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April 1, 2020

Hon. David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: COVID-19 Relief for Qualified Opportunity Zone Deadlines

Dear Assistant Secretary Kautter and Commissioner Rettig:

We write requesting the Department of the Treasury (Treasury) and the Internal Revenue Service (the Service) to issue relief in response to the COVID-19 emergency with respect to the deadlines applicable to qualified opportunity zones (QOZ) under section 1400Z-2. Specifically, we recommend that Treasury and the Service:

- Clarify that the 24-month extension of the working capital safe harbor and the 12-month extension for the reinvestment by a qualified opportunity fund (QOF) for federally declared disasters apply automatically to QOZ businesses in all QOZs nationwide due to the Emergency Declaration (as defined below), and that these periods begin on March 13, 2020, and extend until the earlier of the end of the Emergency Declaration or the period expressed in the regulations.
- Extend the end of the 30-month substantial improvement period by one year for QOFs with substantial improvement periods ending in 2020.
- Deem any failure to meet the 90-percent asset test on a testing date falling during the period beginning March 13, 2020, and through July 15, 2020, to be due to reasonable cause, and treat any failure to meet the 90-percent asset test for the remainder of the year to be due to reasonable cause if the QOF can demonstrate that the failure was attributable to the COVID-19 emergency.



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- Extend the 180-day period in section 1400Z-2(a)(1)(A) by a three-month period for gains required to be invested during the period beginning on March 13, 2020, through the end of 2020 (or at least through July 15, 2020, consistent with Notice 2020-18).
- Provide clarification that employees of a QOZ business who are teleworking due to the COVID-19 emergency will still be deemed to be performing services in the QOZ for purposes of the gross income test.

Background

On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic (Emergency Declaration). The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).”

On March 21, 2020, Treasury and the Service issued Notice 2020-18, which extended the filing deadlines and payment due dates from April 15, 2020 to July 15, 2020.¹

Extended Working Capital Safe Harbor and Reinvestment Period

Discussion

Section 7508A provides Treasury and the Service with authority to postpone deadlines under the internal revenue laws for up to one year for a taxpayer determined by the Secretary to be affected by a federally declared disaster as defined in section 165(i)(5)(A). The Secretary is granted broad authority to postpone deadlines for many types of acts, including filing returns, claims for refund, bringing suit, or “any other act required or permitted under the internal revenue laws specified by the Secretary.”² The Secretary is also granted the authority to disregard up to one year in determining the amount of any penalties.³ For purposes of section 165(i)(5), a “federally declared disaster” means any disaster determined by the President to warrant assistance under the

¹ The notice superseded Notice 2020-17, which limited the payments that could be deferred and did not extend the filing deadline. On March 24, 2020, the Service issued frequently asked questions related to the relief provided in Notice 2020-18.

² I.R.C. §§ 7508A(a)(1); 7508(a)(1).

³ I.R.C. § 7508A(a)(2).



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Stafford Act. The Stafford Act provides for assistance in the event of a disaster or emergency declaration. Treasury and the Service acknowledged in Notices 2020-17, 2020-18, and 2020-20 issued earlier this month that the Emergency Declaration triggered their authority under section 7508A.⁴

The QOZ regulations provide that two of the deadlines may be extended in the case of a federally declared disaster under section 165(i)(5)(A). First, for purposes of the working capital safe harbor in Treas. Reg. § 1.1400Z2(d)-1(d)(3)(v), a QOZ business “may receive” up to an additional 24 months to consume its working capital assets if the QOZ business is located in a QOZ within a federally declared disaster area (as defined in section 165(i)(5)).⁵ Second, a QOF “may receive” up to an additional 12 months to reinvest proceeds from a sale or disposition of, or a return of capital from, QOZ property if the reinvestment is delayed due to a federally declared disaster (as defined in section 165(i)(5)(A)).

Recommendation

There is uncertainty regarding whether the Emergency Declaration constitutes a federally declared disaster within the meaning of section 165(i)(5)(A) and, if so, regarding the scope of the federally declared disaster. There have also been questions, as a result of the “may receive” language, whether such relief is automatic or whether QOZ businesses located in the disaster area must request such relief, and how the time period is determined. We recommend that Treasury and the Service clarify that the 24-month extension of the working capital safe harbor and the 12-month extension for the reinvestment by a QOF for federally declared disasters applies automatically to QOZ businesses in all QOZs nationwide due to the Emergency Declaration, and that these periods begin on March 13, 2020 and extend until the earlier of the end of the Emergency Declaration or the period expressed in the regulations.

Extension of Substantial Improvement Period

Discussion

Section 1400Z-2(d)(2)(D)(ii) provides a 30-month period in which property must be substantially improved in order to meet the substantial improvement requirement. Similar to the issue regarding the working capital safe harbor, due to the COVID-19

⁴ See also Rev. Rul. 2003-29, 2003-11 I.R.B. 587.

