TAX SECTION

www.floridataxlawyers.org

CHAIR
Michael D. Minton
Fort Pierce
(772) 464-7700
mminton@deanmead.com

CHAIR-ELECT
Janette M. McCurley
St. Petersburg
727-892-9901
janette@gibbslawgroup.com

SECRETARY
Mark Scott
Coconut Grove
(305) 857-6768
mscott@kaufmanrossin.com

TREASURER
Brian M. Malec
Orlando
407-841-1200
BMalec@deanmead.com

IMMEDIATE PAST CHAIR
Joseph Barry Schimmel
Miami
(305) 670-0201
jschimmel@miamitaxlaw.com

BOARD LIAISON
Dennis G. Kainen
Miami
(305) 374-5544
dkainen@wkm-law.com

EDUCATIONAL PROGRAMS
Jason E. Havens, Director
Christopher Callahan, Director

SECTION ADMINISTRATION
Gregory A. McLaughlin, Director
Micah Fogarty, Director

STATE TAX
H. French Brown, Director

FEDERAL TAX
Michael Wilson, Director
James A. Schmidt, Director

LONG RANGE PLANNING
Harris L. Bonnette, Jr., Director

MEMBERSHIP RECRUITMENT
Dana M. Apfelbaum, Director
Steve M. Hogan, Director

NEW TAX LAWYERS
Lauren A. Klein, Director
Jeanette Moffa, Director

DIRECTORS AT LARGE
Abrahm W. Smith
Greg Marks
Steven Hadjilogiou
Mark Brown
D. Michael O'Leary
Shawn Wolf

PROGRAM ADMINISTRATOR
Leslie Reithmiller
The Florida Bar
(850) 561-5625
lreithmiller@floridabar.org

November 16, 2018

Internal Revenue Service
CC:PA:LPD:PR (REG-115420-18)
Room 5203
Post Office Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Comments to the Proposed Regulations under Section 1400Z-2 (Qualified Opportunity Zones)

Dear Sir or Madam:

I am pleased to submit The Florida Bar Tax Section's comments to the Proposed Regulations under Section 1400Z-2 (Qualified Opportunity Zones).

Principal authors for these comments were Michael Minton, French Brown, Andrew Huber, Steven Hadjilogiou, Michael Bruno, Keith Hagan, and Abrahm Smith.

Although the members of The Florida Bar Tax Section who participated in preparing these comments may have clients who would be affected by the proposed regulations, no such member 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.

Contact Persons:
Steve Hadjilogiou
McDermott, Will & Emery LLP
333 S.E. 2nd Ave., Suite 4500
Miami, FL 33133
Telephone: (305) 347-6521
Fax: (305) 938-0807
Email: steveh@mwe.com

Abrahm Smith
Baker & McKenzie LLP
1111 Brickell Ave., Suite 1700
Miami, FL 33131
Telephone: (305) 789 8972
Fax: (305) 789 8953
Email: Abrahm.smith@bakermckenzie.com

CHAIR
Michael D. Minton
Fort Pierce
(772) 464-7700
mminton@deanmead.com

CHAIR-ELECT
Janette M. McCurley
St. Petersburg
727-892-9901
janette@gibbslawgroup.com

SECRETARY
Mark Scott
Coconut Grove
(305) 857-6768
mscott@kaufmanrossin.com

TREASURER
Brian M. Malec
Orlando
407-841-1200
BMalec@deanmead.com

IMMEDIATE PAST CHAIR
Joseph Barry Schimmel
Miami
(305) 670-0201
jschimmel@miamitaxlaw.com

BOARD LIAISON
Dennis G. Kainen
Miami
(305) 374-5544
dkainen@wkm-law.com

EDUCATIONAL PROGRAMS
Jason E. Havens, Director
Christopher Callahan, Director

SECTION ADMINISTRATION
Gregory A. McLaughlin, Director
Micah Fogarty, Director

STATE TAX
H. French Brown, Director

FEDERAL TAX
Michael Wilson, Director
James A. Schmidt, Director

LONG RANGE PLANNING
Harris L. Bonnette, Jr., Director

MEMBERSHIP RECRUITMENT
Dana M. Apfelbaum, Director
Steve M. Hogan, Director

NEW TAX LAWYERS
Lauren A. Klein, Director
Jeanette Moffa, Director

DIRECTORS AT LARGE
Abrahm W. Smith
Greg Marks
Steven Hadjilogiou
Mark Brown
D. Michael O'Leary
Shawn Wolf

PROGRAM ADMINISTRATOR
Leslie Reithmiller
The Florida Bar
(850) 561-5625
lreithmiller@floridabar.org

The Florida Bar Tax Section is comprised of approximately 2,000 members.

