The Real Estate Roundtable

July 29, 2026

Mr. Kevin Salinger
Assistant Secretary of Tax Policy (Acting)
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Opportunity Zones Transition Guidance and IRS Notice 2026-40

Dear Assistant Secretary Salinger:

We commend the IRS and Treasury Department for providing transitional guidance in IRS Notice 2026-40 to entrepreneurs and investors deploying capital in Opportunity Zones throughout the country, and we write to suggest a number of recommendations that would further refine and improve the guidance to promote continued investment, expansion of housing supply, and job creation in low-income communities.

Since their enactment in the *Tax Cuts and Jobs Act* (*TCJA*) of 2017, Opportunity Zones have proven to be effective and efficient in mobilizing private capital from diverse sources to create new housing, jobs, and commercial opportunities in economically distressed and long-neglected areas. Under the reforms enacted in the *One Big Beautiful Bill Act* (*OBBBA*), Opportunity Zones are transitioning from a temporary and untested tax benefit to a permanent feature of the tax code driving capital formation and supporting broad-based economic growth. In this process, Notice 2026-40 provides helpful guidance for businesses and funds that are undertaking ambitious, long-duration, and sustained real estate investments in low-income communities that do not neatly end and conclude on a specified, statutory date. Our recommendations are consistent with the shared objective of facilitating qualified opportunity zone (QOZ) investment activity throughout the remainder 2026 and beyond, and we hope they can be adopted and communicated to investors and businesses in short order to provide the certainty necessary for continued capital formation and economic risk-taking.

Critically, Notice 2026-40 addresses the issues that arise with respect to real estate and other investments in *TCJA* Opportunity Zones that are not re-designated as QOZs under *OBBBA*. The Notice appears to view the "acquired after" requirements in the statute and regulations as the primary technical hurdles to continued development and funding of *TCJA* zone projects after 2026. Accordingly, under the Administration's interpretation of the "applicable start date" statutory language, tangible property acquired after 2026 cannot qualify as QOZBP unless it meets one of two exceptions established in the Notice. Similarly, QOZ stock and partnership interests acquired after 2026 cannot qualify as QOZP unless acquired pursuant an exception.

Specifically, the Notice sets out a Written Plan exception in §5.01(2), which provides relief for QOZBP and QOZP, and an Ordinary Course exception in §5.01(3), which as drafted appears only to provide relief for QOZBP.

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Written Plan Exception

Under the Written Plan exception, tangible property acquired after 2026 is treated as acquired after the applicable start date provided the acquisition is pursuant to a written plan meeting the requirements of the Treas. Reg. §1.1400Z2(d)-1(d)(3)(v) and (vi) working capital safe harbors and certain other requirements are satisfied, as set out in the Notice. Complementary relief is provided for stock or partnership interests acquired after 2026 "pursuant to a written plan" described in §5.01(2) of the Notice. Examples 4 and 5 clearly indicate that multiphase developments are permissible and further that tangible property acquired after the lapse of *TCJA* zone designations may qualify under the exception. We greatly welcome this relief and encourage Treasury and the IRS to clarify a few key issues.

The working capital safe harbor requirements in Treas. Reg. §1.1400Z2(d)-1(d)(3)(v) and (vi) do not require that the written plan specify the source of expected capital and so specifying the source is not typical in practice, especially in the context of a master plan for a multiphase development. We do not believe there is or should be any requirement that the QOF providing funding after 2026 is the same QOF that provided funding prior to December 31, 2026, or even that any QOF would necessarily have provided funding to the QOZB prior to December 31, 2026. Rather the intent of this exception appears to be that the QOZB (1) has documented its intention for the development, in writing and prior to the end of 2026, and (2) acquires tangible property in a manner substantially consistent with that writing. Accordingly, we respectfully request a clarification that notwithstanding that Examples 4 and 5 present a scenario where the same QOF provides funding before and after December 31, 2026, this is not a requirement to qualify for the exception in 5.01(2).

