1400Z-2(d)-1(d)(3)(i), as well as in the various other locations in Treasury Regulation Section 1.1400Z-2(d)-1 where that phrase is used.

We are in favor of the 70% test as set forth in Proposed Regulation Section 1.1400Z-2(d)-1(d)(3)(i). The purpose of the qualified opportunity zone rules is to provide incentives aimed at encouraging economic growth and investment in distressed communities. We believe that 70% test is the correct standard given the differences between how small businesses and entrepreneurs find funding sources versus large private equity firms. A 70% test will allow small businesses and entrepreneurs to have more flexibility in obtaining funding. Small businesses and entrepreneurs should be supported in this manner because they are more likely to help create a diversified local economy in the opportunity zones by investing in improvements on the lower end of the capital-intensive spectrum. Although investments from many sources are needed, a percentage greater than 70% would likely impair small businesses and entrepreneurs disproportionately.

One way small businesses and entrepreneurs would benefit from the 70% test is that this test gives them more flexibility to accept a third party's contribution of raw land located within an opportunity zone to a qualified opportunity zone partnership. For example, assume a proposed project for the development of a $44 million mixed use real estate project. The developers need $14 million of equity to obtain a $30 million loan. Under the 70% test, a third party could contribute to a qualified opportunity zone partnership $4 million worth of raw land located in an opportunity zone. Thus, the entrepreneurs would only need to raise $10 million of "deferred gain" cash for contribution to an opportunity zone fund, which would in turn contribute that cash to the same opportunity zone partnership which acquires the raw land. While the raw land would never constitute qualified opportunity zone business property, the improvements constructed with the $10 million of cash presumably could constitute qualified opportunity zone business property, and thus, the qualified opportunity zone partnership presumably would be able to pass the 70% test.

IV. ASSET VALUATION UNDER THE 90% AND 70% TESTS

We respectfully request that Proposed Regulation Sections 1.1400Z-2(d)-1(b)(1) and (2) as well as Proposed Regulation Section 1.1400Z-2(d)-1(d)(3)(ii) be clarified so as to exclude financial accounting depreciation when calculating the 90% test or 70% test. These Proposed Regulations state that the value of each asset of the entity as reported on the entity's financial statement for the relevant reporting period is to be used for determining whether a trade or

business of the entity satisfies the 90% test or 70% test; however, the role of future depreciation is not discussed. If depreciation were to be taken into account, qualified opportunity zone funds and qualified opportunity zone partnerships which initially pass the 90% test or 70% test may later fail as the original "cost" of the qualified opportunity zone business property is depreciated for financial accounting purposes on the balance sheet of a qualified opportunity zone fund or qualified opportunity zone partnership. This result would be inconsistent with the purpose of the opportunity zone program.

V. 1231 GAINS ELIGIBLE FOR DEFERRAL

We would like to join other commentators in recommending that the language in Proposed Regulation Section 1.1400Z-2(a)-1(b)(2)(i)(A) be expanded to include all gains from the sale of Code Section 1231 assets. Code Section 1231 requires gains and losses with respect to 1231 assets to be netted against one another for a tax year, and to the extent such gains exceed such losses, the gain is treated as a capital gain for federal income tax purposes, and would therefore be subject to deferral under Proposed Regulation Section 1.1400Z-2(a)-1(b)(2)(i)(A). Partnerships, however, are required pursuant to Regulation Section 1.702-1(a)(3) to separately allocate gains and losses with respect to Code Section 1231 assets, and therefore the determination of capital gain versus ordinary loss is made at the partner level, rather than the partnership level. Without the expansion of the definition of gains to include gains from the sale of Code Section 1231 assets, partnerships would be unable to defer any gain upon the sale of Code Section 1231 assets. Further, as net Code Section 1231 gain at a partnership level may become a 1231 loss when ultimately netted by individual partners, the pool of funds available to be invested in QOFs may be diminished, frustrating the purpose of the legislation.

