DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

November 18, 2019

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Senator Wyden:

I write in response to your recent letter concerning Opportunity Zones, which cites inaccurate and misleading media reports to which the Department of the Treasury has already responded. We welcome this opportunity to correct the record further.

The Department has worked hard to implement the Opportunity Zone tax incentive with integrity and fidelity to the law. We are proud of the economic potential that this effort is beginning to unleash in disadvantaged areas of the country. Recent inaccurate allegations concerning the Opportunity Zone designation process are a disservice to the thousands of communities that are working to attract investment and create new jobs in areas of our country that need it most.

Background

As part of the Tax Cuts and Jobs Act, Congress created the Opportunity Zone tax incentive to encourage long-term investment and job creation in low-income communities throughout the country. Opportunity Zones encourage economic activity by providing tax benefits for the investment of eligible capital gains in "qualified opportunity funds." Qualified opportunity funds are, in turn, required to invest in eligible property and businesses located in "qualified opportunity zones."[23] Under the statute, all Opportunity Zones were designated in 2018, and the designations remain in effect for 10 years.

State governors played a central role in the selection of Opportunity Zones. The statute directs that governors must "notify the Secretary in writing" of their nominations of eligible tracts for designation as Opportunity Zones.[24] Upon receipt of a nomination, the Department reviewed the nominations for compliance with the statutory criteria, certified the nominations, and designated

[23] 26 U.S.C. § 1400Z-2(d). For simplicity, this letter refers to qualified opportunity zones as Opportunity Zones. All statutory references are to Title 26 (the Internal Revenue Code) unless otherwise stated.
[24] § 1400Z-1(b)(1)(A)(ii).

the nominated tract.[25] The Internal Revenue Service (IRS) has primary responsibility for administration of the Opportunity Zone tax incentive, and the IRS entered into an interagency agreement with Treasury's Community Development Financial Institutions Fund (CDFI Fund) to assist with the 2018 designation process.[26] Beginning in March 2018, the CDFI Fund received and reviewed each nomination. Based on the CDFI Fund's initial analysis, the IRS verified the eligibility of the states' nominations and notified the states when their nominations had been certified and designated.[27]

The statute permits state governors to nominate two types of tracts as Opportunity Zones: (1) low-income communities (LIC tracts), and (2) tracts that are contiguous with low-income communities (non-LIC contiguous tracts).[28] The statute defines a LIC tract by reference to the Internal Revenue Code section governing the New Markets Tax Credit, under which a tract can qualify based on either its poverty rate or its median family income.[29] Generally, a state may nominate as Opportunity Zones a number of tracts that is the greater of 25 tracts or 25 percent of the number of its LIC tracts. No more than 5 percent of a State's nominations can be non-LIC contiguous tracts.[30] The statute contemplates the use of Census Bureau data in determining Opportunity Zone eligibility, but it is silent concerning the appropriate time periods for such data.

In February 2018, the CDFI Fund published a list of census tracts that would be eligible for Opportunity Zone designation.[31] The CDFI Fund's list was based on census data from 2011-2015. On December 7, 2017, the Census Bureau had released more recent five-year data (from 2012-2016),[32] but the CDFI Fund used 2011-2015 data due to the compressed nomination timeline and complexity of incorporating more recent data.[33]

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[25] § 1400Z-1(b)(1)(B).

[26] *See* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF THE TREASURY, AUDIT REPORT OIG-19-014: FINANCIAL MANAGEMENT: AUDIT OF THE COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS FUND'S FINANCIAL STATEMENTS FOR FISCAL YEARS 2018 AND 2017, 43 (Nov. 14, 2018), www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/OIG-19-014.pdf.

[27] The CDFI Fund has 30 days from receipt of notice of a state's nomination to review and designate the Opportunity Zones. *See* § 1400Z-1(c)(2)(A). A state may also request an extension of the consideration period for an additional 30 days.

