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Opportunity without Reach: The Problems with the Opportunity Zone Program and the Need for Clarification, Oversight, and Regulation

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**OPPORTUNITY WITHOUT REACH: THE
PROBLEMS WITH THE OPPORTUNITY ZONE
PROGRAM AND THE NEED FOR
CLARIFICATION, OVERSIGHT, AND
REGULATION**

*Victoria Lee**

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INTRODUCTION

A Google Street View car has not driven through Haasville Road in Bunkie, Louisiana recently.¹ A satellite view shows that this road is a long one — it winds to Highway 115 West on one end and meets with Catfish Kitchen Road on the other.² What is beyond Catfish Kitchen Road is simply “unnamed.”³ A mass of trees borders Haasville Road on its left, and near the 115 West, there are a few structures and a white truck. It is a house, perhaps, or a farm. Pull the map back far enough, and the patches of green become overwhelmed by plots of tan, unused land. This is Haasville Road. It also happens to be part of Census Tract No. 22009030600, tract type: low-income community.⁴

Census Tract No. 22009030600 is an Opportunity Zone, and it is one of 150 such zones in Louisiana.⁵ It is also one of 8764 such zones in the 50 states, the District of Columbia, and the five U.S. territories.⁶ These designated zones, classified by the IRS and nominated by the states, are part of an investment scheme intended to stimulate economic development and employment opportunities in low-income communities.⁷ The Opportunity Zone Program requires

1. Satellite View of Haasville Road, Bunkie, LA, GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/A4LW-WB5A>] (search “Haasville Road, Bunkie, LA” then follow hyperlink).

2. *Id.*

3. *Id.*

4. *See* INTERNAL REVENUE SERV., LIST OF DESIGNATED QUALIFIED OPPORTUNITY ZONES (2018), <https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx> [<https://perma.cc/37LY-TJVW>].

5. *Id.*

6. *Id.*

7. *See Opportunity Zones Frequently Asked Questions*, INTERNAL REVENUE SERV. [hereinafter *Frequently Asked Questions*],

investors to roll-over qualified capital gains into a Qualified Opportunity Fund (“qualified fund”), and in turn, investors receive tax benefits depending on how long the investment is held in the fund.⁸ The qualified fund then invests in eligible real estate in these designated Opportunity Zones.⁹ It is seemingly a win-win situation — investors are incentivized to channel their excess capital gains into qualified funds in exchange for favorable tax benefits, and the qualified funds lift up low-income communities and their residents by developing and investing in select real estate and business opportunities within them.¹⁰

However, not all Opportunity Zones walk and talk like Haasville Road. In New York City, for example, the neighborhood directly under and around the Williamsburg Bridge is also a designated Opportunity Zone.¹¹ The Google Street View car has clearly been through this neighborhood recently.¹² Unlike Haasville Road, however, rows of buildings line paved streets. Several restaurants and bars, including a well-known steakhouse, call this census tract home.¹³ In the District of Columbia, Buzzard Point and NoMa — neighborhoods that have recently seen the rise of a new sports arena, office buildings, and luxury apartments — are also designated Opportunity Zones.¹⁴ The Google Street View car has been through those areas recently, too.

This Note argues that the Opportunity Zone Program in implementation may not have the intended effect of bolstering low-income communities for three reasons. First, the Opportunity Zone Program’s current state of disorganization has both halted monies

<https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions> [<https://perma.cc/UXJ2-4VXZ>] (last visited Apr. 21, 2019).

8. *Id.*

9. *Id.*

10. *Id.*

11. See *Novogradac Opportunity Zones Mapping Tool*, NOVogradac, <https://www.novoco.com/resource-centers/opportunity-zone-resource-center/guidance/novogradac-opportunity-zones-mapping-tool> [<https://perma.cc/UTC4-A3E4>] (last visited Oct. 28, 2019) (picturing Census Tract No. 36047054900).

12. Satellite View of South 6 Street & Broadwav, Brooklvn, NY, GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/7KNP-2JG2>] (search “South 6th St. & Broadway, Brooklyn, NY” then follow hyperlink).

13. *Id.* (showing the famous Peter Luger Steak House).

14. Adam Looney, *Will Opportunity Zones Help Distressed Residents or Be a Tax Cut for Gentrification?*, BROOKINGS INST. (Feb. 26, 2018), <https://www.brookings.edu/blog/up-front/2018/02/26/will-opportunity-zones-help-distressed-residents-or-be-a-tax-cut-for-gentrification/> [<https://perma.cc/PM3B-74RV>].

flowing into low-income communities and left the Program without any meaningful way in which to collect and analyze data. Secondly, some of the designated tracts have already begun to show signs of gentrification and revitalization, and, thus, any investments poured into these areas may be unnecessarily and even recklessly channeled. Finally, past zoning programs with tax incentives carried out both overseas and domestically have demonstrated that such programs have failed at creating employment opportunities and displaced low-income residents due to rapid gentrification practices.

Part I of this Note provides background on the Opportunity Zone Program, its legislative history, and the current state of the Program. Part II questions whether the Opportunity Zone Program can achieve the intended effect of bolstering low-income communities and their residents, and argues that in its current state, it may not be able to. This Note argues that the Opportunity Zone Program may be unsuccessful because of its current disorganization, as evidenced by the fact that some Zones have been wrongfully designated, and the fact that past land zoning initiatives and tax incentives have been previously unsuccessful in creating meaningful employment opportunities and community developments and initiatives. Finally, Part III suggests measures for the IRS and participating agencies to address and adopt moving forward regarding the implementation of the Opportunity Zone Program to better serve the communities and individuals the legislature intended.

I. THE CONCEPTION OF THE OPPORTUNITY ZONE PROGRAM: FROM THEN TO NOW

A. Legislative History

Although the Investing in Opportunity Act (IIOA) was pushed through in the Tax Cuts and Jobs Act of 2017,¹⁵ the genesis of attaching tax incentives to capital gains investment into the nation's low-income neighborhoods was first promulgated in a white paper by Jared Bernstein and Kevin A. Hassett for the Economic Innovation

15. The legislation was introduced into the House and Senate on February 2, 2017, where it was referred to the House Committee on Ways and Means and the Senate Finance Committee. There were 95 cosponsors for the Investing in Opportunity Act — 14 from the Senate and 81 from the House. S. 392, 115th Cong. (1st Sess. 2017); Investing in Opportunity Act, H.R. 828, 115th Cong. (2017–18), <https://www.congress.gov/bill/115th-congress/house-bill/828/text> [<https://perma.cc/LJ8N-ECEJ>]; Investing in Opportunity Act, S. 293, 115th Cong. (2017–18), <https://www.congress.gov/bill/115th-congress/senate-bill/293/all-info> [<https://perma.cc/LJ8N-ECEJ>].

Group.¹⁶ The white paper recognized the disparity between certain areas of the country faring “remarkably well and nearing or exceeding their pre-recession economic states” and others “facing chronic rates of long-term unemployment and historically low levels of new investment.”¹⁷ Bernstein and Hassett based their model, in part, off of failures of previous incentive structures designed to spur economic development in distressed zones.¹⁸ Their model proposed tapping into the “power of intermediaries” — that is, private equity firms, banks, mutual funds, and other small businesses — to pool assets and incentive investments in distressed regions via tax benefits.¹⁹ By February 2017, Bernstein and Hassett’s suggestion had found its way into Congress in the form of a bipartisan bill authored by Senators Corey Booker and Tim Scott and Congressmen Pat Tiberi and Ron Kind.²⁰ Similarly recognizing the vast amount of untapped capital gains “just sitting there”²¹ to the tune of nearly \$6.1 trillion, the legislation devised a way to channel those funds into distressed communities by incentivizing long-term private investment through tax reform, essentially adopting the model promulgated in Bernstein and Hassett’s white paper.²²

16. See JARED BERNSTEIN & KEVIN A. HASSETT, UNLOCKING PRIVATE CAPITAL TO FACILITATE ECONOMIC GROWTH IN DISTRESSED AREAS (2015), <https://eig.org/wp-content/uploads/2015/04/Unlocking-Private-Capital-to-Facilitate-Growth.pdf> [<https://perma.cc/5VZJ-6CFT>]; see also Noah Buhayar, *Will ‘Opportunity Zones’ Help the Rich, the Poor or Both?*, WASH. POST (Feb. 14, 2019), https://www.washingtonpost.com/business/will-opportunity-zones-help-the-rich-the-poor-or-both/2019/01/04/2a1e153a-0fe1-11e9-8f0c-6f878a26288a_story.html [<https://perma.cc/SE6F-6XU3>] (noting that Bernstein was an economic advisor to Joe Biden when he was Vice President and that Hassett is currently chairman of the Council of Economic Advisers).

17. BERNSTEIN & HASSETT, *supra* note 16, at 2.

18. See *id.* at 11–16.

19. See *id.* at 16–20 (pointing to over \$2 trillion in unrealized, unused capital gains that could be funneled into distressed communities).

20. *The Investing in Opportunity Act*, OPPORTUNITY ZONE DATABASE, <https://opportunitydb.com/guide/iioa> [<https://perma.cc/ZLS2-RQP9>] (last visited Oct. 28, 2019).

21. See *id.*; see also 162 CONG. REC. S5125, 5119-01 (daily ed. July 14, 2016) (statement of Sen. Scott); BERNSTEIN & HASSETT, *supra* note 16, at 16–17 (recognizing trillions in unrealized capital gains that could be redeployed into regions in need of economic development).

22. 164 CONG. REC. S1656, 1646-03 (daily ed. Mar. 13, 2018) (statement of Sen. Cruz); see also *How Tax Reform Could Revive American Entrepreneurship: Hearing Before the Joint Econ. Comm.*, 115th Cong. 2 (2017) (noting Senator Pat Tiberi, speaking in favor for the IIOA’s passage, supported the theory of tax reform as a means of “removing artificial barriers” to entrepreneurial stimulation).

The HIOA was designed with the 52 million Americans living in the nation's low-income, distressed communities in mind.²³ In theory, by financially empowering these communities in need and lifting them out of their distress, businesses and new opportunities would be drawn to these now-viable zones for investment, development, and more.²⁴ In turn, the residents of these low-income communities would have the chance to showcase “their creativity, their intelligence, and their work ethic” through the employment opportunities and more that would arise from financial stimulation and revitalization of these neighborhoods.²⁵

B. The Framework of the Opportunity Zone Program

The Opportunity Zone Program is in part premised on longevity. The longer capital gains are held in a qualified fund, the more attractive the tax incentives are to investors.²⁶ There are few restrictions on the capital gains that can be invested into a qualified fund, namely that the property producing the capital gains need only be sold or exchanged with a person “unrelated” to the property itself.²⁷ The language of the statute in regards to eligible capital gains reads “any property,”²⁸ which investors have interpreted to mean that gains from the sale of “business, stocks, bonds, cryptocurrencies or any other type of investment”²⁹ may all be transferred into a qualified fund.

