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Seizing the Opportunity? SEC Zeroes in on Qualified Opportunity Zone (QOZ) Fund Sponsors

On July 15, 2019 the Securities and Exchange Commission (SEC) and North American Securities Administrators Association (NASAA) staffs released a joint statement (the “Statement”) addressing compliance implications for “qualified opportunity funds” (QOFs) established under the 2017 Tax Cuts and Jobs Act.

In an effort to both encourage “main street” investors’ access to QOFs and educate market participants on the regulatory landscape that governs these new products, the Statement provides helpful guidance for sponsors and investors exploring “opportunity zone” investing.

THE KEY TAKEAWAYS INCLUDE:

- Interests in QOFs will generally constitute “securities” for purposes of the federal and state securities laws. Privileged tax treatment under the Code does not afford any special regulatory protection to QOFs or their sponsors.
- Registration exemptions typically available for private offerings and frequently relied upon by real estate sponsors will apply to QOFs. In addition to the widely-used Rules 506(b) and 506(c) under Regulation D, the Statement addresses reliance on Regulation A and Regulation CF (Crowdfunding).
- Finders, brokers and placement agents engaging in marketing or referral activities on behalf of QOFs must comply with the existing federal and state regulatory regimes applicable to brokers. The Statement highlights the relevance of “transaction-based compensation” and the limited availability of the “issuer exemption” under Rule 3a4-1 in this context.
- Customary exclusions from the Investment Company Act of 1940 are available to QOFs, including Sections 3(c)(1) and 3(c)(7). The Statement cautions against issuing QOF interests to more than 100 accredited



investors (who are not qualified purchasers) in reliance on Section 3(c)(5)(c) if the result is a “tiering” of pooled investment vehicles—accordingly, additional care must be taken when structuring certain QOF investments in underlying joint ventures.

- Any person providing investment advice to a QOF (which typically includes anyone involved in the decision-making process for selecting investments) must ensure that they are in compliance with registration obligations as an “investment adviser” under applicable state and federal securities laws.

In confirming the availability of these customary exemptions, the Statement does not break new ground but reinforces the applicability of the existing regime to this new and rapidly-developing sector.

The SEC and state regulators are clearly alive to the potential for aggressive marketing of QOFs as an attractive investment vehicle for tax-sensitive investors. The Statement makes repeated reference to the anti-fraud provisions of the state and federal securities regimes. This is unsurprising given the potential QOF investor base of both “main street” and high-net worth individuals, and shows that the SEC and state regulators are watching this space with keen interest. QOF sponsors would be well advised to revisit their compliance protocols and should expect follow-up questions from exam staff on these products in the near future.

Read the SEC statement [here](#).

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