[28] *See* §§ 1400Z-1(b) and 1400Z-1(e); *see also* Revenue Procedure 2018-16, 2018-9 I.R.B. 383, § 2.05 [Attachment A]. Specifically, a non-LIC contiguous tract must be contiguous with a LIC tract that has been designated as an Opportunity Zone and must have a median family income that is not higher than 125 percent of the median family income of the LIC tract.

[29] *See* § 45D(e).

[30] *See* §§ 1400Z-1(d)(1) and 1400Z-1(e)(2).

[31] *See* CDFI Fund, *Opportunity Zone Resources*, www.cdfifund.gov/Pages/Opportunity-Zones.aspx (last updated Dec. 14, 2018).

[32] United States Census, *American Community Survey (ACS): 2016 Data Release New and Notable*, https://www.census.gov/programs-surveys/acs/news/data-releases/2016/release.html (last updated Jan. 12, 2018).

[33] *See* CDFI Fund, *Opportunity Zones: Nomination Instructions* (Mar. 2018), https://www.cdfifund.gov/Documents/OZone%20Nomination%20Instructions.3.5.18.pdf [Attachment B] ("[D]ue to the March 21, 2018, deadline for State CEOs to nominate census tracts for designation as QOZs, and the complexities of incorporating the most recent data information into the eligibility process, the Opportunity Zone Nomination Tool utilizes the 2011-2015 ACS 5-Year

On February 18, 2018, the IRS issued a revenue procedure clarifying that states could rely on the CDFI Fund's list as a "safe harbor"—even if a tract on that list was "no longer eligible under more recent census data"—but states were not *required* to do so.[34] The revenue procedure made clear that states were permitted to use the more recent 2012-2016 data, provided that their nomination was "accompanied by an analysis demonstrating that eligibility, including appropriate supporting data from [the 2012-2016 census data set]."[35]

In short, the revenue procedure provided a choice: States could nominate tracts on the list published by the CDFI Fund based on 2011-2015 data; or a state could nominate tracts based on the more recent 2012-2016 data if the state assumed the burden of demonstrating eligibility.

In March 2018, the CDFI Fund released instructions for an online "nomination tool" that it had created to guide states through the Opportunity Zone nomination process. Like the IRS revenue procedure, section 3 of the nomination tool instructions explained that "[s]tates may nominate census tracts eligible under the 2012-2016 [census] data that are not already identified" in the list previously generated by the CDFI Fund using older census data.[36] But section 4.1.5 of these instructions provided more restrictive guidance than the IRS revenue procedure, stating that the 2012-2016 data "may be used to nominate only LIC Tracts" and that nominations of "Non-LIC Contiguous Tracts must be based on the 2011-2015 [census] data as presented in the [CDFI Fund's nomination tool]." The CDFI Fund included this limitation due to administrability considerations.[37] The limitation did not appear in the statute or the IRS revenue procedure.

The Nomination and Designation Process Timeline

Under the statute, state nominations were due on March 21, 2018, with the option of a 30-day extension at a state's request. The statute provides that after the Secretary receives notice of a state's nomination, the Secretary may certify the nomination and designate the nominated tracts as qualified Opportunity Zones during a 30-day "consideration period"—also subject to a 30-day extension at a state's request.[38]

The CDFI Fund began receiving nominations on March 9, 2018. The first 18 state designations were announced on April 9, 2018, and an additional six state designations were announced on April 18, 2018.

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data. In addition, the 25 [percent] limitation on the number of designations in a State will be determined using the 2011–2015 ACS 5-Year data.").

[34] Attach. A, § 3.06 (Rev. Proc. 2018-16, *supra* note 6).

[35] *Id.* § 3.07.

[36] *See* Attach. B at 3 (CDFI Fund, *Opportunity Zones: Nomination Instructions*, *supra* note 11).

[37] *Id.*; *see* parenthetical at note 11.

