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Shaking up the Magic 8-Ball – What Does the Opportunity Zone Program Look Like Under a Biden Presidency?



**D&S Opportunity Zone Practice Group
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Politics aside, some in the Land of OZ have started to get nervous about the November election. As presumptive Democratic presidential nominee Joe Biden has gained in the polls, many have begun to wonder what changes could be made to the Opportunity Zone program (OZ program) under a Biden presidency.

This nervousness is understandable. Given the 2019 legislative proposals to modify the OZ program,¹ Representative Ocasio-Cortez’s amendment just a few weeks ago to defund the OZ program, and the recent proposal by New York State Senator Michael Gianaris for New York to decouple from the Opportunity Zone tax incentives, the OZ program has seemed a bit like a punching bag lately.

We got an official proposal from Biden finally on what he would do with the OZ program. Thankfully, it appears that Biden’s proposed changes are aimed at improving the OZ program, rather than dismantling it.

1. How would Biden reform the OZ Program?

Last week Biden released the fourth pillar of his “Build Back Better Agenda”, which is Biden’s economic recovery plan. This fourth pillar focuses on advancing racial equity as part of the nation’s economic recovery, and OZ program reform is one of the key components.

In particular, Biden’s plan is to “reform opportunity zones to ensure they serve black and brown communities, small businesses and homeowners”. Given the demographics of most of the nation’s Opportunity Zones, which are by nature census tracts that meet certain criteria as low-income, it is not surprising that Biden is addressing the OZ program in the context of racial equity. Biden appears to be focused on ensuring that there is a community impact in the Opportunity Zones as a result of the investments being made there.

Although Biden does acknowledge that there have been positive examples of the OZ program being used to advance racial equity, small business creation, and homeownership in low-income urban, rural, and tribal communities, his view is that the OZ program is structured in a way that encourages investors to favor high-return projects like luxury apartments over affordable housing and local entrepreneurs.

The current plan is short on specifics, but Biden’s website includes three goals for OZ program reform:

- i. Incentivizing Opportunity Funds to partner with non-profit or community-oriented organizations, and jointly produce a community-benefit plan for each investment, with a focus on creating jobs for low-income residents and otherwise providing a direct financial impact to households within the Opportunity Zones.*

¹ See our summary of those 2019 proposals [here](#).

- This first goal is laudable, and should help to achieve more positive community level impact, although it is not clear what sorts of incentives could be offered to QOFs to partner with local community organizations. The federal tax benefits are already statutorily prescribed, so we will have to see if OZ program reform would include legislative changes or whether Biden is hoping to achieve this via regulatory guidance.
- ii. *Directing that Opportunity Zone benefits be reviewed by the Department of Treasury to ensure these tax benefits are only being allowed where there are clear economic, social, and environmental benefits to a community, and not just high returns — like those from luxury apartments or luxury hotels — to investors.*
- It is not clear whether this is intended to be just a review process or the imposition of additional requirements in order for investors to be eligible for tax benefits under the OZ program. If it is the latter, this second goal only seems achievable with a legislative change, since the OZ program requirements are already set forth in the Internal Revenue Code. Although Treasury Regulations can help to clarify the statutory rules, any newly prescribed requirements would need to be enacted by Congress. Notably, some of the 2019 legislative proposals included new “sin businesses” and other excluded property that a QOF would be prohibited from investing in, such as skating facilities, skyboxes, luxury boxes, investments in private planes, self-storage facilities, parking structures, sports stadiums and certain luxury residential developments.
 - However, the Biden administration might seek to implement this as part of the certification process through Treasury, which may be a way to get this change through without involving Congress.
- iii. *Introducing transparency by requiring recipients of the Opportunity Zone tax break to provide detailed reporting and public disclosure on their Opportunity Zone investments and the impact on local residents, including poverty status, housing affordability, and job creation.*
- We are most likely to see this last goal implemented by a Biden administration, especially in the short term. OZ program advocates have been pushing for more robust reporting requirements, since it is difficult to show that the program is achieving its goal of benefiting low-income communities without any economic metrics to show improved employment numbers, median family income, etc.

2. How would existing and future OZ program projects be affected?

It is too soon to say for certain how a Biden presidency will impact the OZ program, especially since his ability to create any meaningful change may depend on the makeup of Congress after the election as well. The Magic 8-Ball has a few possibilities though.

“Outlook good” – If Biden wins, Democrats keep the House, and Democrats flip the Senate, Biden could be able to push through a number of agenda items, although it is not clear if OZ program reform will be at the top of his list.

“Don’t count on it” – If Biden wins, and Republicans hold on to their Senate majority, any partisan issues will of course be tougher to advance. It probably does not help that the Trump Administration’s adoption of the OZ program has created an almost automatic distancing by Democrats, so anything requiring a bipartisan effort will be a lift.

“Reply hazy, try again” – Remember that the original OZ program legislation was drafted and sponsored with bipartisan support, so it has the ability to be a unifying program across the aisle. One of the unique aspects of the OZ program is its reliance on private capital to achieve the government priority of increasing investment and economic activity in the designated Opportunity Zones. Especially with a country that is badly in need of economic recovery as we battle through the COVID-19 pandemic, the OZ program does have the potential to be a truly powerful tool.

Whatever happens in November (and beyond), trust that the D&S Opportunity Zones team is keeping tabs on the latest developments. Reach out to any member of the team in the meantime if you would like to discuss your particular project or QOF.

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