As always, we will be pleased to provide additional commentary as requested. If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,

Michael D. Minton, Chair

Dear Ladies and Gentlemen,

On behalf of The Tax Section of the Florida Bar, we request the Treasury to implement the comments stated below with respect to the Code Section 1400Z (Opportunity Zones) Proposed Regulations.

1. Relief to the 180 Day Investment Requirement.

Code Section 1400Z-2(a)(1)(A) provides that a taxpayer invest gain into a QOF within 180 days of the sale or exchange that generated such gain (the "180 Day Investment Requirement"). Many taxpayers who recognized gains after the effective date of TCJA and in the beginning of the calendar year 2018 were effectively unable to comply with the 180 Day Investment Requirement because they did not receive any initial guidance on how to treat their gains and what constituted a Qualified Opportunity Fund until the initial set of proposed regulations was released on October 19, 2018. We recommend the Treasury to provide relief to such taxpayers by allowing taxpayers the option to choose the 180-day period to commence upon either (i) the date of the sale or exchange or, (ii) at the taxpayer's election, upon publication of the upcoming set of proposed regulations allowing such relief.

2. Election for Investments Held at least 10 Years.

The guidance that the election for investments can be preserved until December 31, 2047 was a welcome direction from Treasury. We request that due to the long-term nature of these projects and investments that further direction be given regarding what happens on or after December 31, 2047. We request Treasury provide the ability for investors to hold their investment indefinitely after that date and continue to make the election for basis step up to fair market value whenever the investment is sold under IRC § 1400Z-2(c). In the alternative, we request Treasury provide that on December 31, 2047, a fair market valuation basis step up of the investment should occur and the basis should be stepped up to that valuation on December 31, 2047.

3. Self-Certification of QOZ Partnerships and QOZ Stock Companies.

As it currently stands under proposed Treasury Regulation 1.1400Z-2(d)-1(a) only a QOF would be able to self-certify. However, QOFs are able to and will invest in QOZ partnerships and QOZ stock companies. In order to self-certify, the QOF would need to do a deep dive into the books and activities of the QOF partnerships and QOZ stock companies. This could prove to be a difficult task. We request the Treasury to allow QOZ partnerships and QOZ stock companies be able to self-certify such that the QOFs can rely on such certification. This would be similar to the issuance of a W-9 or W-8BEN. Once issued, the QOF can rely on the statement from the QOZ partnership of QOZ stock company, unless it had reason to know otherwise.

4. Original Use as it Relates to Previously Unused Structures.

Section 1400Z-2(d)(2)(D)(i) defines Qualified Opportunity Zone Business property to mean tangible property that, among other things, either has its original use in a qualified opportunity zone commence with a Qualified Opportunity Fund ("QOF") or that the QOF substantially improves. Rev. Rul 2018-29 states that given the permanence of land, land can never have its original use in a qualified opportunity zone commencing with a QOF. Regardless, the value of the land is excluded from the determination that the building is substantially improved. However, a building that was previously used and acquired by a QOF must be substantially improved. The most recent proposed regulations reserved on elaborating on the original use requirement. However, Prop. Reg. 1.1400Z-2(d)-1(c)(8) provides "If a QOF purchases a building located on land wholly within a QOZ, under section 1400Z-2(d)(2)(D)(ii) a substantial improvement to the purchased tangible property is measured by the QOF's additions to the adjusted basis of the building. Under section 1400Z-2(d), measuring a substantial improvement to the building by additions to the QOF's adjusted basis of the building does not require the QOF to separately substantially improve the land upon which the building is located." We are receiving many inquiries about the meaning of original use as it applies to buildings that have yet to be completed. We request the Treasury to provide a bright line rule defining a "building" to be a completed structure that has received its certificate of

occupancy. Without the receipt of a certificate of occupancy, a structure cannot have had a previous use. Put another way, the certificate of occupancy is required on a newly constructed building before it is legally allowed to be used. These structures are new construction and the first use (whether for commercial or residential use) will be with the QOF that subsequently obtains the certificate of occupancy on behalf of the structure. Without such a rule, it would be unclear at what point any amount of construction on land would be considered to require substantial improvement. For example, if the foundation of a building and a few walls had been constructed would that be a structure that has been already put to use in a QOZ? We recommend Treasury provide a bright line rule defining a "building" to be a completed structure that has received its certificate of occupancy.