[38] *See* § 1400Z-1(b)(1)–(2); (c)(2)(A).

Based on requests from multiple states and following the submission of nominations by the April 20, 2018 extended deadline, the CDFI Fund informed states with pending nominations of an opportunity to modify their Opportunity Zone nominations through the earlier of the end of the "consideration period" or until the state's nominations are designated. On May 7, 2018, the CDFI Fund provided further notification and instructions to state governors with designations still pending regarding the decision to allow states to modify their Opportunity Zone nominations and to allow the substitution of any eligible tract in place of a previously nominated tract. All states with outstanding nominations were informed by email of this opportunity.[39]

The remaining state designations occurred throughout May and June 2018, with two state designations announced on May 16; four on May 17; and 22 on May 18. The final four designations were announced on June 14.[40] By July 7, the CDFI Fund had finalized and released a list of all the Opportunity Zones in Notice 2018-48. This was modified on July 15, 2019 by Notice 2019-42, which included two additional census tracts in Puerto Rico that qualified as LIC tracts based on the 2016 data. The updated notice included these two tracts as Opportunity Zones.

The Nevada Nomination

In April 2018, Nevada asked CDFI Fund staff whether a tract that qualified as a non-LIC contiguous tract under the 2012-2016 census data, but not the 2011-2015 data, would be eligible for nomination and designation as a qualified Opportunity Zone. CDFI Fund staff answered that such a tract was not eligible under its instructions. After receiving that guidance, Nevada submitted its initial nomination on April 20, 2018.

Nevada continued to express concerns to the Department that it should not be required to rely on older data when more recent data was available. Nevada correctly noted that neither the statute nor the IRS revenue procedure required use of 2011-2015 data; in fact, the IRS revenue procedure expressly permitted use of 2012-2016 data. Nevada asserted these views to CDFI Fund staff and ultimately raised the issue with the Secretary.

Consistent with his responsibilities under the law, the Secretary has been regularly briefed on the implementation of the Opportunity Zone tax incentive. The Secretary also accepted two external calls regarding the State of Nevada's concerns about the designation process. On April 13, 2018, the Secretary spoke with then-Senator Dean Heller about Nevada's concerns. The Secretary made no commitment to approve any nomination. On May 8, the Secretary spoke with the then-Governor of Nevada, Brian Sandoval, about the same issue. The Secretary again made no commitment to approve any nomination but indicated that the Department would review Nevada's modified nomination.

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[39] E-mail from Jeff Merkowitz, Senior Advisor, CDFI Fund, to Various State Governors (May 7, 2018, 5:42 PM) [Attachment C].

[40] This included designations of Opportunity Zones in the territories and the District of Columbia.

Also on May 8, Governor Sandoval submitted a modified nomination seeking to replace a previously nominated non-LIC contiguous tract with a different non-LIC contiguous tract.[41] Using the more recent 2012-2016 census data, the Governor nominated tract number 32029970200 in Storey County and included the required data and analysis demonstrating its eligibility based on median family income. The letter pointed out that the IRS revenue procedure "provides flexibility to use the most recent available [census] five-year data," contrary to section 4.1.5 of the CDFI Fund's nomination tool instructions.

Nevada's modified nomination clearly satisfied the statutory standard and complied with the IRS revenue procedure. The only issue presented was whether the nomination should be disapproved based on section 4.1.5 of the CDFI Fund's instructions. The IRS Office of Chief Counsel reviewed the matter and concluded that it would be lawful to approve Nevada's nomination; Treasury's Tax Legislative Counsel and Office of General Counsel concurred.

Separately, to ensure equitable treatment, on May 31, the Department contacted staff for the Governor of Vermont, the only other state that had raised the same data issue as Nevada, concerning the effect of section 4.1.5 of the CDFI Fund's instructions on Vermont's nominations. The state responded on June 5 that it did not wish to change its nominations.