Expanding the definition of "gain" to include all gains from the sale of Section 1231 assets would be more consistent with the broader language included in Code Section 1400Z-2(a). This recommendation to include all gains from the sale of Section 1231 assets is not intended to suggest that the definition of "gain" should not also be expanded to other categories, such as unrecaptured 1250 gain, for instance. A broader definition of "gain" would provide more flexibility to all taxpayers, especially partnerships, in choosing to invest in QOFs.

VI. EXTENSIONS WITH RESPECT TO 30-MONTH PERIOD FOR MAKING SUBSTANTIAL IMPROVEMENTS

Proposed Regulation Section 1.1400Z-2(d)-1(c)(8)(i) provides that "tangible property is treated as substantially improved by a QOF only if, during any 30-month period beginning after the date of acquisition of the property, additions to the basis of the property in the hands of the QOF exceed an amount equal to the adjusted basis of the property at the beginning of the 30-month period in the hands of the QOF." Although a taxpayer may have a reasonable expectation and desire to spend such proceeds within a prescribed period of time, unforeseen challenges may cause reasonable delay in what would otherwise be considered achievable project schedules. In fact, in the tax-exempt bond context Treasury has recognized the possibility of these unforeseen events and has implemented certain temporary period expenditure timelines and safe harbors in Treasury Regulation Sections 1.148-2 and 1.148-7.

We respectfully suggest that Proposed Regulation Section 1.1400Z-2(d)-1(c)(8)(i) be expanded to address the real world challenges associated with spending in a timely manner certain funds for the purposes of constructing and/or improving tangible property. To that end, we recommend the application of expenditure schedule safe harbors similar to those found in Treasury Regulation Sections 1.148-2 and 1.148-7 be included in the Proposed Regulations with respect to good faith attempts to comply with the 30-month requirement of Proposed Regulation Section 1.1400Z-2(d)-1(c)(8)(i). Specifically, we recommend the following:

1) Creation of a 30-month spending safe harbor similar to the 2-year exception found in Treasury Regulation Section 1.148-7(e) that would allow a taxpayer to meet the substantial improvement test if it spent at least 10 percent of funds within 8 months (the first spending period), at least 50 percent of funds within 16 months (the second spending period), at least 75 percent of funds within 24 months (the third spending period), and 100 percent of funds within 30 months (the fourth spending period).

2) Extension with respect to the above spending schedule safe harbor for reasonable retainage similar to Treasury Regulation Section 1.148-7(e)(2), which states that an issue does not fail to satisfy the spending requirement for the fourth spending period as a result of unspent amounts for reasonable retainage if those amounts are allocated to expenditures within 3 years of the issue date. If a taxpayer has a reasonable retainage at the 30-month deadline but spends such amount within the subsequent 6-month period, the taxpayer should still be considered to have satisfied the 30-month requirement of Proposed Regulation Section 1.1400Z-2(d)-1(c)(8)(i).

3) Inclusion of a special exception to allow for an expanded 5-year spending requirement for long-term projects, similar to the special rule found in Treasury Regulation Section 1.148-2(e)(2)(ii) in recognition that a taxpayer may choose to pursue certain long-term construction or renovation projects. In order to qualify for the expanded 5-year spending requirement, we recommend Treasury keep the additional requirement that both the taxpayer and either a licensed architect or licensed engineer must certify that the longer period is necessary to complete the project. Such certification should be made at the outset of the project based on reasonable expectations as of the certification date.

Further, we respectfully request that an exception be made if a taxpayer that reasonably expected to meet the 30-month spending requirement fails to meet the deadline due to the project being located in a federally declared disaster area. There exists a longstanding tradition of leniency by both the IRS and Treasury for taxpayers and businesses that suffer from qualified disasters. We suggest including a 30-month extension for those taxpayers who are located within such areas. Such extension may begin as of the date of the natural disaster or at a later date that may be deemed more appropriate as dictated by the scope of recovery.

We appreciate the opportunity to provide these comments and suggestions on the Proposed Regulations. Thank you for your consideration.

Attached is my outline. Thanks.

