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Reporting The Impact of Qualified Opportunity Zones

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The qualified opportunity zone program, introduced in 2017 as part of the Tax Cuts and Jobs Act (TCJA),¹ is a temporary program designed to encourage private sector investment in designated low-income communities (QOZs). The QOZ program provides three main tax incentives to encourage an investment in a QOZ. First, a taxpayer may defer the recognition of certain capital gains for federal income tax purposes until December 31, 2026, if the taxpayer invests those gains in a qualified opportunity fund (QOF) within 180 days of the transaction that generated the capital gains.² Second, up to 15% of the taxpayer's deferred capital

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¹ Pub. L. No. 115-97, §13823.

² §1400Z-2(a). All section references herein are to the Internal Revenue Code of 1986, as amended (the "Code"), or the Treasury regulations promulgated thereunder, unless otherwise indicated. A taxpayer may need to recognize the deferred gain prior to December 31, 2021, if an inclusion event occurs. An inclusion

gain may be permanently reduced, depending on the length of time that the taxpayer holds its QOF investment prior to December 31, 2026.³ Finally, if the taxpayer holds its QOF investment for at least 10 years, any gain realized on the disposition of the QOF investment may be permanently excluded from income.⁴

The QOZ program differs from prior community development programs in several ways. By allowing for the exclusion of gains from the investment, rather than a credit or grant based on the amount of invested capital, the QOZ program most rewards the most successful investments. The QOZ program also differs from prior programs in the manner in which eligibility is determined. For example, in the new markets tax credit program (NMTC), community development entities must apply to the Treasury Department (Treasury) for an annual allocation of benefits and the overall program is subject to an annual volume cap.⁵ Although the legislative history to the QOZ program provided in documents related to the TCJA indicates that the QOZ program was originally intended to be regulated in a similar manner,⁶ under the QOZ program as implemented by Treasury, a QOF seeking to provide QOZ program benefits to taxpayers need only provide a self-certification to the IRS that it is a QOF and then provide an annual reporting to the IRS of its continued compliance with the program's requirements.

event generally occurs if the taxpayer's investment in the QOZ program is reduced. §1400Z-2(b); Reg. §1.1400Z2(b)-1(c).

³ §1400Z-2(b)(2)(B)(iii), §1400Z-2(b)(2)(B)(iv); Reg. §1.1400Z2(b)-1(e).

⁴ §1400Z-2(c); Reg. §1.1400Z2(c)-1.

⁵ Tax rules governing eligibility for the NMTC by taxpayers are contained in §45D2 and Reg. §1.45D-1. Additional rules governing the award and use of allocation authority under the program are promulgated by the Community Development Financial Institutions Fund of the U.S. Department of the Treasury. The NMTC program was extended through 2025 at an annual allocation level of \$5 billion by the Consolidated Appropriations Act of 2021, which was signed into law on December 27, 2020.

⁶ H. Rep. No. 115-466 at 538 ("The provision intends that the certification process for a [QOF] will be done in a manner similar to the process for allocating the [NMTC]. The provision provides the Secretary authority to carry out the process").

In this article, we will discuss:

- the history of the QOZ reporting provisions,
- the reporting framework currently provided for by Treasury,
- early reports on the impact of the program,
- approaches taken by states for state level reporting, and
- various proposals for additional federal level reporting.

In doing so, we hope to shed light on what the future may hold for QOZ reporting as Congress seeks information necessary to evaluate the success of the program in increasing investment in the designated low-income communities.⁷

HISTORY OF THE QOZ REPORTING PROVISIONS

Before its passage as part of the TCJA, the QOZ program was first introduced in the Investing in Opportunity Act (the “Act”) in April, 2016.⁸ The Act included provisions, in addition to the substantive operating provisions of the QOZ program, that required Treasury to report to Congress on the QOZ program’s impact on job creation, poverty reduction, new business starts, and other metrics selected by Treasury. Although the operating provisions from a subsequent version of the Act were included verbatim in the TCJA as the QOZ program,⁹ the reporting provisions included in the Act were omitted from the TCJA and are therefore not currently law.¹⁰

The provisions removed from the Act went further than those enacted as part of the NMTC program, which required the Comptroller General “pursuant to an audit of the [NMTC] program. . . report to Con-

⁷ H. Rep. No. 115-466 at 538 (“The provision provides two main tax incentives to encourage investment in qualified opportunity zones”).

⁸ Investing in Opportunity Act, S. 2868, 114th Cong. (2016) (introduced on April 27, 2016).

⁹ Investing in Opportunity Act, S. 293, 115th Cong. (2017) (introduced on February 2, 2017).