5. Leased Property.

A qualified opportunity zone business is a trade or business in which, among other things, substantially all of the tangible property owned or leased by the taxpayer is "qualified opportunity zone business property." Qualified Opportunity Zone Business Property is defined to be property that was acquired by the qualified opportunity zone business by purchase after December 31, 2017. Proposed Treasury Regulation 1.1400Z-2(d)-1(d) appears to wisely equate a lease to an acquisition, otherwise, if the statute is read literally, for tangible property leased by a qualified opportunity zone business, the Code would require the Qualified Opportunity Zone Business to have acquired by purchase the leased tangible property to qualify. This literal reading could not be possible because this is a binary fact pattern, the property is either leased by the taxpayer or the property is acquired by purchase by the taxpayer.

Furthermore, the Qualified Opportunity Zone Business would be required to either put the property to first use or substantially improve the leased property. This would yield different results depending on the type of lease for non-first use leased property because substantial improvement is an investment in tangible property that exceeds the taxpayer's cost basis in the property.

It would seem prudent for the regulations to distinguish between (i) short term operational leases where the taxpayer has no cost basis and (ii) long term leases where the taxpayer/lessee makes leasehold improvements that may be capitalized and depreciated such as those addressed in Treasury Regulation § 1.167(a)-4 and pursuant to a ground lease as noted in Treasury Regulation § 1.1031(a)-1(c) that has a term at least thirty (30) years which are treated as tantamount to fee title ownership.

We believe that Congress intended that a Qualified Opportunity Zone Business operate from a location that is physically located in a qualified opportunity zone. Thus, if a Qualified Opportunity Zone Business is leasing real estate from which the business is operated, substantially all of such real estate should be located in a zone. However, it does not appear reasonable to require a lessee to substantially improve all leased tangible property. We request that the Treasury clarify how leased property should be treated. Specifically, we suggest the following sensible solution. A requirement that except in those situations addressed in (ii) above, substantially all leased property be located in a qualified opportunity zone with no requirement that the lessee substantially improve such property. This would allow companies to more easily open businesses and create jobs in qualified opportunity zones.

6. Tiered Entities.

Code Section 1400Z-2(d)(2)(A) defines Qualified Opportunity Zone Property ("QOZ Property") to mean property that is QOZ stock, a QOZ partnership interest, or QOZ business property. With respect QOZ stock and QOZ partnership interests, such entity must conduct a QOZ business. Section 1400Z-2(d)(3)(A) provides that a QOZ business is a business that, among other things, owns or leases certain qualified tangible property. As is the case with many businesses, it is foreseeable that a QOZ stock company or QOZ partnership would own one or more subsidiary entities that could be treated as either a corporation or partnership for U.S. federal tax purposes. It is not clear whether such interests could cause an entity to be disqualified as a QOZ business even if the subsidiary

entity otherwise met the requirements of Code Section 1400Z-2(d)(3)(A). We request Treasury to introduce a look-through rule such that a QOZ business that owns a subsidiary can still qualify as a QOZ business treating the assets of the subsidiary as directly owned by the parent entity.

7. Agricultural Land and Substantial Improvement

While the Proposed Regs and Rev. Ruling 2018-29 give some guidance as to how to determine "substantial improvement" for property that has been vertically improved (with a brick & mortar structure) there is no discussion of other types of improvement to real estate.

While the Rev. Ruling appears to dismiss the "original use" concept for real estate due to its permanence, there are types of "improvements" to real estate that should qualify for "original use" and be taken into consideration for determining "substantial improvement". The Rev. Ruling may promote an overly restrictive interpretation of "original use" as there are improvements to real property that are themselves part and parcel of the real property (ie vineyards & citrus trees) that qualify as "other tangible property", were eligible for investment tax credit under Section 38 and first year Section 179 expense and depreciation under Section 168, all of which would lend themselves to the concept of "original use".

We would like to know if the "original use" test could be satisfied if:

(i) an agricultural producer acquires land and improves the property (levels, beds, tiles, drains, irrigates, etc.) in order to plant crops on the property for the first time – and whether it makes a difference if the crop was an annual crop or a perineal crop;

(ii) if (i) above is coupled with an agricultural producer's investment in vertical integration (allowing it to wash, clean, pack or process crops for market in the Zone) would that be sufficient to constitute an "original use"; and

(iii) could environmental enhancements – such as those required to be able to receive and (in turn) sell mitigation credits – be sufficient to constitute an "original use"?