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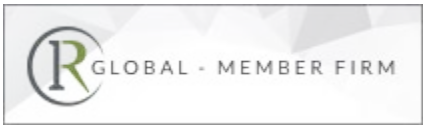

I. RECOGNITION OF PASSIVE ACTVITY LOSSES ON DISPOSITION OF INVESTMENT

Proposed Regulation Section 1.1400Z-2(a)-1(b)(5) provides that, if Code Sections 1400Z-2(a)(1)(B) and 1400Z-2(b) require a taxpayer to include in income some or all of a previously deferred gain, the gain so included has the same attributes in the taxable year of inclusion that it would have had if tax on the gain had not been deferred.

The Proposed Regulations do not, however, describe how the deferral of passive activity losses under Code Section 469 coordinate with the gain deferral and exclusion rules of Code Section 1400Z-2. This is particularly important where a taxpayer sells or otherwise disposes his or her entire interest in a passive activity in accordance with Code Section 469(g) (relating to the disposition of an entire interest in a passive activity investment) or Treasury Regulation Section 1.469-4(g) (relating to the disposition of substantially all of an interest in a passive activity investment) and reinvests proceeds from that disposition in qualified opportunity zone property.

> EXAMPLE: (i) a taxpayer has significant depreciation deductions from a passive activity that were previously suspended in accordance with Code Section 469, (ii) the taxpayer sells all or substantially all of the property used in that passive activity (the "Initial Activity"), which results in both depreciation recapture and capital gain, and (iii) the taxpayer reinvests in qualified opportunity zone property an amount of cash equal to that capital gain (the "Rollover Gain").

To the extent depreciation recapture generates income in the year the Initial Activity is sold, one could assume the taxpayer would be able to deduct previously suspended passive losses from that Initial Activity *to the extent of that depreciation recapture*.

However, what happens to the previously suspended passive losses *in excess of the depreciation recapture* (the "Excess Passive Losses") since Code Section 1400Z-2(a) and Proposed Regulation Section 1.1400Z-2(a)-1(b)(2)(i)(A) defers the taxing of capital gain?

Code Section 469(g)(1)(A) requires that *all gain or loss realized on the disposition of the taxpayer's entire interest in any passive activity must be recognized* before Excess Passive Losses may be deducted. Taken literally, Code Section 469(g)(1)(A) may continue suspension of the passive loss deductions until Rollover Gain is recognized under Code Sections 1400Z-2(b)(1), or arguably Code Section 469(g)(1)(A) may result in Excess Passive Losses being suspended in perpetuity since 10% or 15% of original gain realized in respect to the Initial Activity may not recognized due to the subsequent 10% or 15% basis step-up under Code Sections 1400Z-2(b)(2)(B)(iii) and (iv).

We respectfully request clarification as to how Code Section 469(g)(1)(A) and Treasury Regulation Section 1.469-4(g) should be applied if capital gain is temporarily deferred pursuant to Code Section 1400Z-2(a) and possibly partially excluded pursuant to Code Section 1400Z-2(b).

One approach would be to treat the disposition of the Initial Activity giving rise to the Rollover Gain as a termination of that Initial Activity under Treasury Regulation Section 1.469-

4(g), thereby permitting all previously suspended passive losses to be deducted in the year in which the Initial Activity is sold. This approach has the advantage of being the simplest and least burdensome. Also, note that use of the word "excluded" in Code Section 1400Z-2(b) is in contrast to the language used in Code Section 469(g)(1)(A), which only references gain "recognition." This difference in terminology may justify immediate complete termination treatment.

However, this approach could arguably be viewed as being inconsistent with the manner in which previously suspended passive losses are treated in the context of a like-kind exchange or an installment sale. In the context of a like-kind exchange, previously suspended passive losses become deductible to the extent of boot received in the year of sale or to the extent capital gain is recognized on the sale of the replacement property. In the context of an installment sale, the previously suspended passive losses are deductible as gain is recognized under Code Sections 453 or 453B.

On the other hand, is a comparison to Code Sections 1031 and 453 treatment appropriate given that Code Sections 1031 and 453 only provide for gain deferral rather than gain exclusion? Code Section 1400Z-2(b) specifically states that, in determining the amount of gain to be included in income under Code Section 1400Z-2(a)(1), gain is "excluded" rather than being subject to "non-recognition." This language is in contrast to the language used in Code Section 1031(a)(1) where "no gain or loss shall be recognized."

