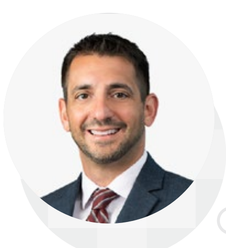
Foreign Investment in Qualified Opportunity Zones by Foreign Taxpayers and CFCs

By Steven Hadjilogiou, Macdonald Norman, and Keith Hagan



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I. Introduction

The Qualified Opportunity Zone tax incentive program provides significant tax benefits to investors and encourages capital expenditure and job growth in the many areas the Federal Government has designated as opportunity zones. The program affords significant tax benefits to multinational corporations, non-resident corporations, non-resident individuals, non-resident trusts and virtually all other taxpayers. Although, much focus has been paid to investment in opportunity zones by individuals, this article focuses on how multinational corporations and non-resident taxpayers may benefit from the program.

Consider the following example. Manufacturing Corporation is a domestic type C corporation. Manufacturing Corporation recently sold a subsidiary corporation generating $10 million of capital gain and invested $10 million into a new manufacturing facility in Wayne County, Michigan that is properly structured as a qualified opportunity fund. In addition to boosting the local economy and employing local residents, Manufacturing Corporation would (a) defer paying tax on its federal tax liability on the $10 million gain (b) offset taxable income by depreciating the $10 million investment (c) be able to refinance the investment and use those funds in any manner of its choice, and (d) after 10 years of investment, be able to sell the manufacturing facility without any federal tax liability on the appreciation or depreciation recapture.

II. Overview of the Qualified Opportunity Zone Tax Incentive

The Tax Cuts and Jobs Act[1] added Code Secs. 1400Z-1 and 1400Z-2 ("Subchapter Z") to allow a deferral of tax on capital gains reinvested in a "qualified opportunity fund" ("QOF") and a permanent exclusion of capital gains on a sale or exchange of an investment in a QOF.[2] As stated by the Internal Revenue Service (the "Service"), Code Sec. 1400Z-2, in conjunction with Code Sec. 1400Z-1, encourages economic growth and investment in designated distressed communities (qualified opportunity zones) by providing Federal income tax benefits to taxpayers who invest in businesses located within these zones.[3] Code Sec. 1400Z-2 provides two main tax incentives to encourage investment in qualified opportunity zones. First, Code Sec. 1400Z-2 allows for the deferral of gross income inclusion for certain gains to the extent that corresponding amounts are reinvested in a QOF.[4] Second, it excludes from gross income the post-acquisition gains on investments in QOFs that are held for at least 10 years. The U.S. Department of Treasury (the "Treasury") proposed regulations on October 2018[5] and April 2019[6] that set forth the requirements for the types of gains that are investment eligible and the types of taxpayers that may invest.

However, the Final Regulations do not address whether a CFC that incurs a capital gain may potentially defer such gain—with the ultimate result of also deferring Subpart F income or GILTI.

On December 19, 2019, Treasury issued final regulations under Code Sec. 1400Z-2 that clarified several key issues facing taxpayers investing in QOFs (the "Final Regulations"). As a general matter, a QOF is a partnership or corporation that is organized for the purpose of investing in qualified opportunity zone property. In the vast majority of cases, qualified opportunity zone property is an interest in a partnership that meets the following requirements. First, the partnership must be in a trade or business. Second, the partnership's tangible property is made up of at least 70% property that was purchased after December 31, 2017, from an unrelated person and is either put to original use in an opportunity zone or is substantially improved by the partnership. Third, a significant portion of the partnership's employees conducts activities in one or more opportunity zones. Fourth, at least 40% of the partnership's intangible property is used in its trade or business. Fifth, the partnership's nonqualified financial property, with the exception of working capital, cannot be greater than 5% of its total assets. Finally, the partnership cannot conduct certain *vice* businesses such as operating a liquor store, gambling facility, suntan facility, *etc*.

The Final Regulations attempted to clarify the types of gains that may be invested into a QOF. According to the statute, "gain from the sale to, or exchange with, an unrelated person of any property held by the taxpayer" is gain that is eligible to be invested into a QOF and thereby provides the taxpayer the two main tax benefits of the opportunity zone program. However, the October 2018 and April 2019 proposed regulations stated that despite the clear language to the contrary, only capital gain of a taxpayer could be eligible for investment into a QOF. The Final Regulations take this proposition even further. Specifically, the Final Regulations provide that gain "is eligible for deferral under section 1400Z-2 and the section 1400Z-2 regulations, if the gain: (A) is treated as a capital gain for Federal income tax purposes or is a qualified 1231 gain within the meaning of paragraph (b)(11)(iii)(A) of this section, … [and] (B) would be recognized for Federal income tax purposes and *subject to tax under subtitle A of the Code* before January 1, 2027 (subject to Federal income tax), if section 1400Z-2(a)(1) did not apply to defer recognition of the gain…."[7] Thus, the Final Regulations clarify that long-term and short-term capital gain of a taxpayer may be invested in a QOF. Additionally, 1231 gain is also eligible gain. However, capital gain or 1231 gain that is recharacterized as ordinary income under the recapture provisions of Code Secs. 1245, 1250 or treated as ordinary income under 1231 is not eligible gain.