⁵ Treas. Reg. § 1.1400Z2(d)-1(d)(3)(v)(D).



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emergency, QOZ businesses are facing difficulty obtaining supplies or labor needed to improve property within the substantial improvement 30-month period. Pursuant to section 7508A(a), Treasury and the Service have authority to postpone deadlines for up to one year for taxpayers who have been affected by a federally declared disaster, including the Emergency Declaration.

Recommendation

Treasury and the Service should issue guidance providing that for QOFs that have a 30-month period for substantial improvement ending during 2020, the end of the substantial improvement period should be extended by one year pursuant to section 7508A(a).

90-Percent Asset Test

Discussion

Under section 1400Z-2(d)(1), at least 90 percent of a QOF's assets must be invested in QOZ property. The 90-percent test is generally the average percentage of assets measured on the last day of the first six-month period of the taxable year of the QOF and the last day of the taxable year, or June 30 and December 31 for a calendar-year QOF. If the QOF does not satisfy this 90-percent threshold, it is generally subject to a penalty under section 1400Z-2(f).

Under 1400Z-2(f)(3), Treasury and the Service have authority to not impose the penalty when failure to meet the 90-percent asset test is due to reasonable cause. In addition, as described above, Treasury and the Service have authority to disregard a period of up to one year under section 7508A in determining penalties.

Recommendation

Many businesses have halted operations as a result of the COVID-19 emergency, and conducting due diligence of potential investments has become difficult due to travel and social distancing restrictions. As a result, some QOFs are having difficulty deploying capital into new investments in QOZ property. If these QOFs fail the 90-percent asset test for the first six-month period, they are much more likely to fail for the entire year due to the averaging computation.



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We recommend that Treasury and the Service deem a failure to meet the 90-percent asset test on any testing date falling on or after March 13, 2020, (the date of the Emergency Declaration) and on or before July 15, 2020, (the extended due date for tax returns and payments under Notice 2020-18) to be due to reasonable cause and not impose the associated penalty.

We also recommend that a failure to meet the 90-percent asset test on any testing date falling after July 15, 2020 through the end of 2020 be treated as due to reasonable cause if the QOF can demonstrate that the difficulty in meeting the 90-percent asset test was attributable to the COVID-19 emergency. To provide certainty to taxpayers, we also recommend providing a list of documentation that would satisfy the requirement to demonstrate difficulty.

180-Day Investment Period

Discussion

Section 1400Z-2(a)(1)(A) provides that new QOZ investments must be made in a QOF within 180 days of the taxpayer's sale or exchange of the capital gain property.

Recommendation

Because of the COVID-19 emergency, QOFs may not be accepting new investments at this time due to the difficulty in deploying such capital into qualifying QOZ property investments. Treasury and the Service have authority to extend statutory time periods pursuant to section 7508A. In Notice 2020-18, Treasury and the Service exercised this authority to extend the deadline for taxpayers to file and pay federal income tax returns by three months from April 15, 2020 to July 15, 2020. Included with this relief is the extension of the deadline for filing Form 8949 on which taxpayers report deferral of gain for investments in QOFs. Consistent with the relief granted in Notice 2020-18, we recommend that Treasury and the Service extend the 180-day period in section 1400Z-2(a)(1)(A) by three months with respect to gains already recognized for which the 180-day period would end on or after March 13, 2020, and on or before July 15, 2020. A similar extension should apply for all 180-day periods provided in the regulations, such as gains arising from passthrough entities and installment sales. However, because the market impacts are likely to last well beyond July 15, it would be helpful to apply this three-month extension for 180-day periods ending through the end of 2020.



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Location of Employee Services for Gross Income Test

Discussion

For purposes of the requirement that at least 50 percent of the gross income of a QOZ business is derived from the active conduct of a trade or business in the QOZ, the regulations provide safe harbors that look to the location in which services are performed for the QOZ business.⁶ Due to the COVID-19 emergency and various shelter-in-place orders, employees may be forced to telework from their homes, which may be located outside of the QOZ.

Recommendation

Treasury and the Service should issue guidance clarifying that employees of QOZ businesses whose normal work location is within a QOZ will still be treated as performing services within the QOZ notwithstanding a temporary work location outside of the QOZ as a result of the COVID-19 emergency.

We would be pleased to answer any questions you have regarding these comments.

Sincerely,

John W. Lettieri
President and Chief Executive Officer
Economic Innovation Group

cc: Hon. Michael J. Desmond, Chief Counsel, Internal Revenue Service
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury

⁶ Treas. Reg. § 1.1400Z2(d)-1(d)(3)(i).