Another approach would be to defer the deduction of Excess Passive Losses until the Rollover Gain is recognized under Code Section 1400Z-2(b)(1), i.e., upon the earlier of (i) the sale of the qualified opportunity zone property or December 31, 2026. However, to avoid confusion under Treasury Regulation Section 1.469-4(g), it may be necessary for the Proposed Regulations to clarify that the "gain realized" as referenced in Code Section 469(g)(1)(A) does not include any gain eliminated by the basis step-up under Code Sections 1400Z-2(b)(2)(B)(iii) and (iv).

II. MEETING THE "SUBSTANTIALLY ALL" TEST FOR QUALIFIED OPPORTUNITY ZONE BUSINESS QUALIFICATION

Proposed Regulation Section 1.1400Z-2(d)-1(d)(1)(i) states that, for a trade or business to be a qualified opportunity zone business, substantially all of the tangible property owned or leased by the trade or business must be qualified opportunity zone business property (as defined in Proposed Regulation Section 1.1400Z-2(d)-1(d)(2)). Proposed Regulation Section 1.1400Z-2(d)-1(d)(3) states that the substantially all requirement is met if at least 70% of the tangible property owned or leased by the trade or business is qualified opportunity zone business property (as defined in Proposed Regulation Section 1.1400Z-2(d)-1(d)(2)). The Treasury Department requested comments regarding the phrase "substantially all" in Proposed Regulation Section 1.1400Z-2(d)-1(d)(3)(i).

We are in favor of the 70% test as set forth in Proposed Regulation Section 1.1400Z-2(d)-1(d)(3)(i). The purpose of the qualified opportunity zone rules is to provide incentives aimed at encouraging economic growth and investment in distressed communities. We believe that 70% test is the correct standard given the differences between how small businesses and entrepreneurs find funding sources versus large private equity firms. A 70% test will allow small businesses

and entrepreneurs to have more flexibility in obtaining funding, which is needed given that small businesses and entrepreneurs do not have the same access to the capital markets as larger firms. Also, small businesses and entrepreneurs should be supported in this manner because they are more likely to help create a diversified local economy in the opportunity zones by investing in improvements on the lower end of the capital-intensive spectrum.

One way small businesses and entrepreneurs would benefit from the 70% test is that this test gives them more flexibility to accept a third party's contribution of raw land located within an opportunity zone to a qualified opportunity zone partnership. For example, assume a proposed project for the development of a $44 million mixed use real estate project. The developers need $14 million of equity to obtain a $30 million loan. Under the 70% test, a third party could contribute to a qualified opportunity zone partnership $4 million worth of raw land located in an opportunity zone. Thus, the entrepreneurs would only need to raise $10 million of "deferred gain" cash for contribution to an opportunity zone fund, which would in turn contribute that cash to the same opportunity zone partnership which acquires the raw land. While the raw land would never constitute qualified opportunity zone business property, the improvements constructed with the $10 million of cash presumably could constitute qualified opportunity zone business property, and thus, the qualified opportunity zone partnership presumably would be able to pass the 70% test.

III. ASSET VALUATION UNDER THE 90% AND 70% TESTS

We respectfully request that Proposed Regulation Sections 1.1400Z-2(d)-1(b)(1) and (2) as well as Proposed Regulation Section 1.1400Z-2(d)-1(d)(3)(ii) be clarified so as to exclude financial accounting depreciation when calculating the 90% test or 70% test. These Proposed Regulations state that the value of each asset of the entity as reported on the entity's financial statement for the relevant reporting period is to be used for determining whether a trade or business of the entity satisfies the 90% test or 70% test.

However, the role of future depreciation is not discussed. If depreciation were to be taken into account, qualified opportunity zone funds and qualified opportunity zone partnerships which initially pass the 90% test or 70% test may later fail as the original "cost" of the qualified opportunity zone business property is depreciated for financial accounting purposes on the balance sheet of a qualified opportunity zone fund or qualified opportunity zone partnership. This result would be inconsistent with the purpose of the opportunity zone program.