

SUPPORTING STATEMENT

Internal Revenue Service

Certain Foreign Persons and Certain Foreign-Owned Partnerships Investing in Qualified Opportunity Funds and Flexibility for Working Capital Safe Harbor Plans
OMB # 1545-XXXX

1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION

Section 14202(a) of the Tax Cuts and Jobs Act, Public Law 115-97 (2017) (“TCJA”), added sections 1400Z-1 and 1400Z-2 to the Code. These provisions seek to encourage economic growth and investment in designated distressed communities (qualified opportunity zones) by providing Federal income tax benefits to taxpayers who invest in businesses located within qualified opportunity zones through a qualified opportunity fund (“QOF”).

Section 1400Z-1 provides the procedural rules for designating qualified opportunity zones and related definitions. Section 1400Z-2 provides two main tax incentives to encourage investment in qualified opportunity zones. First, it allows for the deferral of inclusion in gross income of certain gain to the extent that a taxpayer elects to invest a corresponding amount in a QOF. Second, it allows the taxpayer to elect to exclude from gross income the post-acquisition gain on investments in the QOF held for at least 10 years.

Gain invested in a QOF is eligible for a deferral election only if it meets certain requirements, one of which is that the gain must be a capital gain. The final section 1400Z-2 regulations (TD 9889, published on January 13, 2020) added an additional restriction on foreign investors whereby they may only elect to defer capital gain that would be subject to Federal income tax but for the making of a valid deferral election. This generally limits eligible capital gain for foreign persons to capital gain that is effectively connected to a U.S. trade or business (ECI) or the gain is deemed to be ECI from the disposition of a U.S. real property interest.

Sections 1445 and 1446(f) require withholding of tax (generally by the transferee) on certain transfers by foreign persons of U.S. real property interests or interests in partnerships engaged in a U.S. trade or business, and section 1446(a) requires withholding of tax on certain partnership allocations of effectively connected taxable income to foreign persons. Foreign persons subject to withholding may obtain a credit for the amount withheld. If a foreign person transfers property and elects to defer the gain under section 1400Z-2(a), there would be no immediate tax liability on the transaction, and the withholding tax that would normally apply would be credited or potentially refunded. When the foreign person is required to include the deferred gain in income in a subsequent taxable year, tax is then owed but the statutory withholding mechanism for assuring the collection of tax generally will not apply at this stage. In such situations, the

IRS may be unable to collect the tax owed.

The Requirements for Certain Foreign Persons and Certain Foreign-Owned Partnerships Investing in Qualified Opportunity Funds and Flexibility for Working Capital Safe Harbor Plans NPRM (“proposed regulations”) provide a mechanism to ensure that the tax is paid in the absence of withholding. The proposed rules regarding security interests are based on an existing program under section 1445 whereby taxpayers can obtain withholding relief by providing security to the IRS.

Under the proposed regulations, foreign persons would be required to provide security to the IRS until the tax is paid on the deferred gain. The proposed regulations provide procedural rules, such as the type of security, the timing of a submission, and the calculation of the amount required. The proposed regulations also include a procedure allowing a transaction that required the foreign person to provide security to the IRS to defer gain (rather than be withheld on and later apply for a refund). This procedure responds to comments received on the proposed regulations under section 1400Z-2 requesting withholding relief so that foreign persons have available cash flow to invest the entire amount of eligible gain into a QOF.

2. USE OF DATA

The collection of information is necessary to provide the IRS a mechanism to ensure that the tax is paid in the absence of withholding.

3. USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN

IRS Publications, Regulations, Notices, and Letters are to be electronically enabled on an as practicable basis in accordance with the IRS Reform and Restructuring Act of 1998.

4. EFFORTS TO IDENTIFY DUPLICATION

We have attempted to eliminate duplication within the agency wherever possible.

5. METHODS TO MINIMIZE BURDEN ON SMALL BUSINESSES OR OTHER SMALL ENTITIES

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of

proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

1. CONSEQUENCES OF LESS FREQUENT COLLECTION ON FEDERAL PROGRAMS OR POLICY ACTIVITIES

The Treasury Department and the IRS have determined that the lack of withholding on the inclusion of deferred gain undermines the integrity of the withholding regimes under sections 1445, 1446(a), and 1446(f), and increases the risk of non-compliance by foreign persons with respect to their U.S. tax obligations.

As noted above, the proposed regulations provide the IRS a mechanism to ensure that the tax is paid in the absence of withholding. Under the proposed regulations, foreign persons would be required to provide security to the IRS until the tax is paid on the deferred gain. The proposed regulations provide procedural rules, such as the type of security, the timing of a submission, and the calculation of the amount required.

2. SPECIAL CIRCUMSTANCES REQUIRING DATA COLLECTION TO BE INCONSISTENT WITH GUIDELINES IN 5 CFR 1320.5(d)(2)

There are no special circumstances requiring data collection to be inconsistent with Guidelines in 5 CFR 1320.5(d)(2).

3. CONSULTATION WITH INDIVIDUALS OUTSIDE OF THE AGENCY ON AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, CLARITY OF INSTRUCTIONS AND FORMS, AND DATA ELEMENTS

On October 29, 2018, the Treasury Department and the IRS published in the Federal Register (83 FR 54279) a notice of proposed rulemaking (REG-115420-18) providing guidance under section 1400Z-2 for investing in qualified opportunity funds (83 FR 54279 (October 29, 2018)) (October 2018 proposed regulations). A public hearing on 83 FR 54279 (October 29, 2018) was held on February 14, 2019.