¹⁰ Because the TCJA was enacted under the budget reconciliation process (i.e., special provisions for budgetary measures that require that every provision have more than an incidental effect on revenue or spending and that allow for passage by a simple majority of the Senate) the reporting provisions may have been removed as extraneous to avoid the risk of being struck or subject to a point of order requiring a vote of 60 senators; rather than the simple majority. CRS Report December 1, 2020: The Budget Reconciliation Process: The Senate’s “Byrd Rule,” <https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation>. See also <https://www.klgates.com/Senators-Introduce-Report-Card-Legislation-to-Measure-the-Impact-of-Opportunity-Zone-Investments-05-21-2019>.

gress on such program. . .”¹¹ The Act would have required Treasury to report to Congress the impact of the QOZ program specifically on job creation, business starts and poverty reduction (certain “outcome data”) as well as the number of QOFs, the amount of assets held in QOFs, the composition of QOF investments by asset class, and the percentage of QOZs that have received QOF investments (certain “input data”). No reporting by taxpayers was required by the Act.

CURRENT FEDERAL REPORTING REQUIREMENTS

The determination that the program would be self-certified by taxpayers has limited Treasury’s role in QOZ policy. Treasury has a significant role, however, in implementing regulations and tax administration. Under the current reporting framework, a QOF is required to file Form 8996, *Qualified Opportunity Fund*, as part of its annual federal income tax return. On this form, the QOF self-certifies its status as a QOF and reports the amount of assets in the QOF and what portion of those assets are QOZ property. Form 8996 also requires the QOF to report the location and value of certain tangible property (whether held directly by the QOF or indirectly through an interest in qualified opportunity zone stock or qualified opportunity zone partnership interests) by census tract on six month intervals.¹² Based on annual data provided on Form 8996, if authorized, the IRS could determine and report publicly on (i) the number of QOFs, (ii) the aggregate amount of investment in QOFs, (iii) the portion of that investment reported by QOFs as QOZ property, and (iv) the amount of investment made in a particular QOZ. Investors are required to file Forms 8997, *Initial and Annual Statement of Qualified Opportunity Fund (QOF) Investments*, reporting their QOF investments and deferred gains held at the beginning and end of the current tax year, as well as any capital gains deferred by investing in a QOF and QOF investments disposed of during the current tax year.

This current reporting could enable Treasury to report input data related to the QOZ program. Although

¹¹ Pub. L. No. 106-554, §1(a)(7).

¹² Form 8996 was first introduced in draft form on October 19, 2018, and finalized in December 2018 to enable a QOF to certify that it is organized to invest in qualified opportunity zone property and its QOZ activities. The 2018 Form 8996 required the QOF to provide standard tax form details such as the EIN, filing status, and QOZ specific self-certification, the investment standard calculation, and penalty calculations. There was no other data requested. On October 30, 2019, the IRS released a draft of a more detailed Form 8996 on which the QOF was required to provide information on its investments and the details of the census tracts where the QOF has investments. This version was finalized in January 2020.

Treasury has a specific grant of authority in §1400Z-2 to prescribe regulations necessary and appropriate to certify QOFs, and prevent abuse, it is not clear whether that authority extends far enough to permit Treasury to require taxpayers to report information that does not have a direct link to tax administration, but that might provide the output data necessary to evaluate the effectiveness of the QOZ program in implementing its goals (e.g., the number of employees).

In connection with the issuance of proposed regulations in 2019, Treasury published a Request for Information seeking public input on the development of information collection and tracking related to investment in QOFs. The Request for Information requested comments with respect to methodologies for assessing relevant aspects of investments held by QOFs, including “the impacts and outcomes of the investments in those areas on economic indicators, including job creation, poverty reduction, and new business starts.”¹³ But in final regulations, Treasury, while acknowledging the hundreds of comments received on this topic, declined to provide guidance “beyond reporting of data in addition to what is useful for tax administration purposes” and referenced an early release draft of Form 8996 that it had released on October 30, 2019 for public review, which included new reporting requirements for QOFs, noting “[t]he information required to be reported focuses on data useful for tax administration purposes, data that may also be instructive in measuring the impact and effectiveness of the statute.”¹⁴

EARLY REPORTS ON IMPACT

Even though the Act’s reporting requirements did not become part of law, some information is publicly available on the impact of the QOZ program. Reporting on outcomes at this point in time may be premature – the full list of QOZs was not formalized until July 9, 2018, final implementing regulations for the QOZ program were not promulgated until January, 2020 (just before the beginning of the Covid-19 emer-

¹³ Request for Information on Data Collection and Tracking for Qualified Opportunity Zones, 84 Fed. Reg. 18,648 (May 1, 2019).

