



February 22, 2018

Mr. Scott Dinwiddie
Associate Chief Counsel
Income Tax & Accounting
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Mr. Dinwiddie,

The Local Initiatives Support Corporation (LISC) is pleased that the IRS has published a Revenue Procedure (Rev. Proc. 2018-16) addressing the Opportunity Zones provision in the recently enacted Tax Cuts and Jobs Act of 2017 (H.R. 1), and would like to offer comments with respect to program implementation.

LISC is a non-profit housing and community development organization and certified Community Development Financial Institution (CDFI) with offices in 31 cities throughout the country, and a rural network encompassing 83 partners serving 44 different states. LISC's work supports a wide range of activities, including affordable housing, economic development, building family wealth and incomes, education, community safety, and community health. In 2017 alone, LISC raised and deployed approximately \$1.4 billion of capital into low-income urban and rural communities – including close to \$1 billion that utilized federal Low Income Housing Tax Credits and New Markets Tax Credits. We believe that the Opportunity Zones program has the potential to unleash tremendous amounts of patient, private capital into the underserved urban and rural communities that are the core of LISC's markets.

As you are aware, H.R. 1 creates a very quick timeframe for the Treasury Department to certify the Opportunity Zones, and also incorporates a sunset date by which the otherwise deferred capital gains must be realized – meaning that delays in implementation will impede the ability of investors to participate in this promising new program. It is therefore critical that the Treasury Department move quickly with the additional guidance and rulemaking necessary for jurisdictions to identify Opportunity Zones and for investors to be able to confidently place investment capital into Opportunity Funds. This of course must be done while also creating an administrative structure that protects the integrity of the program without adding unnecessary

burdens on the users. To this end, LISC is offering several recommendations that we believe will help to ensure these outcomes, both with respect to the designation of Opportunity Zones and the certification of Opportunity Funds.

Designation of Opportunity Zones

The recently released Revenue Ruling and the accompanying maps and spreadsheets posted by the CDFI Fund will be helpful to states as they begin the process of identifying their Opportunity Zones. To the extent additional guidance will be provided to Chief Executive Officers of the jurisdictions, and for the purpose of effective administration by the Treasury Department, LISC offers the following recommendations:

1. **Delegation of Authority** – We recommend that the Community Development Financial Institutions Fund (CDFI Fund) be delegated the responsibility for collecting Opportunity Zone designations from the states and certifying such designations. The CDFI Fund has significant experience with such approvals, in that it currently approves eligible Investment Areas under the CDFI Program and the Bank Enterprise Award program, and also designates eligible low-income communities under the New Markets Tax Credit program. It also already maintains the mapping tools and the supporting infrastructure necessary for determining census tract eligibility for the Opportunity Zone program. For these reasons, we believe the CDFI Fund is the administrative agency best positioned to review and approve state designations of Opportunity Zones.
2. **Submission of Requests.** To the extent practicable given the statutory deadlines, we recommend that Treasury establish an electronic portal for states to submit their Opportunity Zone designations and/or waiver requests. This will allow Treasury to more readily verify the eligibility of selected census tracts – most notably the requirements that no more than 25% of eligible census tracts are included and that no more than 5% of the submitted tracts meet the “exception” requirement provided for in the statute -- since this information can be cross-checked electronically with the eligible census tract information already maintained by the CDFI Fund. Collecting such information electronically will also enable the Treasury Department to quickly post this information in a user-friendly format so that investors and other program users can quickly identify Opportunity Zones throughout the country.
3. **Narrative Requirements.** The designations of Opportunity Zones may appear to be a largely mechanical exercise for both states and the Treasury Department, as the statute provides a very clear definition of which census tracts shall qualify, and how such census tracts may be aggregated by the states for submission. However, the Conference Report that accompanied H.R. 1 (Report 115-466) states that:

“Governors are required to provide particular consideration to areas that: (1) are currently the focus of mutually reinforcing state, local or private economic development initiatives to attract investment and startup activity; (2) have demonstrated success in

geographically targeted development programs such as promise zones, the new markets tax credit, empowerment zones and renewal communities; and (3) have recently experienced significant layoffs due to business closures or relocations.”

To this end, we recommend that each state submit a brief narrative explanation discussing the factors that were considered by the state when selecting their Opportunity Zones, including the extent to which these particular factors were given consideration.