A qualified fund is an investment vehicle established as either a partnership or a corporation for federal taxation purposes.³⁰ Establishing a fund is an endeavor in paperwork above all else — a partnership, corporation, or limited liability company treated as a partnership or corporation for federal taxation purposes files Form 8996 with its income tax return to declare that the fund is organized

23. 164 CONG. REC S667-05 (daily ed. Feb. 7, 2018) (statement of Sen. Tim Scott).

24. *See id.*

25. *Id.*

26. I.R.C. § 1400Z-2 (2017).

27. *Id.*

28. *Id.*

29. Meg Epstein, *Find Your Investment Opportunity in an Opportunity Zone*, FORBES (Feb. 4, 2019), <https://www.forbes.com/sites/forbesrealestatecouncil/2019/02/04/find-your-investment-opportunity-in-an-opportunity-zone/#e80edebe4c64> [https://perma.cc/M5BH-TX8R].

30. *See Frequently Asked Questions, supra* note 7.

for purposes of investing in qualified Opportunity Zone property.³¹ If the taxpayer is certifying as a qualified fund for the first time, it must submit a statement by the end of its first year detailing the fund's purpose of investing in qualified Opportunity Zone property and a description of the property's business.³² Beyond the entity's self-certification as a qualified fund, the taxpayer need only roll over its qualified capital gains into the qualified fund within 180 days of the sale of the property and hold 90%³³ of its assets in qualified Opportunity Zone property from between the last day of the first six-month period of the fund's taxable year to the last day of the fund's taxable year.³⁴ No further approval process by the IRS is required.³⁵

Once an investor rolls over capital gains into a qualified fund, the fund itself must invest the monies into qualified Opportunity Zone property within 31 months.³⁶ Except for investment into so-called sin establishments,³⁷ the definition of what constitutes qualified property is extensive. Qualified Opportunity Zone stock,³⁸ qualified

31. Corporations and partnerships that are organized and operate as a qualified fund must file, in addition to Form 8996, either Form 1120, Form 1120-F, Form 1120-REIT, Form 1120S, or Form 1065. INTERNAL REVENUE SERV., FORM 8996 INSTRUCTIONS 2 (2018) [hereinafter FORM 8996 INSTRUCTIONS], <https://www.irs.gov/pub/irs-dft/i8996-dft.pdf> [<https://perma.cc/79YB-KFE9>]. The entity will also continue to file Form 8996 annually to make known that the fund meets the standards set forth in I.R.C. § 1400Z-2 (2017). See INTERNAL REVENUE SERV., FORM 8996 (2018) [hereinafter FORM 8996], <https://www.irs.gov/pub/irs-dft/i8996-dft.pdf> [<https://perma.cc/QCL4-ZU7U>].

32. FORM 8996 INSTRUCTIONS, *supra* note 31, at 2.

33. According to the IRS, the 90% standard is “determined by the average of the percentage of qualified opportunity zone property held in the QOF as measured on: 1. The last day of the first 6-month period of the tax year of the QOF, and 2. The last day of the tax year of the QOF.” *Id.* at 1.

34. I.R.C. § 1400Z-2 (2017).

35. *Id.*; see *Eligible Taxpayers Will Self-Certify to Be a Qualified Opportunity Fund*, NOVOGRADAC (Apr. 25, 2018, 4:00 PM), <https://www.novoco.com/news/eligible-taxpayers-will-self-certify-be-qualified-opportunity-fund> [<https://perma.cc/W85Y-CQKE>].

36. Steve Rosenthal, *IRS Proposes Generous Rules For Opportunity Zone Investors, But What Will They Mean For Communities?*, FORBES (Oct. 23, 2018, 5:34 PM), <https://www.forbes.com/sites/stevenrosenthal/2018/10/23/irs-proposes-generous-rules-for-opportunity-zone-investors-but-what-will-they-mean-for-communities/#69b2880e7ff1> [<https://perma.cc/FR8Z-V9RH>].

37. The IRS defines a “sin establishment” as a “private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.” I.R.C. § 1400Z-2 (2017); see also § 144(c)(6)(B) (2009).

38. Qualified Opportunity Zone stock is:

any stock of a domestic corporation that a [qualified fund] acquires after 2017 from the corporation, either directly or through an underwriter, solely

Opportunity Zone partnership interest,³⁹ and qualified Opportunity Zone business property⁴⁰ all constitute eligible Opportunity Zone investments. Additional proposed regulations issued by the IRS also provided three safe harbors with which to determine whether a business meets the 50% test to qualify as a qualified Opportunity

in exchange for cash. The corporation must be a qualified opportunity zone business . . . when the stock is purchased. The corporation must be organized for the purpose of being a qualified opportunity zone business.

FORM 8996 INSTRUCTIONS, *supra* note 31, at 1. Furthermore, the corporation must qualify as a qualified Opportunity Zone business for substantially all of the time the qualified fund holds the stock. A qualified Opportunity Zone business is a business or trade if:

substantially all of its owned or leased tangible property is qualified opportunity zone business property . . . and if the trade or business satisfies *all* of the following tests. 1. The business generates at least 50% of its total gross income from the active conduct of a qualifying trade or business; 2. The business uses a substantial part of its intangible property in the active conduct of any such business; 3. Less than 5% of the average of the total unadjusted basis of the property of the business is from nonqualified financial property; and 4. The business is not a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.

Id. at 1–2 (emphasis added).

39. Qualified Opportunity Zone partnership interest is:

any capital or profits interest in a domestic partnership that a [qualified fund] acquires after 2017 in exchange for cash. The partnership must be a qualified opportunity zone business when the [qualified fund] acquires the interest. The partnership must be organized for the purpose of being a qualified opportunity zone business. The partnership must qualify as a qualified opportunity zone business for substantially all of the time the [qualified fund] holds the interest.

Id. at 1.

40. Qualified Opportunity Zone business property is:

tangible property that a [qualified fund] acquires after 2017 and uses in a trade or business and that satisfies both of the following tests. 1. The use of the property in the qualified opportunity zone originates with the [qualified fund], or the [qualified fund] substantially improves the property; and 2. During substantially all of the [qualified fund's] holding period for such property, substantially all of the use of such property was in a qualified opportunity zone.

Id. at 1. A qualified fund “substantially improves” property to the satisfaction of the first prong if:

during any 30-month period beginning after the date of the acquisition of such property, additions to basis with respect to such property in the hands of the [qualified fund] are *more than* an amount equal to the adjusted basis of such property at the beginning of such 30-month period in the hands of the [qualified fund].

Id. at 1 (emphasis added).

Zone business.⁴¹ In practice, the proposed regulations will open up a wider range of acceptable qualifying businesses in Opportunity Zone areas, from coffee shops to marijuana dispensaries in states where the drug has been legalized.⁴²

The Opportunity Zone Program rewards investors in a triple-pronged manner via deferral, reduction, and exclusion.⁴³ First, investors are permitted to defer tax on capital gains invested in a qualified fund until either the date on which the investment in the fund is sold or exchanged, or on December 31, 2026 — whichever falls first.⁴⁴ Second, the Program rewards the longevity of an investment.⁴⁵ Depending on the length of time an investor holds a qualified fund investment, he may be eligible for a step-up in basis on the original investment.⁴⁶ If an investor holds an investment for over five years but less than seven, he or she is eligible for a 10% step-up in basis on the original investment.⁴⁷ If the investor holds the investment for at least seven, but less than ten years, an additional 5% is added, leading to a 15% step-up in basis on the original investment.⁴⁸ Finally, for the

41. If at least half of the hours the business' employees or contractors are spent in the Opportunity Zone, half of the business' services are conducted within the Zone, or if the business' management and operations are based within the Zone, the business may qualify for the incentive. Investing in Qualified Opportunity Funds, 84 Fed. Reg., 18,652, 18,658 (May 1, 2018) (to be codified at 26 C.F.R. pt. 1); *see also supra* note 38 and accompanying text.

42. *See* Jim Tankersley, *Treasury Issues Rules on Tax Breaks for Opportunity Zones*, N.Y. TIMES (Apr. 18, 2019) [Tankersley, *Treasury Issues Rules*], <https://www.nytimes.com/2019/04/17/business/economy/opportunity-zones-treasury-regulations.html> [<https://perma.cc/W7S3-4AU2>].

43. *See The Investing in Opportunity Act, supra* note 20 (noting that there are three main tax benefits to entice investors).

44. *See Frequently Asked Questions, supra* note 7.

45. *Id.*

46. A step-up in basis as related to Opportunity Zone investments is essentially an adjustment in the total amount an investor will pay capital gains taxes on. For example, if an investor invests \$100,000 into a qualified fund and later holds the investment in the fund for between five to seven years, he or she is eligible to pay capital gains taxes on a lower investment amount. The percent-reduction is known as the "step-up." *See id.*; *see also* I.R.C. § 1400Z-2 (2017); *infra* note 48.

47. *See Frequently Asked Questions, supra* note 7.

48. An example is useful for illustrative purposes. If an investor transfers over \$100,000 into a qualified fund and holds the investment for over five years but less than seven, he will pay capital gains tax on \$90,000 instead of the original \$100,000 investment, representing a 10% step-up in basis. If the investor holds the investment between seven to ten years, he will pay capital gains tax on \$85,000 instead of the original investment amount, representing a 15% step-up in basis. Since capital gains tax may only be deferred until December 31, 2026, 2019 is a critical year for investors interested in stepping-up their original investment by 15% for tax purposes. The

patient investor that holds the investment for at least ten years, the basis of the investment shall be increased to “its fair market value on the date that the [qualified fund] is sold or exchanged.”⁴⁹ In other words, a taxpayer can exclude capital gains tax due on the profits resulting from the sale or exchange of a qualified fund’s investment after it is held for ten or more years.⁵⁰ Unsurprisingly, the exclusion prong is the most attractive tax benefit to many interested investors.⁵¹

As of September 2019, there are 117 qualified funds in operation with a total investment capacity of approximately \$37.4 billion.⁵² These funds are managed by a range of fund managers, from real estate companies and real estate investment groups⁵³ to global investment firms⁵⁴ and hedge funds. Several qualified funds require a minimum investment buy-in, ranging from \$25,000 to \$1 million, and specify the type of real estate the fund is interested in investing in.⁵⁵

reduced tax on the original capital gains investment would thus be due in April 2027. *See id.*

49. *Frequently Asked Questions, supra* note 7.

50. An example is useful for illustrative purposes. If an investor rolled over \$100,000 into a qualified fund in April 2019 and sold that investment in May 2029, he would be eligible for both a 15% step-up in basis on December 31, 2026, and pay capital gains tax on \$85,000 come April 2027. The investor is further entitled to an exclusion of capital gains accrued in the fund since the investment was held for at least ten years. Thus, if the original investment made \$50,000 in the ten years, the investor would not be required to pay capital gains tax on that profit. *See* I.R.C. § 1400Z-2 (2017); *see also* Epstein, *supra* note 29.

51. *See What Are Qualified Opportunity Funds?*, OPPORTUNITY ZONE DATABASE, <https://opportunitydb.com/guide/opportunity-funds/> [<https://perma.cc/ZC8B-88A7>] (last visited Oct. 28, 2019).

