

IRS Signals Openness to Opportunity Fund Business Plan Tweaks

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By Jonathan Curry

Recent actions by the IRS suggest the agency endorses the concept of Opportunity Zone funds modifying their business plan in response to circumstances, practitioners said.

At issue are the working capital safe harbor written plans that describe how the assets in a qualified opportunity fund's trade or business will be used.

"You have these amazing plans in the beginning, and you're not crazy, you know how these projects work. What happens if there's a change in the economy?" said Kate Kraus of Allen Matkins Leck Gamble Mallory & Natsis LLP at the May 5 American Bar Association Section of Taxation meeting. She noted that the funds are required to be used in a way that is "substantially consistent" with the written plan, and it's unclear what happens if, for example, a plan for building a hotel is converted to one for an apartment building instead.

"Does that mean that you actually used the funds in a manner that's substantially consistent with the written plan? And if you didn't use the money correctly, does that mean that you failed all of your tests, forever, from year zero?" she asked.

Dominic DiMattia of the IRS Office of Associate Chief Counsel (Income Tax and Accounting) said that determining whether a project is substantially consistent is "probably a factual determination," although he noted that proposed regs for international investors in QOFs allow for a modified safe harbor plan if a qualified Opportunity Zone business falls within a federally declared disaster area.

Kraus noted that the United States has been engulfed in a federally declared disaster thanks to the COVID-19 pandemic — although she also pointed out that President Biden's disaster declaration is set to expire May 11. "So get your cash in now," she said.

Kraus also observed that [LTR 202249005](#) implicitly suggested that a working capital safe harbor plan can be modified because it addressed a taxpayer whose plan was modified repeatedly before the ruling was requested. That ruling set out a condition that the taxpayer must modify the plan again to get the benefit of the ruling.

"So I think that shows some support in the government for allowing changes of plans," Kraus concluded.

DiMattia demurred when asked if taxpayers could request letter rulings to approve modified working safe harbor plans, saying only that it's "very dependent upon the facts of the ruling submission."

Even so, Nickolas Gianou of Skadden, Arps, Slate, Meagher & Flom LLP said he was encouraged to see that the IRS is receptive to rulings on Opportunity Zone matters like this, and that it could be worthwhile for the right taxpayer.

"It's something to keep in mind, given the stakes," Gianou said. "If you have an issue that's going to threaten big tax benefits that you might be getting, you know, 10 years down the road, you want to be pretty sure you'll qualify for those," he said.

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