III. Non-Resident Aliens and Foreign Entities

The benefits under subchapter Z are not restricted solely to U.S. residents. Code Sec. 1400Z-2(a)(1) allows a "taxpayer" to elect to defer gain under subchapter Z. Treasury, in the Preamble to the Final Regulations, states that the broad construction of this term in accordance with Code Sec. 7701(a)(14) will be consistent with the language and purpose of subchapter Z. This definition simply defines a taxpayer as "any person subject to any internal revenue tax." Further, under Code Sec. 7701(a)(1), the term "person" includes "an individual, a trust, estate, partnership, association, company or corporation." Of note, none of these terms is limited based on the residency of the taxpayer in question. In particular, non-resident aliens ("NRAs") and foreign entities should be eligible to defer gain by investing in a QOF.

As a result, non-U.S. residents who are partners of partnerships engaged in a U.S. trade or business should pay close attention to subchapter Z post-TCJA. Ordinarily, non-U.S. residents pay no tax on capital gains, with few exceptions, one of the most significant being in the case that those gains are treated as effectively connected with a U.S. trade or business ("ECI"). Code Sec. 864(c)(8), enacted as part of the TCJA, treats the gain on the sale of a partnership interest by a non-U.S. resident as ECI to the extent that a sale by the partnership of the underlying assets would be ECI. This is an important change, of which NRAs and foreign entities ought to be mindful, because, prior to the TCJA, the Tax Court held that such a sale if structured properly would not give rise to ECI, and, therefore, not generally result in U.S. federal income tax liability to the foreign partner.[8]

Post-TCJA, non-U.S. residents who in the past had relatively little concern about U.S. federal income tax liability on the sale of a partnership interest may find a QOF investment desirable. Because subchapter Z is generally agnostic with regard to the residence of the taxpayer seeking to invest in a QOF, the deferral and exclusion benefits under subchapter Z should be on any non-U.S. resident's short-list of options. This is especially true of those non-U.S. residents who intend to remain invested in the U.S. market.

IV. Application of FIRPTA and Code Sec. 1446(f) Withholding to Eligible Gains

Additionally, non-U.S. residents are liable for tax on gain from the sale of a "United States Real Property Interest" ("USRPI").[9] Generally, Code Secs. 1445 and 1446(f) require the "withholding agent" (typically, the purchaser) to withhold and remit a portion[10] of the proceeds on the sale by a non-U.S. resident of a USRPI or a partnership interest, respectively. If the withholding agent fails to withhold, it remains liable to remit the tax.

The primary purpose of such withholding is to protect the tax collection function of the IRS. This function would be impaired if, for example, a non-U.S. resident, otherwise outside the jurisdiction of the United States, were to make such a sale and fail to file a return with payment.

In the event that the amount withheld exceeds the tax liability that would be owed under sections 1 or 11, the non-U.S. resident may file for a refund.[11] This may take significant time and increase compliance costs. Alternatively, prior to sale, the non-U.S. resident may file for a withholding certificate with the IRS showing that no or less tax should be owed or may ask or may request that the Secretary substitute a reduced amount.[12] If granted, the non-U.S. resident may present the withholding certificate to the withholding agent at sale, and the withholding agent may withhold and remit the lesser amount. This, too, can be an involved process, requiring substantiation of the taxpayer's claim, including, for example acquiring an appraisal.

When the disposition of the USRPI or partnership interest involves a non-recognition transaction, a third, and typically preferred exception to withholding, is to provide a notice of non-recognition to the withholding agent.[13] In such a case, the withholding agent is generally not required to withhold or remit to the extent of the non-recognition. Thus, a key issue is whether the transaction is a "non-recognition" transaction for purposes of CodeSecs. 1445 and 1446.

In the case that a non-U.S. resident were to sell a USRPI or partnership interest, the proceeds of which would ordinarily be subject to withholding, the Preamble to the Final Regulations concludes that reinvesting such gains in a QOF would not qualify as a non-recognition transaction for purposes of Code Sec. 1445 and 1446. The Treasury has requested further comments and has indicated it will give further consideration to the issue of whether a taxpayer can obtain a reduced withholding when reinvesting gain into a QOF. In the absence of clarity, such transactions are not non-recognition transactions for purposes of withholding, and the taxpayer must file for a refund.