¹⁴ T.D. 9889, 85 Fed. Reg. 1866 (Jan. 13, 2020). During the Comment Period for the proposed regulations, the IRS received numerous comment letters on the reporting requirements. Various groups including the Real Estate Round Table, the Congressional Black Caucus, Community Development Groups, National Multi Family Housing Council, The Economic Innovation Group, U.S. Impact Investing Alliance – to name a few – submitted comment letters encouraging Treasury to include reporting requirements around social impact.

gency),¹⁵ and even the Act would not have required a report to Congress until five years after the law’s enactment.

Nonetheless, official reports on the QOZ program have been published by the White House Opportunity and Revitalization Council (the “Council”). The Council, comprised of cabinet level appointees across the government, was created by Executive Order on December 12, 2018, with a mission to, among other things, evaluate “what data, metrics, and methodologies can be used to measure the effectiveness of public and private investments in urban and economically distressed communities, including qualified opportunity zones.”¹⁶ In May 2020, the Council issued a best practices report to the president, encouraging the collection and tracking of data by all participants in the QOZ program, and pointing to a variety of open source data that could be used to measure the impact of the QOZ program.¹⁷

In August 2020, the Council of Economic Advisors reported to the White House its “Initial Assessment” of the Impact of Opportunity Zones.¹⁸ The Initial Assessment noted that census tract level data for 2019 would not be available for several years. Therefore, the Council relied on other studies and data to make the initial assessment. Relying on a prior study, the Council estimated that the capital already raised by QOFs as of August 2020 could lift one million people out of poverty and into self-sufficiency, decreasing poverty in QOZs by 11%.¹⁹ Using data from the Securities and Exchange Commission, the Initial Assessment concluded that private equity investment in QOZ businesses grew 29% relative to the comparison group of businesses in eligible communities that were not selected as QOZs.²⁰ The Initial Assessment also discussed housing affordability, finding that housing

¹⁵ Notice 2018-48.

¹⁶ EO 13853 (Dec. 12, 2018).

¹⁷ For example, the report referred to “data from the U.S. Postal Service which is updated every quarter and can capture changes in long-term vacant addresses, increases in total residential and business addresses (a sign of building permit activity), and changes in active addresses (a sign of residential and business leasing activity).” Opportunity Zones Best Practices Report to the President from The White House Opportunity and Revitalization Council (May 2020), https://opportunityzones.hud.gov/sites/opportunityzones.hud.gov/files/documents/OZ_Best_Practices_Report.pdf.

¹⁸ The Impact of Opportunity Zones: An Initial Assessment, The Council of Economic Advisers (Aug. 2020).

¹⁹ The Impact of Opportunity Zones: An Initial Assessment at 25. Freedman, M., *Teaching New Markets Old Tricks: The Effects of Subsidized Investment on Low-Income Neighborhoods*, Journal of Public Economics 96, nos. 11–12: 1000–1014 (2012).

²⁰ The Impact of Opportunity Zones: An Initial Assessment, Executive Summary, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/08/The-Impact-of-Opportunity-Zones-An->

prices in QOZs increased by 1.1% over two years using the Federal Housing Finance Agency repeat sales index for single-family homes as source data. The Initial Assessment did not discuss rents, focusing instead on indirect benefits to renters from improved amenities.

The Initial Assessment did not discuss job creation within QOZs. Several private reports, however, have evaluated the QOZ program's impact on job creation. Two, which considered job postings and posted salaries in QOZs, concluded that the impact was negligible.²¹ Another report, which used employment data from Your-economy Time Series (YTS) concluded that QOZ designation led to a 3-4.5% increase in employment in urban areas.²²

The idea behind requiring QOFs to report various input data (described in greater detail below in Additional Federal Proposals) like number of employees and number of residential units is that this additional information may allow for better conclusions around the QOZ program's effect on job creation, poverty reduction, new business starts, affordable housing, and potentially other metrics Congress determines to be relevant to evaluating the program's success.

STATE APPROACHES

The nomination of census tracts for QOZ designation was delegated to state governors, who, in conjunction with their advisors, worked within the given parameters to select the areas within their jurisdictions to nominate as potential QOZs. Through the creation and maintenance of various pre-existing state and local credit and incentive programs or other regional economic development initiatives, state authorities may already have been familiar with the development needs of specific areas within the regions qualifying for potential selection as QOZs. Accordingly, states may have emphasized different criteria in nominating census tracts.