A second notice of proposed rulemaking (REG-120186-18) was published in the Federal Register (84 FR 18652) on May 1, 2019, containing additional proposed regulations under section 1400Z-2 (May 2019 proposed regulations). The May 2019 proposed regulations also updated portions of the October 2018 proposed regulations. The Treasury Department and the IRS received 127 written and electronic comments responding to the May 2019 proposed regulations. A public hearing on the May 2019 proposed regulations was held on July 9, 2019.

Final regulations (TD 9889) under section 1400Z-2 were published in the Federal

Register (85 FR 1866) on January 13, 2020 (section 1400Z-2 regulations). The burden associated with TD 9889 has been approved under OMB approval number 1545-0123.

Comment will be solicited for 60 days in connection with this proposed rule and taken into consideration before the rule is finalized.

4. EXPLANATION OF DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS

No payment or gift has been provided to any respondents.

5. ASSURANCE OF CONFIDENTIALITY OF RESPONSES

Generally, tax returns and tax return information are confidential as required by 26 USC 6103.

6. JUSTIFICATION OF SENSITIVE QUESTIONS

A privacy impact assessment (PIA) has been conducted for information collected under this request as part of the “Individual Master File (IMF)” system and a Privacy Act System of Records notice (SORN) has been issued for this system under IRS 24.030--Customer Account Data Engine Individual Master File, formerly Individual Master File, and IRS 34.037--IRS Audit Trail and Security Records System. The Department of Treasury PIAs can be found at <http://www.treasury.gov/privacy/PIAs/Pages/default.aspx>.

Title 26 USC 6109 requires inclusion of identifying numbers in returns, statements, or other documents for securing proper identification of persons required to make such returns, statements, or documents and is the authority for social security numbers (SSNs) in IRS systems

7. ESTIMATED BURDEN OF INFORMATION COLLECTION

Proposed section 1.1400Z2(a)-2 contains collections of information that are not on existing or new IRS forms. The proposed regulations require that security-required persons submit to the IRS an application that includes the following information and documents to obtain an eligibility certificate with respect to security-required gain.

- (a) Identification of security-required person (proposed section 1.1400Z2(a)-2(d)(3)(ii));
- (b) Information about the covered transfer (proposed section 1.1400Z2(a)-2(d)(3)(iii));
- (c) Agreement for deferral of tax and provision of security (proposed section 1.1400Z2(a)-2(d)(4));
- (d) U.S. agent agreement (proposed section 1.1400Z2(a)-2(d)(5)); and

(e) Security and any related required documents (proposed section 1.1400Z2(a)-2(d)(6)).

The estimated number of such transactions per year is 3,500. The IRS estimates that about 4 percent of partners in real estate partnerships are foreign persons. The Office of Tax Analysis has estimated that there could eventually be 55,000 to 120,000 investors in QOFs. Four percent of 55,000 to 120,000 would mean that there may be 2,200 to 4,800 foreign investors in QOFs. Only a subset of these foreign investors would be affected by these regulations because these regulations apply only to foreign investors who elect to invest in a QOF existing capital gains that arise from the specific transactions that are subject to withholding.

Authority	Description	# of Respondents	# Responses per Respondent	Annual Responses	Hours per Response	Total Burden
1.1400Z2(a)-2	Requirement to obtain eligibility certificate	3,500	1	3,500	10	35,000
Totals		3,500		3,500		35,000

Proposed section 1.400Z2(d)-1(d)(3)(v)(D) imposes an additional information collection requirement in the form of recordkeeping. The creation of, or modification of, existing written schedules as required under proposed section 1.1400Z2(d)-1(d)(3)(v)(D) will be performed by qualified opportunity zone businesses that want to receive an additional 24 months to expend their working capital assets, under the extension of time permitted by proposed section 1.1400Z2(d)-1(d)(3)(v)(D). This recordkeeping requirement will not be conducted using a new or existing IRS form. Such businesses must maintain, as part of their records, a copy of the written working plan including any modifications to the plan and provide these records to the IRS upon its request. This modification encourages investment in QOFs by providing greater specificity to how an entity may consistently satisfy the statutory requirements to be a qualified opportunity zone business in light of the current economic climate. However, the increase in burden on these entities is minimal as these entities were required to maintain such records prior to the proposed modification if they wanted to utilize a working capital safe harbor under section 1.1400Z2(d)-1(d)(3)(v).

The following regulation imposes no additional burden. Please continue to assign OMB number 1545-XXXX to this regulation.

1.1400Z2(a)-2

8. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS

As suggested by OMB, our NPRM will request public comments on estimates of cost burden, i.e., estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

To ensure more accuracy and consistency across its information collections, IRS is currently in the process of revising the methodology it uses to estimate burden and costs. Once this methodology is complete, IRS will update this information collection to reflect a more precise estimate of burden and costs.

9. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

There are no known annualized costs to the federal government.

10. REASONS FOR CHANGE IN BURDEN

This is a new proposed rulemaking.

11. PLANS FOR TABULATION, STATISTICAL ANALYSIS AND PUBLICATION

There are no plans for tabulation, statistical analysis and publication.

12. REASONS WHY DISPLAYING THE OMB EXPIRATION DATE IS INAPPROPRIATE

We believe that displaying the OMB expiration date is inappropriate because it could cause confusion by leading taxpayers to believe that the regulation sunsets as of the expiration date. Taxpayers are not likely to be aware that the Service intends to request renewal of the OMB approval and obtain a new expiration date before the old one expires.

13. EXCEPTIONS TO THE CERTIFICATION STATEMENT

There are no exceptions to the certification statement.

Note: The following paragraph applies to all the collections of information in this submission:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.