IRS Acting Commissioner David Kautter was thoroughly briefed on the issue by IRS staff and determined that the CDFI Fund's instructions—subregulatory guidance that lacks the force of law—should not override the flexibility provided by the IRS revenue procedure and the statute itself. Acting Commissioner Kautter concluded that states should not be required to use older data if they are able to establish eligibility based on the more recent 2012-2016 census data, consistent with the revenue procedure.

On June 14, 2018, a letter was sent electronically by the CDFI Fund to Nevada informing Nevada that all of the state of Nevada's designations were certified and designated as Opportunity Zones. On June 15, Acting Commissioner Kautter directly informed Nevada of his decision in a letter to Governor Sandoval.[42] As the letter explains, the Department decided to accept Nevada's modification request "on the ground that the substitute census tract and the supporting information satisfy the requirements in Section 3.07 of Revenue Procedure 2018-16." The letter further stated that the nomination instructions will be revised to conform to the revenue procedure for any future nomination rounds, if the tax incentive is extended by Congress.

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[41] *See* Letter from Brian Sandoval, Governor, State of Nevada, to Steven T. Mnuchin, Secretary, U.S. Department of the Treasury (May 8, 2018) [Attachment D].

[42] *See* Letter from David J. Kautter, Acting Commissioner, Internal Revenue Service, to Brian Sandoval, Governor, State of Nevada (June 15, 2018) [Attachment E].

Ultimately, the Department designated 8,764 tracts as Opportunity Zones. Of those, 8,713 designated tracts appeared on the CDFI Fund's safe-harbor list based on 2011-2015 data, and 51 tracts were determined to be eligible based on states' submissions of 2012-2016 data. A list of all tracts designated based on the more recent census data set is enclosed.[43]

Allegations Regarding Michael Milken

Your letter cites a *New York Times* article which suggested that the Department's decision concerning Nevada's nomination was influenced by Michael Milken. That suggestion is categorically false. Indeed, we are aware of no Treasury or IRS officer or employee who had any communications whatsoever with Mr. Milken or his representatives concerning the designation of Storey County, or who even knew of Mr. Milken's reported ownership of property in Storey County, until the Department received press inquiries in October 2019.

Moreover, we note that the former head of the CDFI Fund, whose comments are central to the *New York Times* article on this issue, has subsequently stated that her comments were misconstrued. In an October 26 email to Treasury's Assistant Secretary for Public Affairs, former CDFI Fund Director Annie Donovan explained:

> I would like to address the manner in which I was quoted in a New York Times article published online today regarding Opportunity Zones. I would like to make it clear that my quote was misconstrued. I and others involved in the designation process were troubled that changes made to the eligibility criteria late in the process could lead to unintended outcomes. Sandwiched in between my words were accusation about Secretary Mnuchin and his role in the process that I never conveyed.
>
> I do not believe that Secretary Mnuchin acted inappropriately at any point in the process.[44]

It is our understanding that Ms. Donovan also informed the *New York Times* that her comments were misconstrued. Nevertheless, the *New York Times* did not update its story to reflect this correction.

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[43] Information regarding all designated Opportunity Zones is available at CDFI Fund, *Opportunity Zone Resources*, *supra* note 9. For your convenience, enclosed as Attachment F is a list reflecting only the tracts designated based on the more recent 2012-2016 census data.

[44] E-mail from Annie Donovan, former CDFI Fund Director, to Monica Crowley, Assistant Secretary for Public Affairs, U.S. Department of the Treasury (Oct. 26, 2019, 1:44 PM) [Attachment G].

The Department is proud of the work that Treasury and IRS staff have done to effectively implement the Opportunity Zone tax incentive, and we hope this thorough explanation of the nomination and designation process is helpful.

Sincerely,

Brian McGuire

Brian T. McGuire

Identical letter sent to:
The Honorable Richard E. Neal

cc: The Honorable Charles E. Grassley