In contrast to development programs driven by state and local governments, for which monitoring has been a common feature, the QOZ program involved state governments in the selection process but included no inherent role for state and local governments to regulate the investments made within the QOZs. Some states have reacted to the QOZ program by promulgating laws or regulations rewarding spe-

cific activities in QOZs consistent with state or local government priorities (or discouraging activities not in line with local priorities). Others have worked through their existing economic and community development groups to support developers and businesses in QOZs, and with potential investors to highlight the benefits of investing in QOZs within their jurisdictions. At least one, Louisiana, added all QOZs within the state to its definition of "economic development districts," using its existing development infrastructure to support projects within QOZs subject to preexisting rules.²³

States may seek data on the activities of QOFs for reasons similar to Congress – i.e., to evaluate the effectiveness of the federal incentive in accomplishing their own goals for the QOZs. They likely also desire to align state incentives and other programs with the federal incentive. States may also be at a disadvantage relative to the federal government with respect to data collection because (i) several states do not impose income taxes on individuals and/or businesses and therefore may not be able to use tax returns to gather data on who is investing in QOZs within their boundaries, and (ii) even if they do impose income taxes, not all taxpayers investing in their QOZs may be required to file a tax return with the state (e.g., a QOF based in a different state that invests in a QOZB corporation in the state).

States have been able to gather data in a variety of ways – a few have implemented regulated programs but others have followed the model suggested by the Council in its best practices report "through complementary Opportunity Zones incentives. . . [playing] a key role in identifying, tracking, and measuring Opportunity Zone investments within their jurisdictions."²⁴

Regulated Programs

Alabama and the District of Columbia each offer state tax benefits comparable to federal QOZ tax benefits (i.e., these jurisdictions "conform") only for certain QOFs that apply for and are granted special state QOF status, generally following a regulated model more like the NMTC program and less like the federal QOZ program.

Alabama limits state QOZ tax benefits to certain "approved QOFs." The QOFs must be 75% or more invested in businesses or property located in Alabama, and must deploy a substantial portion of their capital into certain specified project and company types, in-

Initial-Assessment.pdf.

²¹ Neumark, D., Freedman, M., Khanna, S., *The Impacts of Opportunity Zones on Zone Residents* (2021); Atkins, R., Hernández-Lagos, P., Jara-Figueroa, C. *What is the impact of Opportunity Zones on employment?* (2021).

²² Arefeva, A., Ghent, A., Davis, M., and Park, M., *Job Growth from Opportunity Zones* (2021).

²³ La. Rev. Stat. §47:4312(3), La. Rev. Stat. §47:4315(A)(6).

²⁴ Opportunity Zones Best Practices Report to the President from The White House Opportunity and Revitalization Council, p. 20 (May 2020).

cluding affordable housing or “companies or projects that will have substantial, measurable impact on social, environmental, or economic conditions in low-income areas.” In order to be approved by the Alabama Department of Economic and Community Affairs (ADECA), ADECA must determine that the fund has the “capacity to improve Alabama’s low-income opportunity zone communities,” taking into account certain specified criteria.²⁵ Applicants must disclose their strategy for measuring, tracking, and reporting annually to ADECA how they will achieve investment outcomes set forth in their applications and must partner with local or statewide public or nonprofit entities to ensure community engagement.²⁶

In the District of Columbia, for a resident individual investor to receive benefits in the investor’s tax base, for the District of Columbia personal income tax, that are similar to the federal income tax base benefits, the individual’s investment must be in a QOF that is certified by the Mayor of the District of Columbia as an “eligible QOF.” To qualify as an eligible QOF, the QOF must submit documentation to the Mayor demonstrating that at least some of the QOF’s investments in QOZBs and QOZB Property meet one of four criteria: (i) the investments are in a business or property that has been selected by the District of Columbia for a grant, loan, tax incentive, tax abatement, or other benefit or incentive intended to pro-

²⁵ ADECA must further determine that the QOF is deploying a substantial portion of its capital into one or more of the following: (i) rural areas described in Ala. Code §40-18-376.1(a); (ii) technology companies meeting all of the criteria found in new Ala. Code §40-18-376.3(c) or facilities housing such companies; (iii) companies or projects described in Ala. Code §40-18-372(1) or facilities housing such companies or projects; (iv) workforce training; (v) affordable housing; (vi) remediation of blighted or abandoned property; (vii) revitalization of distressed urban neighborhoods; or (viii) companies or projects that will have substantial, measurable, impact on social, environmental, or economic conditions in low-income areas. This requirement can also be met if a fund demonstrates to ADECA’s satisfaction “that it will create substantial wealth within and for residents of Alabama’s low-income and rural communities and will directly track the wealth created.” AL H.B. 540: Alabama Incentives Modernization Act - Ala. Code §41-10-46.01.