Certification of Qualified Opportunity Funds

H.R. 1 and the accompanying Conference Report envision a role for the Treasury Department to play in certifying eligible Opportunity Funds. We believe that any future administrative guidance or regulations pertaining to the certification of Opportunity Funds should address the following issues:

1. **Delegation of Authority.** As with the certification and approval of Opportunity Zones, we would recommend that the IRS delegate to the CDFI Fund the authority to certify Opportunity Funds. The CDFI Fund has the related experience of certifying Community Development Entities (CDEs) under the NMTC Program, as well as the electronic systems in place for such certifications. These existing system could be adapted with some modifications to also be used to certify Opportunity Funds, thus enabling a much more efficient and timely review process.
2. **Elements for consideration during review.** We offer the following as considerations as the Treasury Department establishes protocols for certifying Opportunity Funds:
 - a. Legal Entity/Mission test. The statute requires that the entity be “organized as a corporation or partnership for the purpose of investing in qualified opportunity zone property . . .” This test should be satisfied at the time of submission of the certification application, with an entity demonstrating that it has been legally formed and that its incorporating documents show an *intent* to invest in Opportunity Zone property and businesses.
 - b. Asset test. In order to be deemed an Opportunity Fund, an entity must have at least 90% of its assets invested in Opportunity Zones. However, it is not contemplated that such a test be applied at the time of submission of the initial certification application; and in fact, many Opportunity Funds are not likely to have any significant assets at the time of initial certification request, as most investors are likely to want to see proof of certification prior to investing in the Opportunity Fund.

The statute provides that the asset test is to be based on the average of the assets held on two different dates: the last day of the first six month period of the taxable year of the fund; and the last day of the taxable year of the fund.

However, as cited in the example below, this could have the unintended consequence of leading to an incidence of non-compliance based upon elements beyond the control of the Opportunity Fund (e.g., the date by which its certification is approved by the Treasury Department) or elements that are very difficult to control (e.g., the date by which businesses and projects are ready for investments).

Example: Opportunity Fund A has a Fiscal Year End of December 31st. It is duly organized as a legal entity on April 1, 2018, but has no appreciable assets yet because it has yet to draw down investment capital. It applies for certification by the Treasury Department on April 15th, 2018 and receives its certification on June 15th, 2018. While it awaits certification, it has been soliciting investors and identifying projects for a \$10 million investment fund, but as of June 30, 2018, it has yet to secure investor capital or make investments. On August 1, 2018 it draws \$10 million of investor capital and simultaneously invests \$9.5 million (95%) of the funds into qualifying Opportunity Zone property, which it then holds in those investments for the remainder of the year. In this instance, Opportunity Fund A could be deemed to be in non-compliance with the program rules, since even though it has surpassed the 90% test as of the end of the fiscal year, there are no assets as of June 30, 2018 for which to determine the average of the assets.

In order to mitigate against this noncompliance risk, while still allowing Opportunity Funds to seek certification status while simultaneously securing investor capital and lining up investments, Treasury should establish a safe harbor rule. For example, Treasury could state in its compliance regulations that the initial year for which the asset test will be applied shall be the first complete fiscal year following the fiscal year in which the entity received its certification as an Opportunity Fund. Alternatively, if Treasury does not deem it prudent to waive the first-year compliance review, it could provide a rule noting that, in the initial certification year only, any entity that had no appreciable assets as of the first reporting period shall be required to meet the test solely on the basis of its second reporting period.

- c. Additional review requirements. While the statute does not clearly establish additional review criteria beyond these two tests, the Conference Report does. Specifically, the Conference Report states that *“The provision intends that the certification process for a qualified opportunity fund will be done in a manner similar to the process for allocating the new markets tax credit. The provision provides the Secretary authority to carry out the process.”*

New Markets Tax Credits are allocated through an annual competitive application process, one which helps ensure that the most qualified entities are

provided with credit allocations, and that the scarce credits are directed to the highest and best uses. While it is not feasible to hold competitions among Opportunity Funds in the manner that CDEs apply for NMTCs, Treasury can certainly consider employing some of the best practices from its NMTC review process into its Opportunity Fund certification review.

For example, through the NMTC allocation process, CDEs are encouraged to commit to more rigorous outcomes as a condition of receiving an allocation, and then are held to these commitments as part of their allocation agreement. These include, among others:

- i. targeting investments in areas of severe economic distress;
- ii. offering below-market rates and terms to their borrowers;
- iii. investing more than the minimally required 85% of the NMTC investment proceeds into their low income communities;
- iv. financing (if applicable) affordable housing; and
- v. making “innovative” investments, including investments in small businesses.