52. *Opportunity Zone Fund Directory*, OPPORTUNITY ZONE DATABASE, <https://opportunitydb.com/funds/> [<https://perma.cc/Z62P-K6GE>] (last visited Oct. 28, 2019) (providing a directory of 117 Qualified Opportunity Funds from around the nation as of September 23, 2019).

53. RXR Realty, a New York-based real estate company, and CIM Group, a Los Angeles-based real estate investment group, for example, both manage qualified funds. *Id.* CIM Group currently manages a \$5 billion fund. *Id.*

54. For example, Fundrise Advisors, LLC and SkyBridge Capital both manage qualified funds named Fundrise Opportunity Fund and SkyBridge Opportunity Zone REIT, respectively. SkyBridge Capital, as of March 2019, has a fund size of \$3 billion and is targeting a \$1 billion fund. *Id.*; *see also* Keith Larsen, *So Many Opportunity Zones, So Many Questions for Developers, Investors*, REAL DEAL (Feb. 15, 2019, 2:30 PM), <https://therealdeal.com/miami/2019/02/15/so-many-opportunity-zones-so-many-questions-for-developers-investors/> [<https://perma.cc/JT9S-MQDT>].

55. Investment real estate types include hotels, multi-family housing, office and residential spaces, commercial spaces, and student housing. *See supra* note 52 and accompanying text.

C. How Opportunity Zones Were Designated

Per I.R.C. § 1400Z-1(b)(1), a qualified Opportunity Zone is a low-income community population census tract.⁵⁶ To qualify as an Opportunity Zone, the tract must have been nominated by the chief executive officer of the state where the tract is located no later than the end of the determination period,⁵⁷ and the Secretary of the Treasury must have been notified in writing of the nomination.⁵⁸ Notably, tracts bordering low-income tracts, known as contiguous tracts, were also eligible for nomination if the median family income did not exceed 125% of the adjusted low-income tract.⁵⁹ Currently, there are 8764 qualified Opportunity Zones designated in the 50 states, the District of Columbia, and the five major U.S. territories, 230 of which are contiguous tracts.⁶⁰ State governors were permitted to nominate up to 25% of their eligible tracts as potential Opportunity

56. I.R.C. § 1400Z-1(b)(1) (2017). The IRS defines a “low-income community” as any population census tract where the poverty rate is at least 20%. If the census tract is located *within* a metropolitan area, the median family income for such tract may not exceed 80% of the greater statewide median family income, or the metropolitan area median income. If the census tract is located *outside* a metropolitan area, the median family income for the tract may not exceed 80% of the statewide median family income. I.R.C. § 45(D)(e) (2018); *see also What Are Opportunity Zones?*, OPPORTUNITY ZONE DATABASE, <https://opportunitydb.com/guide/opportunity-zones> [<https://perma.cc/ZLP2-4XD5>] (last visited Mar. 27, 2019) (noting that there are 31,866 census low-income census tracts in the United States, the District of Columbia, and the five major territories); Ronald Li, *Will New Opportunity Zones Attract Investors to the Bay Area’s Poorest Areas?*, S.F. BUS. TIMES (Apr. 26, 2018, 4:06 PM), <https://www.bizjournals.com/sanfrancisco/news/2018/04/26/us-opportunity-zones-taxes-vallejo-mare-island.html> [<https://perma.cc/TQ4V-NMYM>] (noting that an area’s poverty rate was based on American Community Survey data taken between 2011 to 2015 as the country was coming back from the recession).

57. The IRS defines the “determination period” as the “90-day period beginning on the date of enactment of the Tax Cuts and Jobs Act” I.R.C. § 1400Z-1(c)(2)(B) (2017).

58. *Id.*

59. BRETT THEODOS ET AL., DID STATES MAXIMIZE THEIR OPPORTUNITY ZONE SELECTIONS? 2 (2018), https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_1.pdf [<https://perma.cc/4NEQ-LY42>] (noting that contiguous tracts could not represent more than 5% of the total number of tracts selected).

60. *Id.* (noting that there were 42,176 eligible tracts in total throughout the 50 states, the District of Columbia, and the five major U.S. territories); *see also List of Opportunity Zones by State*, OPPORTUNITY ZONE DATABASE, <https://opportunitydb.com/location> [<https://perma.cc/2AHM-FAJ6>] (last visited Oct. 28, 2019).

Zones, or in a state with fewer than 100 qualified tracts, at least 25 tracts.⁶¹

In practice, state governors and heads of state nominated tracts using various criteria and methodology. In Pennsylvania, for example, the Department of Community and Economic Development spearheaded the nomination process, taking feedback and commentary from “individuals, cities, counties, legislators, and organizations” in regard to which neighborhoods most deserved the designations.⁶² Pennsylvania gave special consideration to the state’s poorest areas, taking into account the poverty rate, unemployment rate, and median family income. The state also considered anchor establishments such as airports and hospitals, and the potential to develop affordable housing in the tract, too.⁶³ In Ohio, the Development Services Agency worked with “local units of government . . . development professionals, development organizations, port authorities, and more” and “received over 100 calls and 238 online submissions, as well as letters of support” in contemplating which eligible tracts to ultimately nominate.⁶⁴ Tracts that demonstrated employment creation potential were awarded nomination priority, for example, “local cooperation” — that is, the number of submitters that nominated a single tract — and “future commitments of public/private [sic] investment,” to name a few.⁶⁵ The Treasury Department released the official designations based on the states’ nominations.⁶⁶

61. THEODOS ET AL., *supra* note 59, at 1.

62. *Qualified Opportunity Zones*, PA. DEP’T. CMTY. & ECON. DEV., <https://dced.pa.gov/programs-funding/federal-funding-opportunities/qualified-opportunity-zones/> (last visited Mar. 31, 2019); see also *Pennsylvania Submits Nominations for Qualified Opportunity Zones to U.S. Department of Treasury*, GOVERNOR TOM WOLF [hereinafter *Pennsylvania Submits Nominations*], <https://www.governor.pa.gov/pennsylvania-submits-nominations-qualified-opportunity-zones-u-s-department-treasury/> (last visited Oct. 28, 2019) (noting that Pennsylvania had 1197 census tracts eligible for Opportunity Zone designation).

63. *Qualified Opportunity Zones*, *supra* note 62.

64. *Opportunity Zones*, OHIO DEV. SERV. AGENCY, https://development.ohio.gov/bs/bs_censustracts.htm [https://perma.cc/7MTQ-J9PB] (last visited Oct. 28, 2019).

65. *Id.*

66. Press Release, U.S. Dep’t of the Treasury, IRS Announce Final Round of Opportunity Zone Designations (June 14, 2019), <https://home.treasury.gov/news/press-releases/sm0414> [https://perma.cc/ZC26-4EYD].

II. THE CURRENT ISSUES FRUSTRATING THE OPPORTUNITY ZONE PROGRAM

The Opportunity Zone Program aims to bolster low-income communities and their residents by injecting capital to spur economic development and employment opportunities in these neighborhoods. However, the Program's current state of disorganization, the wrongful designation of several Zones, and failures of past land zoning programs with built-in tax incentives both domestically and internationally suggest that without further safeguards, regulations, and monitoring, the Opportunity Zone Program may not end up achieving its goals.

This Part addresses some of the issues currently frustrating the Program's purpose. Section II.A discusses how the lack of clarity in regard to the IRS's regulations have given qualified funds pause when it comes to making investments in these zones. Next, Section II.B questions whether certain Opportunity Zones have been wrongfully designated. Lastly, Section II.C looks into two past land zoning programs with built-in tax incentives, Enterprise Zoning, and the New Markets Tax Credit, and suggests these initiatives are not as beneficial to local communities as they appear due to their cost ineffectiveness and the potential to displace rather than aid low-income community residents.

A. The Opportunity Zone Program Is Currently Disorganized and Without Meaningful Monitoring Systems

There is a massive amount of capital ready to deploy in the 117 qualified funds.⁶⁷ Some qualified funds are already making headway on their investment portfolios.⁶⁸ The Cresset-Diversified fund, for example,⁶⁹ announced a joint venture with Hines, a real estate investment firm, to develop The Preston, a multi-story residential

67. *Opportunity Zone Fund Directory*, *supra* note 52 (noting that some funds are targeting fund sizes of \$1 billion and over).

68. *Id.*; see also *Cresset-Diversified QOZ Fund Enters into Joint Venture with Hines Fund's First Qualified Opportunity Zone Investment*, BUS. WIRE (Feb. 6, 2019) [hereinafter *Cresset Fund*], <https://www.businesswire.com/news/home/20190206005360/en/Cresset-Diversified-QOZ-Fund-Enters-Joint-Venture-Hines> [<https://perma.cc/VK6Y-XM99>].

69. The Cresset Diversified Fund is managed by Cresset Capital Management and has a fund size of \$500 million. The fund is primarily interested in affordable housing, hotel, industrial, office, retail, and storage investment opportunities throughout the U.S. *Opportunity Zone Fund Directory*, *supra* note 52.

building in downtown Houston.⁷⁰ The building will house 373 apartment units featuring “ten-foot ceilings, engineered wood flooring, and Italian wood cabinetry,” and will provide its residents with amenities such as a fitness center, skydeck, and “23,500-square-foot tenth floor amenity level with resort-style pool, covered terrace, gas BBQ grills, and lounge seating.”⁷¹ The luxury apartment building will also boast 6804 square-feet of ground-level commercial space.⁷²

Several other qualified funds, however, have hesitated in deploying their raised capital despite the important 2019 deadline.⁷³ According to these qualified funds, there are both simple basics and minutiae that must be clarified before they feel comfortable with making sizable investments.⁷⁴ In fairness to the IRS, the agency has attempted to address and provide clarification to Opportunity Zone investors. In February 2019, it held a public hearing to gather questions and concerns about the Program, an event attended by approximately 200 people.⁷⁵ Amongst the questions put forth were whether a sale of an Opportunity Zone asset and the subsequent purchase of another would start the clock over again in regards to the ten-year holding period, and what exactly “substantially improv[ing]” an asset to qualify for the tax benefit means.⁷⁶ On April 17, just 64 days later, the IRS issued a lengthy set of regulations addressing

70. *Cresset Fund*, *supra* note 68.

71. *Id.*

72. *Id.*

73. Interested investors must invest their capital gains by the end of 2019 if they want to benefit from the 15% step-up in basis on their original investments, as investments must be held within a qualified fund for at least seven years by December 31, 2026 to qualify. I.R.C. § 1400Z-2(b)(2)(B)(iv) (2017); *see also* Allison Nagel, *Investors Need Final Guidance to Move Forward on Opportunity Zones, but Some See More Risk in the Wait*, BISNOW (Feb. 7, 2019), <https://www.bisnow.com/san-francisco/news/opportunity-zones/reading-the-tea-leaves-continued-uncertainty-means-that-some-have-embraced-oz-investment-while-others-wait-97400> [<https://perma.cc/W9BA-MFM7>] (noting that some investors are hesitant to move forward without additional clarification); Larsen, *supra* note 54 (“[Investors] remain cautious enough over of the program’s many unanswered questions that few have deployed much of the capital raised.”).