²⁶ To that end, the application would be required to show all of the following: (i) the amount of existing committed capital or potential to raise committed capital; (ii) the investment track record or strength of the applicant’s management team; (iii) the existing project pipeline or strategy for developing new pipeline; (iv) the fund structure and anticipated returns within that fund structure; (v) the presence of sound legal, accounting, and compliance policies and procedures; (vi) a strategy for measuring, tracking, and annual reporting to ADECA on how the approved opportunity fund is achieving investment outcomes set forth in its applications; and (vii) one or more clear and demonstrable partnerships with local or statewide public or nonprofit entities to - ensure community engagement. AL H.B. 540: Alabama Incentives Modernization Act - Ala. Code §41-10-46.01.

mote economic or community development in the District of Columbia, (ii) the investments are in a business that has been selected by the Office of the Deputy Mayor for Planning and Economic Development (DMPED) to manage the redevelopment of a property or are in property owned or disposed of by the District of Columbia government, (iii) a local Advisory Neighborhood Commission gives unconditioned resolution of support, or conditioned resolution of support for which all conditions have been met, that addresses the business or property within the relevant neighborhood area, or (iv) the QOF has been scored at seventy five or greater by the Urban Institute’s OZ Community Impact Assessment Tool.²⁷ If a QOF is approved, the DMPED will issue an approval letter to the QOF. The DMPED has indicated the approval process must be completed annually over a 10-year period in order for the investor to receive “abatement” similar to the basis step-up benefits that can occur for federal income tax purposes.

The programs implemented by Alabama and the District of Columbia should allow them to gather significant amounts of data on the QOFs they approve. However, as state tax authorities are not able to impact federal income tax benefits, it is likely that QOFs that are not approved for state tax benefits will nonetheless invest in QOZs in Alabama or the District of Columbia without any requirements to report to the state on relevant activities.

Limitation of Benefits to In-State Investments

Arkansas and Hawaii each limit QOZ tax benefits to QOFs investing in QOZBs and QOZ property within the state. This generally impacts tax residents of those states by requiring them, in order to replicate the federal income tax base benefits in the state tax base, to ensure their QOF invests in QOZBs and QOZ property located within their resident state. The net impact of this model to nonresident investors depends on sourcing of income and the rules for the credit for taxes paid offered by the individual’s state of residency, but may in some cases present a disincentive to invest due to a double tax impact.²⁸

Notwithstanding that this policy may deter investment in their QOZs by out of state residents, Arkansas and Hawaii should be able to collect similar data from QOFs that choose to invest in their QOZs to what would have been available had the state not limited state QOZ tax benefits in this manner.

²⁷ DC Code §47-1803.03(a)(20)(D), §47-1803.03(b-5). *See also* <http://ozmarketplace.dc.gov/pages/district-qualified-opportunity-fund-dc-qof>.

²⁸ <https://tax.kpmg.us/events/webcasts/kpmg-qoz-webcast-series/qoz-quick-hit.html>.

Separate Tax Incentives for In-State Projects

Certain states have enhanced state QOZ tax benefits for QOZ investments that meet additional criteria aligned with their development goals. For example, Wisconsin gives an additional income tax base benefit for investments in Wisconsin QOZs.²⁹ West Virginia provides an incentive that allows any new business created in a QOZ to be exempt from corporate and personal income tax for 10 years as long as the business was created before 2024.³⁰ New Mexico guaranteed \$1 million in Local Economic Development Act (LEDA) funding to projects locating in New Mexico QOZs if they meet certain additional criteria based on the type of industry or the amount of capital investment or annual payroll.³¹ And Ohio provides a 10% non-refundable individual state income tax credit for investments made into Ohio QOZ Property, subject to an application and a volume cap.³²

In addition to collecting tax return data, these regimes may allow states to collect additional data specific to measuring their desired outcomes. For example, the West Virginia incentive allows for collection of data on new business starts. The New Mexico and Ohio tax credit programs appear to be quasi-regulated programs imposing some guardrails with respect to the additional expenditure; the New Mexico program may allow for collection of payroll data.

Incentives for Reporting

Maryland has a specific tax credit enhancement for impact reporting, the “Opportunity Zone Enhancement Credits” program. To apply for these credits, a QOF must include an impact report with qualitative and quantitative data addressing job creation, providing affordable housing, providing healthy food, promoting environmental sustainability, ensuring minimum wage thresholds are met, details of local members of the board of directors for the QOZB and statement of community benefits agreement between the QOF and the community groups in the QOZ.³³

²⁹ Wis. Stat. §71.26(3)(vm)(1).

³⁰ W.Va Code §11-21-12L. The state may provide additional incentives and project related grants depending on the project.

³¹ <https://gonm.biz/business-development/edd-programs-for-business/finance-development/opportunity-zones>, https://gonm.biz/uploads/documents/pressReleases/Press_Release_OZ_Jobs_Bonus.pdf.

³² Ohio Rev. Code Ann. §122.84 (enacted by L. 2019, H 166, §101.01, eff. Oct. 17, 2019) https://www.development.ohio.gov/bs/bs_censustracts.htm The total credit is limited to \$1 million per fiscal biennium (10% of a \$10 million investment). There is also a cap of \$50 million on the total allocation of credits.