If not "original use" would each of the above qualify as "substantially" improved property?

8. Working Capital Safe Harbor.

The 31-month working capital safe harbor found in Prop. Reg. 1.1400Z-2(d)-1(d)(5)(iv) is welcomed by practitioners. Though, we do have the following comments to the safe harbor provision:

a. Given that Florida is subject to a number of hurricanes in any given year, we request that the 31 month time period be tolled for any unforeseeable circumstances, such as hurricanes and other natural disasters. An adequate amount of time after the natural disaster should be provided to allow for recovery before the time period to restart (e.g., 24 months).

b. The 31 month time period is inadequate for most real estate projects that would otherwise meet the requirements of a QOF. Development of real estate projects can involve significant time with respect to things such as obtaining permits & final environmental approvals, construction delays and other challenges. Therefore, we request that the 31 month time period be extended for all projects by an additional 24 months to be a 55 month time period. Furthermore, because the permitting process and environmental approvals can be subject to unforeseeable delays, the 55 month period should not begin to run until such permits and environmental approvals have been obtained by the taxpayer and are non-appealable. If that is not acceptable, we request that the

aforementioned rules apply for large scale projects. For example, projects whose expected cost exceeds an amount of $10 million.

c. Finally, we request a working capital safe harbor be added to the timing of substantial improvement. A building that requires substantial improvement will often require time consuming permitting and other delays before construction may even begin. Thus, we request that a safe harbor be created that would allow working capital that has been put aside according to a plan similar to the requirements described in Prop. Reg. 1.1400Z-2(d)-1(d)(5)(iv) to be treated as if it were an addition of basis to such property being substantially improved.

9. Tacked holding period for inheritance

It is unclear what happens upon the death of a taxpayer who dies while owning a QOF. Treasury should clarify that the estate and heirs receive a tacked holding period for the deferral period, 5 year & 7 year basis step-ups, and 10 year appreciation exclusion rule.

10. Tacked holding period for liquidation or termination of taxpayer

It is unclear what happens if the taxpayer, for example, a partnership or S corporation, liquidates for US tax purposes and whether its partners or shareholders would be entitled to a tacked holding period. The regs should clarify that the transferees received a tacked holding period for the deferral period, 5 year & 7 year basis step-ups, and 10 year appreciation exclusion rule.

11. Non-U.S. Persons.

In Florida we represent a number of non-U.S. persons who invest in U.S. real estate. The guidance provides that an eligible taxpayer is a person that may recognize gains for purposes of Federal income tax reporting. For non-U.S. persons, we request guidance for the following:

a. FIRPTA. For non-U.S. persons with gains from the sale or exchange of U.S. real estate, Federal tax law requires a FIRPTA withholding tax on such sale or exchange. In many of these transactions, the non-U.S. person seller requests a reduced FIRPTA withholding certificate prior to the sale or exchange. In such circumstances, the FIRPTA withholding agent holds in escrow the FIRTA withholding tax until the IRS issues the reduced FIRPTA withholding certificate. In many cases, it takes several months to receive the reduced withholding certificates from the IRS. Given that the taxpayers do not have access to the funds being held by the withholding agent until the IRS issues the FIRPTA withholding certificate, we request that the IRS allow taxpayers to elect to treat their 180-day period from the date of the sale or exchange or the date they receive the reduced FIRPTA withholding certificate.

b. Eligible Gains. In the case of non-U.S. persons, many of their non-U.S. source gains are generally not subject to U.S. federal income taxation. For example, when a non-U.S. person sells publicly traded U.S. securities, they generally pay no U.S. federal income tax on such gains. Given that the purpose of the opportunity zone legislation is to attract investor capital to opportunity zones, we request that the definition of eligible gain be clarified to include gains from non-U.S. persons that are not subject to U.S. federal income tax. Such gains would not become subject to U.S. income tax, but investments made with such gains would be eligible for the special rule for investments held for at least 10 years. This would allow non-U.S. persons to take gains that are not subject to U.S. Federal income tax, invest such gains in opportunity zones, and receive the benefits of the special 10-year rule. This would attract non-U.S. investor capital to opportunity zones that would not otherwise have an incentive to be directed to investments in opportunity zones.

We hope you consider these comments. Please let us know if you have any questions relating to the aforementioned points.