74. *See* Larsen, *supra* note 54.

75. *Id.*; *see also* Jim Tankersley, *Investors Eagerly Await Trump Rules on Opportunity Zones*, N.Y. TIMES (Mar. 17, 2019) [hereinafter Tankersley, *Investors*], <https://www.nytimes.com/2019/03/17/us/politics/opportunity-zones.html> [<https://perma.cc/R4T6-AE5B>] (noting that the IRS hearing was attended by and large by “investors and civic leaders requesting changes and additions to the rules in several areas”).

76. Larsen, *supra* note 54; *see also* Tankersley, *Investors*, *supra* note 75.

several of these concerns.⁷⁷ While it remains unclear if these newly-issued regulations have provided enough clarification for qualified funds to move forward with their investments, a companion document released by the Treasury Department asking the public for advice and guidance as to how to collect and track qualified funds' investment movement suggests that one, there are still several components of the Program that require attention, and two, that data collection has not been a priority thus far.⁷⁸ The lack of meaningful monitoring systems stands against the Program's purpose, given that data collection would provide invaluable information as to how the Program is operating at the ground level, and more importantly, if it is, in fact, benefitting low-income communities and their residents.

B. The Opportunity Zone Program Inaccurately Designated Several Zones

While states were required to adhere to certain criteria in nominating tracts for Opportunity Zone designation, the question remains as to whether or not some of the tracts that ultimately earned designations truly deserved their inclusion.⁷⁹ Fresno County in California, for example, a few hours' drive from the Bay Area and home to 47 designated Opportunity Zones, is lauded for its "melting-pot atmosphere, the arts scene, the nearby nature, and the affordable housing."⁸⁰ This depiction is not to say that Fresno does not have its share of problems: poverty and pollution are very much real and pressing issues present in the area.⁸¹ Furthermore, unlike the nearby Silicon Valley, which is teeming with new business and development,

77. 84 Fed. Reg. 18,691 (May 1, 2018) (to be codified at 26 C.F.R. pt. 1) (addressing the reinvestment issue, and allowing for a one-year grace period for a qualified fund to reinvest the capital upon the sale of a qualified Opportunity Zone asset). The regulations do not provide further clarification as to what "substantially improve" means, rather, they redirect the investor back to the original set of instructions for Form 8996. *Id.* Given that the IRS only released the first set of regulations in October 2018, eight months after the first Opportunity Zones were designated, the turnaround for the release of the second set of regulations was quick in comparison. *Id.*

78. U.S. DEP'T OF THE TREASURY, REQUEST FOR INFORMATION ON DATA COLLECTION AND TRACKING FOR QUALIFIED OPPORTUNITY ZONES 1 (2019) [hereinafter REQUEST FOR INFORMATION], <https://www.irs.gov/pub/irs-drop/reg-120186-18.pdf> [<https://perma.cc/N5DK-8YBL>].

79. See Annie Lowrey, *Fixing America's Forgotten Places*, ATLANTIC (July 24, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/how-do-we-help-this-place/565862/> [<https://perma.cc/T37Q-UKZX>].

80. *Id.*

81. *Id.*

technology companies have not flocked to Fresno to set up shop despite the area's affordability and proximity to several major California cities.⁸² Still, Fresno County is a place that "feels on the cusp" — it has a strong industrial base, affordable real estate, highway foot-traffic, and a "steady supply of educated workers" due to its proximity to California State University, Fresno and other higher educational institutions.⁸³ One of Fresno's designated Opportunity Zones is home to new development for Amazon, Ulta Beauty, and Volkswagen distribution centers.⁸⁴ Another Zone includes a mixed housing and retail commercial development, a project that has been in the development stages for quite some time.⁸⁵

A second California case study further enlightens the potential inaccuracy in Zone designation. The downtown Berkeley neighborhood, adjacent to the University of California, Berkeley campus, has a 44.6% poverty rate by-and-large due to the high number of students living in the area.⁸⁶ On a numerical basis, the neighborhood technically meets all requirements to qualify as a low-income community. But whether or not the area is truly impoverished is up for debate, given the fact that many students are neither employed on a full-time basis nor do they earn full-time salaries.⁸⁷ Nevertheless, Berkeley's economic development officials audibly supported the downtown neighborhood's inclusion in the Opportunity Zone Program on two premises — one, that the neighborhood meets both the income and poverty requirements required and two, that "future opportunity for transit-oriented

82. *Id.*

83. *Id.*

84. FRESNO CTY. ECON. DEV. CORP., SPOTLIGHT ON FRESNO COUNTY: 2018 REAL ESTATE FORECAST 14 (2018), <https://www.fresnoedc.com/wp-content/uploads/2019/02/2018-REF-Publication.pdf> [<https://perma.cc/NMG6-JNCE>] (showing Amazon, Ulta, Volkswagen, and other companies are developing industrial sites in South Fresno); George Hostetter, *President Trump's "Opportunity Zones" Could Help the Majority of Fresno*, SAN JOAQUIN VALLEY SUN (Mar. 30, 2018), <http://sjvsun.com/news/fresno/president-trumps-opportunity-zones-help-majority-fresno> [<https://perma.cc/C69M-BL8L>].

85. FRESNO CTY. ECON. DEV. CORP., *supra* note 84.

86. Li, *supra* note 56 (noting that the downtown Berkeley neighborhood is adjacent to the University of California, Berkeley campus).

87. *Id.* There are roughly 46,000-plus UC-Berkeley students in the downtown Berkeley neighborhood, 36,000 of which are undergraduate students and 10,125 of which are graduate students. There are also approximately 13,000 additional UC-Berkeley faculty and staff who either study or work in the neighborhood. DOWNTOWN BERKELEY, HAVE YOU BEEN TO DOWNTOWN BERKELEY LATELY? 5, http://www.downtownberkeley.com/docs/Retail_Brochure_FORWEB_rev11.pdf [<https://perma.cc/6GWF-HTN4>] (last visited Nov. 2, 2019).

development [in downtown Berkeley]” could benefit poorer neighborhoods, “with residents easily commuting downtown on the BART [train].”⁸⁸

Though California has the greatest number of Opportunity Zones, leading with a total of 879 Zones, only a quarter of the state’s eligible low-income tracts were ultimately designated and accepted into the Program.⁸⁹ The downtown Berkeley Opportunity Zone was far from the poorest tract in California designated, let alone in Berkeley itself.⁹⁰ Yet, three-quarters of California’s low-income communities will go without Opportunity Zone funding despite their potential need in favor of downtown Berkeley.⁹¹ Then, there is also the glaring evidence that some of the designated Zones do not appear to be as impoverished as the numbers suggest, due to the use of outdated census data and inflated poverty rates in defining the nation’s low-income communities.⁹² The downtown Berkeley neighborhood elucidates this. While the neighborhood’s poverty rate far exceeds both the national and California’s poverty rate — 14% and 19% respectively — downtown Berkeley’s overall unemployment rate sits at a mere 2.4%.⁹³ Oakland, by comparison, has a 3.7% unemployment rate, and California overall has a 4.6% unemployment rate.⁹⁴ Downtown Berkeley also has a median home price of around \$1 million.⁹⁵ Altogether, these data points suggest a discrepancy between the reported poverty rates and reality.

Fresno County and Berkeley are not unique in regard to questionable designations; rather, it is a rampant problem seen throughout the nation’s Opportunity Zones. In San Francisco, the

88. Li, *supra* note 56.

89. *What Are Opportunity Zones?*, *supra* note 56.

90. Li, *supra* note 56 (“More investment could benefit *poorer* neighborhoods . . .”) (emphasis added).

91. *Id.* (noting that poorer tracts in South and West Berkeley were also included in as designated Opportunity Zones).

92. HILARY GELFOND & ADAM LOONEY, BROOKINGS INST., *LEARNING FROM OPPORTUNITY ZONES: HOW TO IMPROVE PLACE-BASED POLICIES 1* (2018), https://www.brookings.edu/wp-content/uploads/2018/10/Looney_Opportunity-Zones_final.pdf [<https://perma.cc/J579-ALWA>] (“[T]he data used to identify places worthy of federal subsidies after 2018 dates as far back as 2011.”).

93. Li, *supra* note 56 (positing that the low poverty rate can be attributed to the neighborhood’s student residents); *see also* Sammy Caiola, *California Has One of the Nation’s Highest Poverty Rates, Again*, CAPITAL PUB. RADIO (Sept. 12, 2018), <http://www.capradio.org/articles/2018/09/12/california-has-one-of-the-nations-highest-poverty-rates-again/> [<https://perma.cc/4H2T-KZQK>] (noting California’s high poverty rates).

94. Li, *supra* note 56.

95. *Id.*

South of Market (SoMa) neighborhood, which has seen billions of dollars in new construction in the past ten years, was considered for nomination as a designated Opportunity Zone, as was the area near Stanford University in Palo Alto, due to its high student population.⁹⁶ In the District of Columbia, the Buzzard Point neighborhood adjacent to D.C. United's brand-new soccer stadium, Audi Field, is a designated Opportunity Zone even though hundreds of millions in upcoming investment have already been planned for both the stadium and surrounding area.⁹⁷ In New York City, a tract in the Upper East Side, bounded by Central Park, Park Avenue, East 98th Street, and East 106th Street, is a designated Opportunity Zone. Across Central Park in Hell's Kitchen, the tract bounded by the Hudson River, 10th Avenue, West 58th Street, and West 50th Street is also a designated Zone, despite the fact that just some 16 blocks away, the Hudson Yards residential, office, and shopping mega-complex — “one of the biggest real estate projects in the country in recent years” — opened in March 2019.⁹⁸ In Nevada, local businesspeople lobbied policymakers to get Storey County, the seat to the Tahoe-Reno Industrial Center, onto the list of eligible zones even though the County was initially ineligible for designation.⁹⁹ These communities, adjacent to affluent neighborhoods and new developments, are not as deprived as other areas in the same city, and thus begs the question as to whether development would have inevitably occurred there

96. *Id.* (pointing out that both Zones were removed from consideration as designated Opportunity Zones after feedback from the cities in question).

97. Looney, *supra* note 14 (noting that according to one estimate, half of D.C.'s low-income neighborhoods are in fact, already gentrified — the same can also be said of cities such as Portland, Seattle, Minneapolis, and Atlanta); *see also* Steven Goff, *D.C. United Will Open Audi Field on July 14, Setting Up All-Star Week on Waterfront*, WASH. POST (Jan. 4, 2018), <https://www.washingtonpost.com/news/soccer-insider/wp/2018/01/04/d-c-united-to-open-audi-field-july-14-vs-vancouver-whitecaps> [https://perma.cc/4S56-BQKX] (discussing how Audi Field, a 20,000-capacity sports arena two blocks from Nationals Park, opened in July 2018, at a cost of more than \$300 million).

98. Azi Paybarah, *Hudson Yards: The Making of a \$25 Billion Neighborhood*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/newyorktoday/nyc-news-hudson-yards.html> [https://perma.cc/L9ND-HLAM] (according to public records and an analysis by the New School, the complex cost an estimated \$6 billion in tax breaks and other government assistance).