³³ Maryland S.B. 581, Subtitle 10, §6-1001 (enacted by L. 2019, c. 211, §1; amended by L. 2020, c. 38, §1; L. 2020, c. 254,

California as an Example

One QOZ conformity bill that was part of Governor Newsom’s budget trailer in California included a combination of a regulated program, a limitation of benefits to in-state investment, and steep penalties for a QOF’s failure to report outcome data.³⁴

In addition to limiting benefits to in-state QOZ investments, this legislation would have (1) required an application to the Franchise Tax Board (FTB) for benefits (though granted on a first come first served basis unless applying for an allocation in excess of \$100 million provided the requirements are met), (2) limited benefits to certain types of assets (generally, affordable housing and renewable energy), and (3) capped the overall “allocation” by the FTB to California QOFs to \$5 billion and to any particular QOF generally to \$100 million.³⁵ The legislation would also have required QOFs to report to the FTB at six month intervals certain input data (e.g., capital raised, investment purpose), and within 60 days of year end certain outcome data (e.g., affordable housing units and alternative energy production capacity).³⁶ The legislation would also have required the FTB to report annually to the state legislature on the program, and to post on its internet website the total amount of California qualified opportunity zone investment allocated as of the end of each month. A unique penalty regime would have applied to a QOF that did not report the required information completely and timely, treating failure to report as an “inclusion event” ending tax benefits, in addition to other penalties.³⁷

Despite its failure to conform to federal QOZ tax benefits or otherwise offer any tax benefits to QOFs, it is nonetheless the state that has attracted the most QOZ investment dollars. Of the \$15 billion raised for

§1 and L. 2020, c. 255, §1). <https://commerce.maryland.gov/fund/programs-for-businesses/opportunity-zone-enhancement-credits>.

³⁴ Budget Trailer Bill (Administration) Opportunity Zone Tax Conformity. See also Fact Sheet dated August 22, 2019, <https://ajed.assembly.ca.gov/content/opportunity-zone-related-legislation>.

³⁵ The allocation is the maximum amount that a California qualified opportunity zone is allowed to raise as investment in the fund.

³⁶ QOFs would be required to report (1) a description of each project that received an allocation during the taxable year, (2) the local agency and the census tracts where the investment was made, (3) the number of low-income housing units created as a result of the investment, if applicable, (4) the number jobs created as a result of the investment and the average wage paid for those jobs, and (5) the alternative electricity production capacity created as a result of the investment, if applicable. Budget Trailer Bill (Administration) Opportunity Zone Tax Conformity, SEC. 5, §18190 (f) at 5. <https://ajed.assembly.ca.gov/sites/ajed.assembly.ca.gov/files/OpportunityZonesConformity%20ver%202%20-%20August%2023%202019.pdf>.

³⁷ Budget Trailer Bill (Administration) Opportunity Zone Tax Conformity, SEC. 6, §19183.5 at 7.

QOFs by one source, 11% was invested in California, ranking California first among states.³⁸ Because California does not offer tax benefits to QOFs or QOF investors, presumably it will not be able to gather information about the large number of QOZ investments within its QOZs through the income tax return process.

Not all states may be as directly motivated as Maryland by data reporting and collection. States may have budgetary or local development motives for limiting or enhancing benefits. It is unclear whether any additional data published by QOFs or Treasury indicating successful results in QOZs would impact state decisions around expanding or extending QOZ tax benefits. Although additional data on the in-state zones may become available with additional reporting by Treasury, that information may be already available from a state's economic development department or from county and municipal governments. Moreover, it appears that states have other mechanisms available to them to collect data on activity within their QOZs.

PROPOSED FEDERAL LEGISLATION

Several bills have been proposed to address QOZ reporting since the TCJA (see **Summary Table**).

A bill to require Treasury to collect data and issue a report on the opportunity zone tax incentives enacted by the TCJA was introduced by Representatives Kind (D-WI) and Kelly (R-PA) in May of 2019 (the "Kind-Kelly Bill").³⁹ This bill, similar to the Act, was aimed at reporting the impact of the QOZ program on job creation, poverty reduction and new business starts. Unlike the Act, it required Treasury to collect specific data from QOFs, including the number of residential units of real property and number of employees of QOZ businesses, and required Treasury to make the information collected from QOFs available to the public. Uniquely, it requested details on whether a business investment was a new or existing business.

In the fall of 2019, two additional bills were introduced. The Opportunity Zone Accountability and Transparency Act, introduced by Kind, Kelly, and Sewell (OZATA)⁴⁰ required QOFs to report, "to the extent known," the number of affordable housing units owned by the qualified opportunity zone business, and added penalties of up to \$200,000 for a

QOF's failure to file a complete and correct information return. Unlike the Act and the Kind-Kelly Bill, OZATA required Treasury to make its impact report available to the public annually.