Additionally, notwithstanding that Treas. Reg. §1.1400Z2(d)-1(d)(3)(v)(A) requires that working capital is designated in writing for "the development of a trade or business" in a QOZ, and Treas. Reg. §1.1400Z2(d)-1(d)(3)(B) requires that there is a written schedule consistent with "the ordinary start-up" of a trade or business for the expenditure of the working capital assets, we are of the view that a real estate trade or business that is not a startup can meet the requirements of the Treas. Reg. §1.1400Z2(d)-1(d)(3)(v) and (vi) working capital safe harbors. Example 4 and 5 in the Notice, as well as Example 4 in Treas. Reg. §1.1400Z2(d)-1(d)(3)(vii)(D) appear to support this view because they address a scenario in which a second phase of development independently meets the requirements of Treas. Reg. §1.1400Z2(d)-1(d)(3)(v)(A) with respect to a subsequent application of a working capital safe harbor notwithstanding that a portion of the first phase of development is being used in a trade or business of the QOZB. However, due to the importance of this issue to multiphase real estate developments and the need to provide investors with tax certainty to unlock capital for productive investment, we respectfully request clarification on this point.

Ordinary Course Exception

Under the Ordinary Course exception, tangible property acquired after 2026 in the ordinary course of business to replace existing tangible business property may be treated as QOZBP if the requirements of Section 1400Z-2(d)(2)(D) are otherwise met. Replacements include modernizations of property necessary to continue the operations of the trade or business, and Example 3 provides that a new ventilation system installed by a restaurant to improve energy efficiency can qualify.

Ordinary course replacements do not include tangible property acquired "pursuant to the expansion of a trade or business or the transition of a trade or business into a new trade or business." Although we agree with this limitation, additional clarification on what is considered an "expansion," specifically in the context of real estate investments, would be helpful. Example 1 provides that a new warehouse on an adjacent plot of land constructed to expand the facility's capacity the produce a new product is an impermissible expansion. However, it is unclear whether the new product, expansion into a new plot, or any increase in the building footprint, in itself, would give rise to an "expansion."

We respectfully request an administrable rule drawing the line between certain activities, such as energy efficiency and accessibility retrofits and interior reconfigurations (which we believe clearly fit within "modernization") and others, such as construction of a new building on an adjacent parcel serving new tenants (which we believe is a clear "expansion"). To the extent borderline cases such as addition of new floors, conversion of existing square footage to habitable space, addition of an adjacent parking structure to service existing tenants etc. could be addressed, this would greatly enhance certainty for market participants. For example, it would be helpful if an existing standard, such as the distinction drawn in the capitalization regulations between restorations and betterments in Treas. Reg. §1.263(a)-3(j) and (k) as contrasted with adaptations of property to a new or different use in (l), could be used for rental real estate business to ascertain in what situations there is an "expansion".

Additionally, the Ordinary Course exception for QOZBP, although generous, is incomplete because of the lack of complementary relief for QOZP. Unlike the written plan exception in 5.01(2) of the Notice, which further allows the activity to be funded by new QOF investment, it appears that ordinary course QOZBP must be funded by debt, existing cash, or non-QOF equity investment. We would appreciate clarification on this point as it may not always be possible to fund such replacement/modernization projects without additional equity capital.

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Lastly, and consistent with the requests of other stakeholder groups and coalitions supportive of Opportunity Zone investment,[1] we believe Treasury could reasonably interpret the *OBBBA* "applicable start date" requirement as only applying to tangible property located in the newly designated OZs (and not *TCJA* zones). Under this interpretation, the final guidance could clarify that new capital can continue to be deployed in *TCJA* zones in 2027 and 2028, and the Written Plan and Ordinary Course exceptions could apply to investments in those zones after December 31, 2028. Such an interpretation would facilitate even greater capital formation and investment over the next two years, support the development of new housing supply, and boost jobs and economic growth where it is needed most. Moreover, this interpretation appears more in line and consistent with the intent of Congress, which modified an initial House version of the *OBBBA* that would have ended *TCJA* zone designations at the end of 2026. We believe that this reading of the statute would be wholly consistent with the objectives of the legislation and a reasonable use of Treasury's substantial authority to provide well-designed transition rules as we shift from the old statutory regime to the new framework.

Thank you again for your focus and attention to ensuring a successful transition to the new Opportunity Zone rules. We would welcome the opportunity to meet with you or your staff after you have had a chance to review our recommendations.

Sincerely,

Jeffrey D. DeBoer
President and Chief Executive Officer

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1 See, e.g., Letter to Dep. Ass't. Sec. Salinger from the Novogradac Opportunity Zones Working Group, Comments on Notice 2026-40 – Transitional Guidance on Qualified Opportunity Zones (Jul. 17, 2026).