99. GELFOND & LOONEY, *supra* note 92, at 7 (“Clearly, this play [to get Storey County on the list of eligible Opportunity Zones] was not motivated by a desire to help improve conditions of poor Nevada residents, but instead to deliver tax benefits for Nevada investors.”).

regardless of the Program's incentives, and if the investments are targeted at the neighborhoods most in need.¹⁰⁰

Studies support the proposition that states did not select Zones that are most in need of the designations.¹⁰¹ In 2018, Brett Theodos, Brady Meixell, and Carl Hedman conducted a study inquiring into whether or not states maximized their Opportunity Zone selections, and specifically, examined recent investment flow into the designated Zones, if any.¹⁰² They ranked each eligible census tract from one-to-ten, with ten representing areas attracting the highest level of investment and one representing the lowest.¹⁰³ While approximately one-third of designated Opportunity Zones were in fact tracts with historically low levels of investment, 28% of designated Zones had also attracted high levels of investment even before the conception of the Opportunity Zone Program.¹⁰⁴ On average, the majority of states' investment score hovered between five and six,¹⁰⁵ suggesting that many Opportunity Zones had already experienced notable levels of monetary flow even before their inclusion in the Program. Furthermore, a report issued by Hilary Gelfond and Adam Looney of the Brookings Institution arrived at a similar verdict: while some Zones clearly are in distress, others not so much.¹⁰⁶ States, Gelfond and Looney concluded, "could have targeted more of their Zones to places in deeper distress."¹⁰⁷

Wrongful designations threaten the Opportunity Zone Program's goal of lifting up low-income communities in several ways. In areas already seeing steady levels of economic investment and revitalization, channeling funds into projects that would have inevitably occurred regardless of a federal tax incentive draws budgeted funds away from the other low-income tracts that did not make the final cut for the Program. Several states either maxed out

100. *Id.* at 5.

101. *See, e.g.*, GELFOND & LOONEY, *supra* note 92, at 5; THEODOS ET AL., *supra* note 59, at 3.

102. THEODOS ET AL., *supra* note 59, at 3, 10–11 (discussing how investment flows to tracts were scored based on four components: commercial lending, multifamily lending, single-family lending, and small business lending. Since there is not currently information available about existing equity flows "at small areas of geography across the dimensions of interest," debt flows are another means of understanding local access to capital).

103. *Id.* at 3.

104. *Id.*

105. *See id.* at 5.

106. *See generally* GELFOND & LOONEY, *supra* note 92.

107. *Id.* at 5.

or came close to maxing out their nomination slates by putting forth the full 25% of eligible tracts, meaning that in these states, three-quarters of low-income Zones are now without funding, and possibility even development, at the expense of Zones that may not truly require either.¹⁰⁸ Storey County, Nevada, for example, became a designated Opportunity Zone at the expense of Dayton, Nevada, a far more impoverished neighborhood.¹⁰⁹

Channeling funding into areas that are already undergoing revitalization may also end up harming the very individuals the Opportunity Zone Program seeks to aid. Critics of the legislation see the expansion and creation of new local businesses and the rehabilitation of existing property in these distressed zones as, at best, “an optimistic scenario.”¹¹⁰ To them, the Program’s tax incentives are a so-called “subsidy for gentrification,” and here, gentrification is far from a positive thing.¹¹¹ Incentivizing tax breaks correlates, perhaps inevitably, with high business profitability, property values, and rent rates, given investors’ interest in high returns on their investment. Economic theory suggests that high returns on investment “will flow to [investments] in the fastest gentrifying areas.”¹¹² Meanwhile, as these businesses move in, local residents may be displaced out for the individuals with the educational credentials and incomes to qualify for and afford these jobs and lifestyles.¹¹³ As high-rise, luxury apartment buildings soar in these Zones, the current residents of the

108. *State-by-State Analysis, URBAN INST.*, https://www.urban.org/sites/default/files/urban_statesozs_update.xlsx (last visited Oct. 28, 2019) [<https://perma.cc/UP6F-UTCV>] (showing states like California and New York maxed out their nominations for designating Opportunity Zones); *see also Pennsylvania Submits Nominations*, *supra* note 62 (noting that the state nominated its maximum of 300 tracts).

109. GELFOND & LOONEY, *supra* note 92, at 7. Dayton, Nevada, unlike Storey County, is a true “economically depressed neighborhood that lacks Storey County’s huge industrial center.” Damian Paletta, *After Nevada GOP Push, Treasury Changed Lucrative Policy Benefitting One County*, WASH. POST. (June 22, 2018), https://www.washingtonpost.com/business/economy/after-nevada-gop-push-treasury-quietly-changed-policy-benefiting-one-county/2018/06/22/d142acfc-74c5-11e8-b4b7-308400242c2e_story.html [<https://perma.cc/U8XW-LD2N>]. While Storey County’s median income is \$65,608, Lyon County’s median income — where Dayton is located — sits at just \$49,007. *Id.*

110. Looney, *supra* note 14.

111. *Id.*

112. *Id.*; *see also* THEODOS ET AL., *supra* note 59, at 3 (“[I]n communities already experiencing high levels of socioeconomic change further investment places low- and moderate-income residents at risk of displacement, and therefore Opportunity Zones in these areas may be less likely to result in benefits for residents in need.”).

113. *See* Looney, *supra* note 14.

neighborhood may find themselves unable to afford the increased rent rates that comes with upgrading these areas, not to mention the increased cost of living.¹¹⁴ States themselves may also feel pressured to maximize the Program's tax benefits to their citizens and developers, and consequently could push for qualified funds to invest in already-gentrifying neighborhoods which "are guaranteed to have large capital gains," as opposed to deeply distressed areas where investment is speculative at best.¹¹⁵ Thus, despite the Program's purpose to create opportunities for the individuals living in these distressed neighborhoods, that goal may not come to fruition for current residents living in Opportunity Zones.¹¹⁶

C. The Opportunity Zone Program Has Not Accounted for the Failures of Similar Zoning Programs

In a way, the Opportunity Zone Program is not the first economic development policy of its kind. In the past 40 years, the U.S. has seen two programs with similar goals to that of the Opportunity Zone Program: Enterprise Zones and the New Market Tax Credits.

i. Enterprise Zones

In the 1980s and early 1990s, the majority of states implemented Enterprise Zone legislation, which cited aims very similar to that of the Opportunity Zone Program — to "provide tax preferences to capital and/or labor and other development incentives in an attempt to induce investment expansion or location, and to enhance employment opportunities for residents in depressed areas."¹¹⁷ Like Opportunity Zones, Enterprise Zones also relied primarily on private-sector investment.¹¹⁸ Typical Enterprise Zone programs provide tax incentives such as subsidies to capital or labor, or both, to

114. THEODOS ET AL., *supra* note 59, at 3 ("With respect to benefit, low-and moderate-income residents will need to be able to afford to remain their communities as the areas the areas upgrade — not be displaced — if they are to benefit from the gains Opportunity Zones bring.").

115. Looney, *supra* note 14.

116. *See* 164 CONG. REC. S667-05 (daily ed. Feb. 7, 2018) (statement of Sen. Tim Scott).

117. Leslie E. Papke, *What Do We Know About Enterprise Zones?*, 7 TAX POL'Y & ECON. 37, 38 (1993); *see also* ALAN H. PETERS & PETER S. FISHER, W.E. UPJOHN INST. FOR EMP. RES., STATE ENTERPRISE ZONE PROGRAMS: HAVE THEY WORKED?, 23 (2002) (noting how Enterprise Zone policy geographically targeted economically depressed areas in need of regeneration). Between 1981 and 1991, 39 states and the District of Columbia adopted some form of Enterprise Zone programming. *Id.* at 1.

118. PETERS & FISHER, *supra* note 117, at 23.

lower the cost for businesses in the area. In theory, business and production in those areas would, in turn, increase.¹¹⁹ A labor subsidy, for example, would lower labor costs, increase the use of labor as well as capital, and bolster output and employment.¹²⁰

Even before the federal government authorized Enterprise Zones, their effectiveness was called into question.¹²¹ Tax induced investment in distressed Zones, the naysayers argued, was merely investment relocated from somewhere else and in essence, a “zero-sum game for the country as a whole.”¹²² On the other hand, investment into these areas could both incentivize an existing business to relocate to those neighborhoods and stimulate new businesses that otherwise may not have been inclined to begin in those neighborhoods, which in turn could produce taxable profits and incomes to reduce the revenue cost of the tax incentives.¹²³

By and large, Enterprise Zones were considered failures both domestically and abroad.¹²⁴ Alan H. Peters and Peter S. Fisher conducted an extensive study that thoroughly examined Enterprise Zones across multiple states, concluding that Enterprise Zones were

119. Papke, *supra* note 117, at 41 (noting how, in theory, these subsidies should “tend to increase zone production”).

120. *See id.* (discussing how subsidies to both capital and labor can increase Enterprise Zones’ production by both encouraging existing firms to increase production and by promoting new firms to relocate and expand into the Enterprise Zones so that they can benefit from these tax incentives). Labor subsidies include employer tax credits for new employees, employee income tax credits, and job training tax credits, amongst others. *Id.* at 49.

121. *See id.* at 38–39 (discussing the criticism of Enterprise Zoning programs). Enterprise Zones were first authorized under the Omnibus Budget Reconciliation Act of 1993, which allowed for the designation of nine Empowerment Zones and ninety-five Enterprise Zones. Omnibus Budget Reconciliation Act of 1993 (OBRA-93), Pub. L. No. 103-66, 107 Stat. 543 (1993).

122. Papke, *supra* note 117, at 39.

123. *Id.* at 39, 41.

124. *See, e.g.*, Bruce Bartlett, *Enterprise Zones: A Bipartisan Failure*, FISCAL TIMES (Jan. 10, 2014), <https://www.thefiscaltimes.com/Columns/2014/01/10/Enterprise-Zones-Bipartisan-Failure> [https://perma.cc/7NNV-JYAC] (noting that Enterprise Zones are “at best a very weak generator of jobs” and that there was “no significant difference in economic growth or job creation inside the enterprise zones from the surrounding area”); *California’s Enterprise Zone Program Fails to Create Jobs*, PUB. POL’Y INST. CAL., <https://www.ppic.org/press-release/californias-enterprise-zone-program-fails-to-create-jobs/> [https://perma.cc/9SE4-EEC5] (last visited Apr. 7, 2019) (stating that the Enterprise Zone Program “failed to achieve its key goal: increasing jobs”); PETERS & FISHER, *supra* note 117, at xi (noting that Enterprise Zones’ implementation at the state level “has not been a success”); Papke, *supra* note 117, at 47 (“[The] British zone program has failed in its goal of generating *new* industrial activity.”).

unsuccessful for several reasons.¹²⁵ According to Peters and Fisher's calculations, the Enterprise Zone Program created roughly 9% of induced jobs.¹²⁶ For these Enterprise Programs to be successful, however, cities would need at least 30% in induced jobs to come out ahead.¹²⁷ Additionally, states with Enterprise Zones also saw a net loss of establishments under such programming and averaged a 1.2% decline in businesses and establishments per year over six years due to a "pronounced comparative disadvantage" in attracting and holding onto capital-intensive sectors of manufacturing.¹²⁸ Enterprise Zone programming also failed to create employment for low-income community-residents, as the Zones ended up attracting the majority of its workers from commuters living outside the areas.¹²⁹ Other research concluded that Enterprise Zones did nothing at all for the communities involved.¹³⁰

British Enterprise Zones, which focused primarily on industrial and commercial revitalization in mostly vacant and deteriorating industrial neighborhoods experiencing under population, were unsuccessful, too.¹³¹ Surveys did not find any real difference between employment creation, investment behaviors, or business between Enterprise Zones and non-Enterprise Zones.¹³² These surveys further noted that only 25% of new jobs within these areas were induced jobs.¹³³ Other studies quantified the cost of the British

125. PETERS & FISHER, *supra* note 117, at xi (discussing how Enterprise Zones also fail to influence business decisions).