In the fall of 2019, Senator Wyden also introduced the Opportunity Zone Reporting and Reform Act (OZRRA),⁴¹ which included various provisions that would have changed zone designations and certain eligibility requirements for the QOZ program, in addition to reporting provisions. OZRRA's impact report was required to be composed by the Office of the Comptroller General (not Treasury) and to include data on housing costs and income distribution among residents of QOZs, in addition to employment data, new business starts and poverty reduction. OZRRA required QOFs to publish their information reports online and maintain the returns online for three years, and introduced reporting requirements for QOF investors (effectively codifying the Form 8997 reporting). OZRRA did not require QOFs to report on the number of affordable housing units, but other sections of the bill removed residential housing other than certain affordable housing from the definition of qualified opportunity zone business property.

Finally, the Improving and Reinstating the Monitoring, Prevention, Accountability, Certification and Transparency Provisions of Opportunity Zones Act (IMPACT Act)⁴² introduced in December of 2019, went still further in requiring impact reporting. The IMPACT Act requires these types of reports by Treasury. As soon as practical after enactment, Treasury would make publicly available an annual report including certain aggregated input data from QOFs (e.g., number of QOFs, aggregate amount of assets), and beginning in year six would include outcome data on job creation, poverty reduction, and new business starts. In years six and 11, the IMPACT Act requires Treasury to publish information on changes in specific QOZs over the prior five-year period with respect to unemployment, poverty rates, median income, average percentage of income spent on rent, and other metrics, and further requires a comparison of these factors as between the QOZ and "any census tract that was a low-income community eligible to be designated as a [QOZ] but was not so designated."

In comparing the federal reporting bills, we see a trend over time toward direct investor and QOF reporting and penalties for failure to report. Notable differences between the bills include the type of data that is made available to the public – OZATA and OZRRA

³⁸ CalOZ Newsletter (Feb. 23, 2021) (citing Novogradac Opportunity Zones Investment Report: Data Through December 31, 2020: \$15 billion plus in OZ Equity Raised Through 2020).

³⁹ H.R. 2593, 116th Cong. (2019).

⁴⁰ Opportunity Zone Accountability and Transparency Act, H.R. 5011, 116th Cong. (2019).

⁴¹ Opportunity Zone Reporting and Reform Act, S. 2787, 116th Cong. (2019).

⁴² Improving and Reinstating the Monitoring, Prevention, Accountability, Certification, and Transparency Provisions of Opportunity Zones (IMPACT Act), S. 2994, 116th Cong. (2019).

provide for QOF information reports to be made public in one way or another, whereas the IMPACT Act provides information to the public only via Treasury’s annual and decennial impact reports. OZRRA requires taxpayers to publish this information directly. From a taxpayer perspective, however, the most relevant differences may be those related to penalties and the level of input data they would be required to provide. In the case of minority investments by QOFs into QOZBs, additional information required to be collected from the QOZB could disturb commercial arrangements or be viewed as burdensome.

Although it is not yet clear which, if any, of these bills ultimately may become law, the new administration supports the notion of additional impact reporting by QOFs. President Biden campaigned on a racial equity platform that included “reforming opportunities zones to ensure they serve black and brown communities, small businesses and homeowners,” and the specific reforms he endorsed included “introducing transparency by requiring recipients of the [QOZ] tax break to provide detailed reporting and public disclosure on their [QOZ] investments and the impact on local residents, including poverty status, housing affordability, and job creation.”⁴³

⁴³ The Biden Plan to Build Back Better by Advancing Racial Equity Across the American Economy | Joe Biden for President: Official Campaign Website (July 9, 2020), <https://joebiden.com/racial-economic-equity/>.

CONCLUSION

The QOZ program is novel in its design. Because any impact reporting requirements were removed from the QOZ provisions when added to the TCJA, the QOZ program currently lacks an official impact reporting framework. Various stakeholders will evaluate the QOZ program’s success for purposes of determining whether to renew, expand or reform the program, or design a new program in the future using similar concepts, and data will be critical in making these determinations. Although the QOZ program is still quite new, data is already available from both public and private sources that may be used to evaluate the impact of the program. Additional data may be gathered through a variety of approaches, as evidenced by the states. Although differences exist between the various federal proposals, the more recent bills have generally required taxpayers to report specific input data in addition to requiring government bodies to report specific outcome data, or impacts. Were legislation of this type to be enacted, it could help formalize the outcomes by which the QOZ program is judged. Additionally, assuming the data is made available to the public (whether by making the taxpayer input data directly available or through official impact reports) this could provide stakeholders more comprehensive data with which to inform their evaluation of the QOZ program.