In addition to these provisions, which become a compliance requirement of the NMTC allocation agreements, applicants also receive higher scores for being able to demonstrate a likelihood of achieving significant community impacts, such as: creating high quality jobs; providing goods and services to low income community residents; financing minority-owned businesses; and ensuring environmentally sustainable outcomes.

As noted previously, LISC does not suggest trying to implement a competitive scoring and selection process into the certification of Opportunity Funds. This would be an unwise use of resources (both Federal and private sector) and would cause considerable delays in program implementation. However, consistent with the language of the Conference Report, we do think it would be appropriate for the Treasury Department to require Opportunity Funds to identify, at the time of certification, one or more outcomes from a list of desirable community development outcomes that they will commit to achieving with their investments.

The desirable outcomes could be drawn entirely from the NMTC selection items above, or could be broadened to include additional items that may be more relevant to the intentions of the Opportunity Zone program; for example, providing working capital and equipment capital to start-up businesses. Applicants would indicate their chosen outcomes through self-certifications at the time of the certification application, which could then be verified during a compliance audit after the investments have been made.

- d. Additional information collection. We recommend that Opportunity Funds also be required to submit brief information regarding their business strategy (e.g., types of investments they intend to make; asset classes; etc.) and anticipated geographic markets to be served, so that the Treasury Department can make available to the public a listing of all certified Opportunity Funds in a format that will allow investors and investees to identify Opportunity Funds working in their desired markets.
3. **Certification process.** The certification process should be as straightforward as possible. Applicants should be able to submit certification requests electronically. An initial approval should be given to a “Master Opportunity Fund” (along the lines of a Master CDE under the NMTC Program), with the understanding that this organization may then “register” one or more “Subsidiary Opportunity Funds” once these funds get capitalized or simultaneous with the capitalization. This would be a slight departure from the certification of subsidiary CDEs, which while greatly streamlined, still requires approval from the CDFI Fund prior to investors placing capital into the entity. As a result, organizations will submit many more subsidiary CDEs for certification than will ever end up drawing capital. This creates unnecessary work and expense for CDEs and for the CDFI Fund. By contrast, if Subsidiary Opportunity Funds can be registered simultaneously with the capital draw, this will not only save time and expense for all parties, but will enable the Funds to better manage the compliance risks associated with the timing of their assets test.

The Opportunity Fund certification should be assumed to last for the life of the Opportunity Fund, unless the Opportunity Fund violates any of the conditions of its certification (which could include failure to meet the commitments made under 2c above).

4. **Dissemination of Certification Information. Reporting Requirements.** The Treasury Department ideally will collect significant data from the Opportunity Funds, not just to ensure program compliance, but also to be responsive to reporting requirements set forth in the Conference Report:

The Secretary or the Secretary’s delegate is required to report annually to Congress on the opportunity zone incentives beginning 5 years after the date of enactment. The report is to include an assessment of investments held by the qualified opportunity fund nationally and at the State level. To the extent the information is available, the report is to include the number of qualified opportunity funds, the amount of assets held in qualified opportunity funds, the composition of qualified opportunity fund investments by asset class, and the percentage of qualified opportunity zone census tracts designated under the provision that have received qualified opportunity fund investments. The report is also to include an assessment of the impacts and outcomes of the investments in those areas on economic indicators including job creation, poverty reduction and new business starts, and other metrics as determined by the Secretary.

We recommend that this information be collected by the Treasury Department on an annual basis via an electronic portal. While it may take some time for the Treasury Department to set up these systems, Opportunity Funds should be made aware of the data points that Treasury intends to collect at the time they are certified; ideally by including these data points as part of the certification agreement.

We also recommend that in addition to this quantitative data, that Opportunity Funds be required to submit very brief narrative information about each of their investments. This would enable the Treasury Department to collect snapshots of each investment to enhance its outcome reports, and also would provide each Funds with an opportunity to address the extent to which they have satisfied the conditions of their certification agreements, particularly with respect to the items identified in 2c above.

Finally, we recommend that all of this data and accompanying reports, whether needed by the IRS for compliance purposes or to fulfil the other reporting requirements specified in the Conference Report, be collected by the CDFI Fund, as is currently done under the NMTC Program.

Thank you for consideration of these comments. We are excited about the prospects of the Opportunity Zone program, and look forward to working with the Treasury Department on implementation going forward.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matt L. Josephs", with a long horizontal flourish extending to the right.

Matt Josephs
Senior Vice President for Policy