126. *Id.* at 10 (defining induced jobs as jobs that would not have existed in the Enterprise Zone but for the inducement packages).

127. *Id.*

128. *Id.* at 11–12 (noting that while 11 Zones experienced net growth of over 10%, 24 Zones experienced declines of 15% or more).

129. *Id.* at 14 (noting that the commute time for workers in Enterprise Zones was, on average, longer than that of workers employed elsewhere in regions that contained Enterprise Zones, suggesting that proximity between home and employment did not necessarily improve employment accessibility).

130. See BERNSTEIN & HASSETT, *supra* note 16, at 8 (noting that research into Enterprise Zones "found little impact of the programs on local job markets" and that it was not possible to tie any improvements in poverty and unemployment to Enterprise Zoning).

131. TIMOTHY P.R. WEAVER, *BLAZING THE NEOLIBERAL TRAIL: URBAN POLITICAL DEVELOPMENT IN THE UNITED STATES* 33 (2015); see also Papke, *supra* note 117, at 47.

132. Papke, *supra* note 117, at 47.

133. *Id.*

Enterprise Zone Program and estimated that each induced job created cost between \$35,000 to \$45,000 in lost revenue.¹³⁴

Several theories have been put forth speculating as to why Enterprise Zone programming failed as spectacularly as it did. For one, businesses learned how to circumvent the system and engaged in rent-seeking behavior by relocating businesses just outside of an Enterprise Zone into one.¹³⁵ High tax rates, furthermore, were never the reason why businesses failed to invest in Enterprise Zones before they were even designated as such.¹³⁶ Rather, the lack of educated laborers, transportation, and a moneyed population in these areas drove away potential investment.¹³⁷ Enterprise Zone policy neglected to address these issues.

ii. The New Markets Tax Credit

Like both Enterprise and Opportunity Zones, the New Market Tax Credits (NMTC)¹³⁸ encourages investment in distressed zones by providing institutions and individuals with federal income tax credits for investing in Community Development Entities (CDE).¹³⁹ CDEs are specialized financial vehicles created to provide loans, fund investments, and counsel low income communities in financial matters.¹⁴⁰ Much like qualified funds, CDEs make equity investments into low-income communities¹⁴¹ and businesses, and in turn, taxable

134. Timothy Weaver, *The Problem With Opportunity Zones*, CITYLAB (May 16, 2018), <https://www.citylab.com/equity/2018/05/the-problem-with-opportunity-zones/560510/> [<https://perma.cc/ZK2Q-ZKKH>]. While proponents of the British Enterprise Zone Program cite Canary Wharf, a previously dilapidated neighborhood turned financial hub as an example of the Program's success, Canary Wharf is also still home to some of the most income-deprived households in the United Kingdom. *Id.*

135. Bartlett, *supra* note 124.

136. *Id.*

137. *Id.*

138. Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified in scattered sections of 26 U.S.C.).

139. DONALD J. MARPLES & SEAN LOWRY, *NEW MARKETS TAX CREDIT: AN INTRODUCTION* 1 (2016), <https://fas.org/sgp/crs/misc/RL34402.pdf> [<https://perma.cc/MH2Z-PQH5>]; *see also* MARTIN D. ABRAVANEL ET AL., *NEW MARKETS TAX CREDIT (NMTC) PROGRAM EVALUATION* 2 (2013), <https://www.cdfifund.gov/Documents/NMTC%20Program%20Evaluation%20Final%20Report.pdf> 3 [<https://perma.cc/VH6L-JD9D>].

140. MARPLES & LOWRY, *supra* note 139, at 2.

141. *Id.* at 3 (stating that like the Opportunity Zone Program, qualifying "low-income communities . . . have at least one of the following criteria: (1) has a poverty rate of at least 20%, (2) is located in a metropolitan area with a median family income below 80% of the greater of the statewide or metropolitan area median family

investors earn tax credits, which they are eligible to claim at 5% for the first three years, then at 6% for the subsequent four years as long as the investments remain in those communities.¹⁴²

While the NMTC has not fared as poorly as Enterprise Zones have in the public eye,¹⁴³ it has received its fair share of criticism, too.¹⁴⁴ One study of the NMTC suggests that while funds may have shifted from high to low-income communities, there is also no evidence pointing to any increase from corporations in their investment levels.¹⁴⁵ This phenomenon suggests that corporations may be receiving credits for investments they would have made regardless of tax incentives.¹⁴⁶ The NMTC has also been criticized as overly confusing and difficult to navigate, even for the financial institutions directly involved in funding and loaning procedures.¹⁴⁷ It also lacks controls and regulation to prevent excessive rates of return, potential duplication of benefits, and high costs.¹⁴⁸ Furthermore, while the NMTC did create jobs, on average, each job created cost \$53,162 in

income, or (3) is located outside a metropolitan area, with a median family income below 80% of the median statewide family income.”).

142. *Id.* (noting that there are four types of qualified low-income community investments: (1) loans or investments to qualified low-income community businesses; (2) provision of financial counseling; (3) loans or investments in other CDEs; and (4) the purchase of loans from other CDEs).

143. *See, e.g.,* Paul Anderson, *The NMTC, Business Financing, and Entrepreneurship*, NEW MKTS. TAX CREDIT COAL. (Feb. 21, 2018), <http://nmtccoalition.org/2018/02/21/the-nmtc-business-financing-and-entrepreneurship/> [<https://perma.cc/T6J5-MVQG>] (praising the NMTC’s hand in creating construction employment, even though such jobs may be temporary); Press Release, U.S. Dep’t of the Treasury, \$3.5 Billion in New Markets Tax Credits Awarded to Spur Economic Growth Nationwide (Feb. 13, 2018), <https://home.treasury.gov/news/press-release/sm0288> [<https://perma.cc/T7KU-B73C>] (noting that the NMTC has created 750,000 jobs and led to the construction and rehabilitation of over 190 million square feet of commercial real estate)

144. *See, e.g.,* BERNSTEIN & HASSETT, *supra* note 16, at 9–11 (stating that the NMTC is “overcomplicated”); MARPLES & LOWRY, *supra* note 139, at 7 (suggesting that the NMTC be simplified and that geographic distribution of activity has been concentrated into only a few states).

145. Tami Gurley-Calvez et al., *Do Tax Incentives Affect Investment? An Analysis of the New Markets Tax Credit*, 37 PUB. FIN. REV. 371, 373 (2009).

146. *Id.*

147. *See* JAMES R. WHITE ET AL., NEW MARKETS TAX CREDIT: BETTER CONTROLS AND DATA ARE NEEDED TO ENSURE EFFECTIVENESS 10 (2014), <https://www.gao.gov/assets/670/664717.pdf> [<https://perma.cc/VLT5-XB9P>] (stating that the NMTC financial structure has only “become more complex and less transparent over time”); Roshan Rajabi, *Inside the New Markets Tax Credit Program: Who Is the Real Winner?*, BOLLER REV. 296, 298–303 (2017) (discussing how “many . . . in the field of finance — commercial banking specifically — are unclear on what the NMTC program is”).

148. WHITE ET AL., *supra* note 147, at 12.

tax credits, and the number created was small when squared against the cost.¹⁴⁹ The leeway in the NMTC's definition of "low-income community" ensures almost all neighborhoods, even historically affluent ones like Beverly Hills and the Hamptons, could stand to benefit from the program.¹⁵⁰

The problems that plagued Enterprise Zones and the NMTC are present in Opportunity Zone programming, too. Opportunity Zone programming, much like Enterprise Zone programming, does not currently account for businesses interested in gaming the system, nor does it regulate for non-zone residents usurping employment opportunities meant for residents within these low-income Zones.¹⁵¹ Furthermore, the Opportunity Zone Program uses the same definition of low-income communities the NMTC adopted.¹⁵² Even now, there is evidence that some designated Opportunity Zones may already be on the road to gentrification and thus, may not require or benefit from supplemental funding as much as other zones.¹⁵³ Furthermore, like the NMTC, the Opportunity Zone Program has also been criticized for being confusing and complicated; the delay in clarification and additional regulations has only exacerbated these concerns.¹⁵⁴ Without regulation and policy addressing the areas where Enterprise Zones and the NMTC faltered, the Opportunity Zone Program may fall victim to the same pitfalls given the similarities in the legislation and overarching purpose.

149. Bartlett, *supra* note 124.

150. See TOM COBURN, *BANKING ON THE POOR: HOW CORPORATE AMERICA EXPLOITS STRUGGLING COMMUNITIES TO COLLECT NEW MARKET TAX CREDITS* i (2014).

151. Bartlett, *supra* note 124 (addressing how a lack of educated individuals, transportation, and a moneyed population in Enterprise Zones may have contributed to its failure). See generally I.R.C. § 1400Z-2 (2017).

152. See I.R.C. § 1400Z-1 (2017); see also MARPLES & LOWRY, *supra* note 139, at 3.

153. See Looney, *supra* note 14 (discussing how some Census data defining low-income communities date back to 2011, and that possibly half of the low-income zones in the District of Columbia, Seattle, Portland, Minneapolis, and Atlanta may already be gentrified).

154. See *Partner Insights, Opportunity Zones: The Do's and Don'ts of Real Estate's Most Exciting Investment Vehicle*, COM. OBSERVER (Dec. 11, 2018, 2:50 PM), <https://commercialobserver.com/2018/12/opportunity-zones-the-dos-and-donts-of-real-estates-most-exciting-new-investment-vehicle/> [https://perma.cc/8FTE-95ZF] (calling Opportunity Zones "exciting, but often confusing"); see also Robert D. Matt, *FAQ: Understanding Opportunity Zones*, KAUFMAN ROSSIN (Dec. 17, 2018), <https://kaufmanrossin.com/blog/faq-understanding-opportunity-zones/> [https://perma.cc/8TH7-A74C] (calling Opportunity Zones "complicated"); Nagel, *supra* note 73 (stating that investors have been hesitant to move forward).