[racial-economic-equity/](https://joebiden.com/racial-economic-equity/).

| SUMMARY TABLE | | | | | |
|-----------------------------|---|---|--|---|---|
| Name of QOZ Reporting Bills | Investing in Opportunity Act | “Kind-Kelly Bill” | Opportunity Zone Accountability and Transparency Act | Opportunity Zone Reporting and Reform Act | Improving and Reinstating the Monitoring, Prevention, Accountability, Certification and Transparency Provisions of Opportunity zones (IMPACT Act) |
| Sponsored by | Senators Scott (Republican) and Booker (Democrat), <i>et al.</i> S. 293 (2017) Representative Tiberi, <i>et al.</i> H.R. 5082 (2016), Senators Scott, <i>et al.</i> S.2869 (2016) | Representative Kind (Democrat) and Kelly (Republican) H.R. 2593 and by Senators Booker, Scott, Young and Hassan. S.1344 | Representative Kind, (Democrat), Kelly (Republican), Sewell (Republican) H.R. 5011 | Senator Wyden (Democrat) S. 2787 | Senators Scott, Grassley, Young, Gardner, Ernst, Cassidy, Rubio, Capito (all Republicans) S.2994 |
| Date Proposed | February 2, 2017 April 27, 2016 | May 8, 2019 | November 8, 2019 | November 6, 2019 | December 5, 2019 |

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| Notable “Input data” to be reported by QOFs | N/A | Approximate total square footage and the approximate number of residential units Approximate number of full-time employees at the time the investment in such business was made | Square footage of buildings; number of residential units and number of rental units; (to the extent known) number of residential units occupied by individuals whose income is 50% or less of area medium gross income Number of employees (stated in full-time equivalents) | Square footage of real property; number of residential units; (no reporting on number of low-income units but see below) Average monthly number of full-time equivalent employees (FTE defined) | Approximate number of residential units Whether the approximate average monthly number of full-time equivalent employees is 0-25, 26-50, 51-75, 76-100, 101-500, 501-1000 or 1000+ (FTE defined) |
| Penalties for QOFs | N/A | N/A | \$500/day up to \$200,000 | \$10,000 with opportunity to correct within 30 days and reduce to \$250; penalty for intentional disregard is twice the amount with no mitigation; inflation adjustment | \$500/day up to \$50,000 (\$10,000 for QOFs with \$10M or less in assets); inflation adjustment |
| Are QOF info returns made public? | N/A | N/A | Secretary required to publish QOF returns in a machine readable format as soon as practicable | QOFs required to publish information reports online and maintain reports for three years; Secretary of Treasury required to maintain a list of QOFs with name, address, and URL | No |
| Who is required to report on impact? | Secretary of Treasury | Secretary of Treasury (Secretary also required to collect data from QOFs) | Secretary of Treasury | Office of the Comptroller General (GAO) | Secretary of Treasury |
| What “outcome data” is ultimately reported? | Job creation, poverty reduction, new business starts | Job creation, poverty reduction, new business starts | Job creation, poverty reduction, and community and economic development | Employment, new business start-ups, and poverty reduction; also housing costs, and income distribution among residents of such zones | Job creation, poverty reduction, new business starts; comparison of listed factors (see below) for QOZs over a five-year period, and similar comparisons to eligible census tracts that were not designated. |
| Timing of Impact Report | five years after date of enactment and annually thereafter | five years after enactment and annually thereafter | Annual | Years five and 10 after enactment | Annual; additional information available in Y6; special report on changes and comparisons required in Y6 and Y11 |
| Is Impact Report required to be shared with the public? | No | Yes | Yes | No | Yes |

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|-------|--|--|--|---|---|
| Other | | Input data also includes whether the investment is in an existing business or new business | | <p>Would codify reporting for investors similar to what is now required on the Form 8997</p> <p>Bill included other changes to QOZ program, including modification of “qualified opportunity zone business property” definition to exclude residential real property “unless 50% or more of the residential units of such property are both rent-restricted (within the meaning of §42(g)(2) and occupied by individuals whose income is 50% or less of area median income”</p> | <p>Would codify reporting for investors similar to what is now required on the Form 8997, including penalties of \$5,000 (opportunity to correct w/in 60 days and reduce to \$500) and \$25,000 intentional disregard penalty with no mitigation; inflation adjustment</p> <p>Listed factors: (i) Unemployment rate; (ii) # of persons working in census tract including % who were not residents in the census tract in the preceding year; (iii) individual, family, household poverty rates; (iv) median family income of residents in the census tracts; (v) demographic information including race, age, income, education, and employment; (vi) average % of income spent on rent; (vii) # of residences in the tract (viii) average value of the residential property in the tract (ix) # of affordable housing units in the census tract (x) # and % of residents in census tract that were not employed for the preceding year; (xi) # of new business starts (xii) distribution of employees in the census tracts by NAIC Code</p> |
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