III. MOVING FORWARD: WHAT NEEDS TO BE DONE

This Note proposes measures that the IRS, the Treasury Department, and the states themselves can take in an effort to ensure the Opportunity Zone Program truly benefits the intended low-income communities and their residents. Section III.A suggests measures the IRS and the Treasury Department should adopt going forward to better ensure that investors are not deterred away from participation due to lack of knowledge, and that as much transparency and oversight is included as possible. Section III.B then puts forth measures state officials can undertake to better ensure that their low-income communities and residents are truly the areas and individuals benefitting from the Opportunity Zone Program.

A. What the IRS and the Treasury Department Can Do

i. The IRS and Treasury Department Should Continue to Clarify the Existing Regulations

The second set of regulations the IRS promulgated on April 17, 2019 is undoubtedly a step in the right direction, as the agency has stepped forth and clarified several key components of the Program that required further explanation. The 169-page document has provided useful clarification as to what “50 percent of a business’ total gross income” means to qualify for the tax incentives,¹⁵⁵ how long an investor has to reinvest gains if he sells an Opportunity Zone asset,¹⁵⁶ and what the parameters are for vacant property.¹⁵⁷ The regulations have also provided a more comprehensive definition as to what “substantially all” means in regards to investment in qualified Opportunity Zone stock and partnership interest¹⁵⁸ and have made it

155. 84 Fed. Reg. 18,691 (May 1, 2018) (to be codified at 26 C.F.R. pt. 1) (clarifying the three safe harbors a business may comply with to benefit from the Program’s tax incentives).

156. *Id.* at 163 (providing investors with a one-year grace period in which to reinvest gains made from an Opportunity Zone asset into another Opportunity Zone asset).

157. *Id.* at 12 (clarifying the purchase of vacant property by a qualified fund — If the acquired property has been standing vacant for five or more years before the purchase of such property by the qualified fund, the purchased property will satisfy the original use requirement).

158. Tony Nitti, *IRS Releases Latest Round of Opportunity Zone Regulations: Where Do We Stand Now?*, FORBES (Apr. 22, 2019), <https://www.forbes.com/sites/anthonymitti/2019/04/22/irs-releases-latest-round-of-opportunity-zone-regulations-where-do-we-stand-now/#3ed372c42772> [https://perma.cc/J9H4-BAAW]; FORM 8996 INSTRUCTIONS, *supra* note 31, at 1–2 (stating that if a qualified fund is investing in stock or a partnership interest, the

easier for startup companies and existing businesses to become involved with Opportunity Zones,¹⁵⁹ thus potentially diversifying the real-estate-heavy investments seen so far. Still, however, other pieces of necessary information remain without clarification.¹⁶⁰

While it remains unclear as to whether investors' concerns have been sufficiently assuaged with the new regulations, the IRS and the Treasury Department should continue to address the queries and concerns in a timely manner if they are serious about achieving the Program's goals. Though the IRS and Treasury Department appear uninterested in issuing a third set of regulations and clarifications, it may be in the agencies' best interest to do so, as guidance is still needed for several key components of the Opportunity Zone Program.¹⁶¹ 2019 is an important year for generating cash flow and interest in investors, as the 15% step-up in basis on the original investment will only apply to investments made by the end of the year.¹⁶² To ensure that investors remain interested in the Program — and perhaps more importantly, that their investments stay within qualified funds and Opportunity Zone neighborhoods — the IRS

corporation or partnership must be a qualified Opportunity Zone business for “substantially all” of the time the fund holds the stock or interest). *Id.* at 7–9. The second set of Regulations defines “substantially all” as at least 90% of the qualified fund's holding period. *Id.* at 1–2.

159. Michael Cohn, *Opportunity Zone Rules Aim to Spur Further Business and Real Estate Investment*, ACCT. TODAY (Apr. 23, 2019), <https://www.accountingtoday.com/news/opportunity-zone-rules-aim-to-spur-further-business-and-real-estate-investment> [<https://perma.cc/5FUH-DAYT>] (noting that the safe harbors in the new regulations have made it easier for startup companies and existing businesses to participate in the Program too).

160. *See id.* (directing investors back to the original definition of “substantially improve” in the legislation, the same definition that initially confused investors); *see also* Tankersley, *supra* note 42 (discussing how agencies have yet to clarify how important data will be collected).

161. *See* Lydia O'Neal, *No Plan for Third Round of Opportunity Zone Rules, Officials Say*, BLOOMBERG (May 13, 2019, 2:00 PM), <https://news.bloombergtax.com/daily-tax-report/no-plan-for-third-round-of-opportunity-zone-rules-officials-say> [<https://perma.cc/LG7C-PCRB>] (reporting that the IRS and Treasury Department have no plan for a third set of regulations). Treasury Tax Legislative Counsel Krishna Vallabhaneni stated “I don't know what would even be in a third reg [sic]” despite parties calling for guidance on anti-abuse, de-certification, and penalties, amongst others. *Id.*

162. *See* I.R.C. § 1400Z-2 (2017) (stating that capital gains tax on original investments channeled into qualified funds may only be deferred until December 31, 2026); *see also* Matthew Rothstein, *Delays Could Be Good News for Philadelphia*, BISNOW (Apr. 5, 2019), <https://www.bisnow.com/philadelphia/news/opportunity-zones/opportunity-zone-deadline-different-investments-good-news-98359> [<https://perma.cc/4NRT-56QL>] (discussing how the 15% step-up in basis only applies to investments made by the end of 2019).

must continue to provide clarity on key components of the Program before both the end of 2019 and before the 15% step-up in basis incentive terminates. Or else, they risk losing both investments and investors' interest.¹⁶³

ii. The IRS and Treasury Department Should Regulate Opportunity Zones That May Not Be as Distressed as Others

To help low-income neighborhoods and their residents, legislation and programming must actually be directed towards these areas. Currently, the evidence demonstrates some of the designated Zones may not be as distressed as the outdated data suggests that they are.¹⁶⁴ Though tracts have already been designated as Opportunity Zones and no current provision exists in the legislation to remove, re-designate, or otherwise alter the designation of tracts, the IRS could still put forth additional regulations to more accurately target distressed areas in need of Opportunity Zone funding.

For one, several college towns were selected as Opportunity Zones due to their high qualifying poverty rates.¹⁶⁵ Other selected tracts may be well on the road to gentrification already. Several designated neighborhoods have seen millions of dollars in new investment in the past couple of years and bear the signs of revitalization: a flagship Whole Foods and a Trader Joe's, new sports arenas, and headquarters for technology darlings like AirBnB and Uber.¹⁶⁶ While the tracts may have qualified for nomination based on the definition of "low-income community," the census data used to define these Zones is outdated and thus, fails to accurately capture a true picture

163. While interested investors can still qualify for a 10% step-up in basis if they invest into Opportunity Zones after 2019, since an investment must be held for at least seven years by December 31, 2026 to qualify for a full 15% step-up in basis, investors will lose the extra 5% step-up in basis if they do not invest by the end of 2019. I.R.C. § 1400Z-2 (2017).

164. See discussion, *supra* Section II.B; see also GELFOND & LOONEY, *supra* note 92, at 1, 5 (stating that it is "obvious" that to help individuals in distressed neighborhoods, those neighborhoods actually need to be targeted).

165. See GELFOND & LOONEY, *supra* note 92, at 9–10 (noting how "subsidizing college campuses is not what Congress intended" in regard to Opportunity Zone programming). The neighborhood housing the University of Southern California in Los Angeles, located in Census Tract 222700 has an official poverty rate is 88%, and yet, 99% of its residents are enrolled in college. *Id.*

166. See Looney, *supra* note 14 (pointing out that San Francisco's SoMa neighborhood qualifies as a designated Opportunity Zone, even though it is home to trendy supermarkets and sporting goods stores) Several other major cities also are home to "gentrifying hotspots" that nevertheless, qualify as Opportunity Zones. *Id.*

of what a Zone looks like.¹⁶⁷ Establishing a more accurate definition of a low-income community¹⁶⁸ and updating census data to better catalog the nation's distressed zones should be a priority for the IRS moving forward.¹⁶⁹

In doing so, the federal government would have a clearer understanding of exactly which Zones are, in fact, distressed, and could implement regulations that guard against exploitation of the Program accordingly. Regulations guarding against excessive investment in illusory low-income communities — that is, college towns with inflated poverty levels and already-gentrifying neighborhoods — could be put into place.¹⁷⁰ A cap on the dollar-amount spent, or a restriction on the number of projects carried out in these particular Opportunity Zones could help counteract investors' tendency to seek for high returns in investment in the areas gentrifying most rapidly.¹⁷¹ More stringent restrictions on the types of projects that may be carried out in these illusory Zones may prove useful, too. The majority of the projects stimulated thus far under the Opportunity Zone Program have been real estate ventures such as luxury apartment buildings and hotel developments.¹⁷² However,

167. *See id.* (pointing out that the Treasury Department relied on maps of census data, some of which dated back to 2011).

168. GELFOND & LOONEY, *see supra* note 92, 8–10. One measure that could be implemented in redefining poverty and low-income communities could be to exclude students from the census count. Another could be to look for additional indicators of distress, such as child poverty rates when designating low-income communities. *Id.*

169. *See* Looney, *supra* note 14.

170. *See* FORM 8996 INSTRUCTIONS, *supra* note 31, at 1–2 (stating that while qualified funds themselves must invest at least 90% of their funds into qualified Opportunity Zone property, stock, interest, business, or business property per year, there are no minimum or maximum thresholds an Opportunity Zone itself must meet to qualify as such. Therefore, state-imposed regulations as described above would still be within the statutory guidelines); *see also* GELFOND & LOONEY, *supra* note 92, at 12 (noting that it is “incumbent on states and localities to direct investments” and that they have available to them the “tools they’ve used before — zoning, local hiring requirements, property or other tax incentives, preservation, [and] assistance to homeowners”).

171. *See* Looney, *supra* note 14.

172. *See Cresset Fund*, *supra* note 68 (detailing a luxury apartment under development in a Houston, Texas Opportunity Zone); Tankersley, *Investors*, *supra* note 75 (describing a SpringHill Suites by Marriott hotel project under development in Phoenix, Arizona). Though the additional regulations have expanded the types of eligible businesses to “service transactions and employee location,” it remains to be seen whether qualified funds will end up diversifying their portfolios or if they will continue to invest in profitable luxury living real estate. Mary Childs, *Opportunity Zones Just Got Clearer, Giving Investors a Green Light*, BARRON'S (Apr. 19, 2019, 1:13 PM), <https://www.barrons.com/articles/opportunity-zone-rules-tax-investments-51555693905> [<https://perma.cc/3L3Z-YU24>]; *see also DC Opportunity Zones*,

these projects may not be all that beneficial to the residents living in these neighborhoods, who may not be able to afford rent on an apartment with all the bells and whistles. Creating and enforcing regulations that curtails the displacement of residents in distressed communities or that draws in employees from outside the Zones by limiting investment opportunities would better ensure that the Program truly benefits those it is intended to benefit.

iii. The IRS and Treasury Department Should Implement Data Collection and Monitoring Systems

In April, the Treasury Department issued a request for information seeking public input on data collection and tracking as it relates to investment in qualified opportunity funds, alongside the second set of regulations issued by the IRS.¹⁷³ Unsurprisingly, critics have panned this part of the Program's lag, given the many months the respective agencies have had to consider and address this data collection deficiency.¹⁷⁴ Since the Opportunity Zone Program is run through the tax code and the benefit exists in the form of capital gains — which are typically reported only when an asset is sold, without additional oversight — much of the Program's day-to-day operation will go unchecked.¹⁷⁵ This leaves the Program wide open for abuse: there are no systems in place to gather information about what projects are being developed, how qualified funds are gathering and

BISNOW, <https://www.bisnow.com/events/washington-dc/DC-Opportunity-Zones-1346> [<https://perma.cc/ETP5-4DAH>] (last visited May 13, 2019) (noting that “high-end condominiums, luxury apartments, high-rise hotels, towering offices, and chic retail and restaurants” are rising at “an astonishing pace” in low-income areas in D.C.).

173. REQUEST FOR INFORMATION, *supra* note 78.

174. See Tankersly, *Treasury Issues Rules*, *supra* note 42 (quoting Olugbenga Ajilore, a senior economist with the Center for American Progress, who commented that “[t]his [Program] has been in place for 17 months and now you’re going to ask for comments about data collection? . . . There needs to be some accountability to the community.”); see also Olugbenga Ajilore, *Treasury’s Second Set of Guidelines for Opportunity Zones Still Leaves Struggling Communities Behind*, *CTR. FOR AM. PROGRESS* (Apr. 25, 2019), <https://www.americanprogress.org/issues/economy/news/2019/04/25/469039/treasury-second-set-guidelines-opportunity-zones-still-leaves-struggling-communities-behind/> [<https://perma.cc/YF84-MG7V>] (“As it now stands, there is nothing in the new rules that ensures investors have any, let alone meaningful, engagement with distressed communities. There is nothing in the rules that ensures private capital will be deployed beyond a few major metropolitan areas.”).

175. See Tankersley, *Treasury Issues Rules*, *supra* note 42 (discussing how § 1202, providing for the exclusion of gains on small business stock, presents a cautionary tale for Opportunity Zone monitoring, as there is “no concurrent information on how investors are using the provision”).

dispensing their monies, and how well, or not, the Program is benefitting the communities and the residents it is supposed to.¹⁷⁶

The Treasury Department and the IRS must install the proper data collection and monitoring tools to track the Program's effectiveness. As it is, the Opportunity Zone Program has drawn its fair share of criticism and been denounced as nothing more than a "subsidy for gentrification."¹⁷⁷ To combat these real fears, the IRS and the Treasury Department must do more to demonstrate that the Program's effectiveness is an important concern. Adding weight to critics' fears that accountability to the community has not been a priority thus far, is based on the fact that no meaningful systems were put into place after 17 months to check the activity of qualified funds, and these agencies are only now beginning to turn their attention towards data collection.¹⁷⁸ Moving forward, the IRS and the Treasury Department must take into account the comments it receives from the public in regard to data collection, and collaborate with proper state institutions and organizations to gather the necessary information so as to properly assess the Opportunity Zone Program — and whether or not it is achieving its goals.

B. What the States Can Do

i. States Should Promote a Local Mindset

Much of the criticism of Enterprise Zone programming revolved around the induced jobs created, and specifically, that few of the residents within Enterprise Zones benefitted from the opportunities generated.¹⁷⁹ Commuting times demonstrated that only a small portion of the Enterprise Zone residents actually worked within these zones, suggesting that many of the Enterprise Zone-created employment opportunities were not in fact taken by the residents they were created for.¹⁸⁰ The rapid gentrification of these distressed neighborhoods, furthermore, may lead to both the displacement of their residents unable to afford the skyrocketing cost of living in such areas and the entry of a population with higher incomes and

176. *See id.* (stating that there must be accountability to the community).

177. *See* Looney, *supra* note 14.

178. *See* Tankersley, *Treasury Issues Rules*, *supra* note 42.

179. *See* PETERS & FISHER, *supra* note 117, at 197–215 (noting how Enterprise Zone programming has likely done little to increase accessibility of employment opportunities to the individuals living in low-income communities); *see also supra* Section II.C.i.

180. *See* PETERS & FISHER, *supra* note 117, at 208.

education.¹⁸¹ While there are currently no provisions or measures in place to prevent the Opportunity Zone programming from falling victim to the same pitfalls that plagued the Enterprise Zone programming,¹⁸² states must do their part in promoting practices and policies that encourage a local mindset, lest it fall victim to a similar eventuality.

For one, the states could promote so-called smart-gentrification — “policies to retain local residents and preserve or expand low-and middle-income housing,” even while participating in Opportunity Zone programming.¹⁸³ Smart gentrification posits that gentrification in and of itself may not be completely detrimental to low-income families, as certain improvements in neighborhood services may be beneficial to the original population.¹⁸⁴ Instead of restoring deteriorating buildings into hotels and headquarters for booming technology companies, states could encourage investors to turn this real estate into community centers and institutions that will enhance services and education in the neighborhood.¹⁸⁵ Instead of developing luxury apartment buildings with amenities that will inevitably price and displace local residents out of their communities, states could instead promote the creation of affordable housing that low-income families can afford.¹⁸⁶ Rather than permitting moneyed companies that require high levels of education and skillsets for employment to sweep up large tracts of cheap, available real estate in these neighborhoods, states could instead support local businesses and local hiring initiatives that Opportunity Zone residents could actually benefit from.¹⁸⁷

While gentrification does not look the same from neighborhood to neighborhood, the effects of rapid gentrification will almost certainly

181. See THEODOS ET AL., *supra* note 59, at 3 (noting that “low-and-moderate income residents will need to be able to afford to remain in their communities as the areas upgrade”).

182. See GELFOND & LOONEY, *supra* note 92, at 12 (suggesting that the Opportunity Zone Program apply guardrails to account for the fact that there “is little to direct federal subsidies”).

183. Looney, *supra* note 14 (defining smart gentrification).

184. Jonathan Grabinsky & Stuart M. Butler, *The Anti-Poverty Case for “Smart” Gentrification, Part 2*, BROOKINGS INST. (Feb. 11, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/02/11/the-anti-poverty-case-for-smart-gentrification-part-2/> [<https://perma.cc/ZKGG9-D65G>] (discussing the benefits and drawbacks of smart gentrification).

185. See *id.*

186. See THEODOS ET AL., *supra* note 59, at 3 (noting that residents need to be able to afford the cost of living in their developing communities).

187. See Li, *supra* note 56 (supporting local hiring requirements).

be adverse on the neighborhoods and residents in question.¹⁸⁸ Some cities have already begun using their regulatory powers to combat some of the perils of speedy gentrification.¹⁸⁹ The District of Columbia, for example, has begun requiring developers to preserve or expand affordable housing alongside higher-priced housing.¹⁹⁰ The smart gentrification effort, an undertaking known as “revitalization without gentrification,” channels \$550 million into the historic African American community Barry Farm, to create 1400 public and affordable apartments and recreational and educational centers.¹⁹¹ After the project is complete, all former residents will be invited back to the new development — no one will be displaced, the city has pledged.¹⁹² In Portland, the Cully Main Street Plan sought to preserve the Cully neighborhood’s cultural character and diversity even as the neighborhood underwent revitalization and development.¹⁹³ The Cully Main Street Plan’s efforts appear to have been successful thus far. In 2017, the neighborhood’s “adult super center,” home to three strip clubs, an adult video establishment, and a lingerie shop, was transformed into a 150-unit affordable housing complex, a project reflecting the understanding that many residents in the Cully community are young, intergenerational families in need of such housing.¹⁹⁴ In Ohio, Walnut Hills, a predominately African American neighborhood in Cincinnati, residents are pushing against the kind of rapid gentrification seen in both Cincinnati’s downtown

188. See Grabinsky & Butler, *supra* note 184.

189. See *id.* (“Some cities, such as Washington DC, have started using their regulatory powers to require developers to preserve or expand modest-income housing alongside higher-priced housing.”).

190. Jared L. Green, *Is Revitalization Without Gentrification Possible?*, SMART CITIES DRIVE, <https://www.smartcitiesdive.com/ex/sustainablecitiescollective/urban-revitalization-without-gentrification-possible/614391/> [<https://perma.cc/7NHW-GTPJ>] (last visited Oct. 28, 2019).

191. *Id.*

192. *Id.* (stating “[t]here will be zero displacement”).

193. See PORTLAND BUREAU OF PLANNING & SUSTAINABILITY, CULLY MAIN STREET & LOCAL STREET PLANS IMPLEMENTATION REPORT 2 (2012), <https://www.oregon.gov/LCD/TGM/TGMProducts/1D-10.pdf> [<https://perma.cc/U9TH-FAA7>] (discussing the Plan’s goals to preserve “an attractive main street for residents to gather with locally-run family-serving businesses that reflect the diversity of the community” as the neighborhood undergoes development).

194. Amanda Waldroupe, *So Long, Sugar Shack: Affordable Housing Planned at Living Cully Plaza*, STREET ROOTS NEWS (Nov. 3, 2017), <https://news.streetroots.org/2017/11/03/so-long-sugar-shack-affordable-housing-planned-living-cully-plaza> [<https://perma.cc/A7FY-5RYP>].

and Over-the-Rhine (OTR) neighborhoods.¹⁹⁵ When Walnut Hills residents saw “hipsters from all over the city” flocking to their neighborhood to enjoy new pop-up eateries and biergartens, they took their concerns to the Walnut Hill Redevelopment Foundation, claiming that the influx of redevelopment “was helping the outside, bringing people in, but not [helping] the neighborhood.”¹⁹⁶ With the Foundation’s help and development of neighborhood-conscious programming, such as the Walnut Hills Reinvestment Plan, which supports the development of low-income housing, “the biergartens stopped.”¹⁹⁷ Given the potentially harmful effects the Opportunity Zone Program could hoist upon the very communities and individuals it is meant to lift-up, states participating in the Opportunity Zone Program should endeavor to engage in smart gentrification projects that promote local businesses and hiring, community and educational projects, and affordable housing.

CONCLUSION

Though still nascent, the Opportunity Zone Program represents the potential to lift-up low-income, distressed communities, and their residents. However, the Program should address and improve upon several areas, including its current disorganization, the inaccurate designation of several Zones, and the potential for it to fall victim to similar failures of plagued past land zoning initiatives. Continuing to address investors’ concerns in a timely manner, regulating and restricting the types of projects and the amount of investments developed in qualified Opportunity Zones, implementing data collection and monitoring systems to assess the Program’s progress and effectiveness at both the state and federal level, and promoting a local mindset will better ensure that the Opportunity Zones will truly benefit low-income communities and their residents.

195. Hillary Copsey, *Can You Have Redevelopment Without Gentrification? Some in the Walnut Hills Neighborhood of Cincinnati Say Yes*, BELT MAG. (Dec. 19, 2017), <https://beltmag.com/redevelopment-without-gentrification/> [https://perma.cc/N3B7-ZEJZ] (noting that in the OTR neighborhood, vacant buildings were transformed into \$500,000 condominiums).

196. *See id.*

197. *Id.*