V. Potential Deferral of Subpart F Income and GILTI

The Final Regulations failed to clarify certain issues with respect to the potential deferral of Subpart F income and global intangible low-taxed income ("GILTI") through investment in a QOF by a controlled foreign corporation ("CFC").[14] As discussed below, this is an area that may require further clarification from the Treasury and the Service. The deferral of Subpart F income and GILTI through investment in a QOF by a CFC might be in the government's best interests and satisfy the purposes of Code Sec. 1400Z-2.

Congress' purpose for enacting Code Secs. 1400Z-1 and -2 was to encourage economic growth and investment in designated distressed communities (qualified opportunity zones) by providing Federal income benefits to taxpayers that invest in such communities. The deferral of Subpart F income and GILTI through investment in a QOF would further both (i) the purposes underlying Code Sec. 1400Z-2, and (ii) require capital investment in the United States. By allowing the deferral of Subpart F income and GILTI, the Service would encourage taxpayers (potentially large multinationals) to bring funds back into the United States in a tax-efficient manner—but would tie such repatriation to both investment of those funds in distressed communities in the United States. Further, the investment of these funds would also have the added benefit of generating jobs for individuals in these distressed communities.

Subpart F provides rules that require U.S. shareholders of a CFC to include in their gross income certain income earned by the CFC.[15] These rules apply to a U.S. shareholder's Subpart F and GILTI inclusions with respect to its CFCs.[16] Subpart F income includes, in relevant part, foreign base company income ("FBCI").[17] Foreign base company includes, in relevant part, foreign personal holding company income ("FPHCI").[18]

For example, assume that a domestic corporation wholly owns a CFC. In Year 1, the CFC sold certain stock, and the gain from the sale of such stock represents capital gain in the hands of the CFC. Further, assume that the CFC has no other items of income. Further, the CFC's capital gain from the sale of stock would represent Subpart F income to the CFC's parent.

In broad terms, Subpart F and GILTI generally represent gross income of a CFC, which in many cases is income by the CFC from the sale of capital assets. If such gain is eligible to be invested in a QOF, Subpart F and GILTI income of a CFC should be deferred.

Specifically, Code Sec. 1400Z-2 provides that, at the election of the taxpayer, the taxpayer's "gross income for the taxable year shall not include" gain from the sale or exchange to an unrelated person of any property held by the taxpayer—to the extent such gain does not exceed the aggregate amount invested by the taxpayer in a QOF during the 180-day period beginning on the date of such sale or exchange. That is, when a taxpayer invests in a QOF, the amount so invested is excluded from that taxpayer's gross income. The determination of Subpart F and GILTI is based on the CFC's gross income. In particular, Reg. §1.954-1(a)(1) provides that "the gross foreign base company income of a controlled foreign corporation consists of the following categories of gross income…."[19] Further, with respect to GITLI, Code Sec. 951A(c)(2) provides that "'tested income' means, with respect to any controlled foreign corporation for any taxable year of such controlled foreign corporation, the excess (if any)of—(i) the gross income of such corporation determined without regard to [certain types of gross income.]"

Accordingly, in the above example, if the CFC were able to invest its capital gain from the sale of stock in a QOF and defer such capital gain, this circumstance should result in the deferral of both Subpart F income and GILTI. The statute, the final and proposed regulations as well as the legislative history provide arguments both for and against the potential deferral of Subpart F and GILTI through investment in a QOF. Accordingly, this is an area that deserves further clarification from the Treasury with thought given to the purpose of deferral under Subchapter Z.

A. "Eligible Gain": Text of the Final and Proposed Regulations

The Final Regulations present the issue of whether the CFC's capital gain represents "eligible gain," as defined under the Final Regulations. In the above example, the relevant capital gain is at the CFC level, but this capital gain is Subpart F income that is immediately taxable to the CFC's shareholder. Thus, the CFC's capital gain would be subject to tax under subtitle A in the form of Subpart F income, although the CFC itself would not be liable to pay the tax. As described above, the Final Regulations look to whether the gain would be "subject to tax under subtitle A," if Code Sec. 1400Z-2(a)(1) did not apply, not on who is liable to pay that tax. Indeed, in the absence of Code Sec. 1400Z-2(a)(1), the shareholder would pay tax on its share of the CFC's Subpart F income, and the earnings and profits of the *CFC* associated with the capital gain would be categorized as "*previously taxed* earnings and profits" in accordance with the regulations under Code Sec. 951. Accordingly, the taxation of Subpart F income should satisfy this requirement. Although the shareholder pays tax on its share of the CFC's Subpart F income at ordinary rates and, under the Final Regulations, the Service has clearly taken the position that only capital gains qualify for deferral under Code Sec. 1400Z-2, the capital gain should retain its character as such.[20]

Because the Final Regulations are either silent or at least fail to be explicit with regard to whether the applicable "eligible gain" must be taxed at the level of the investing entity and because an otherwise similarly situated partnership would unquestionably have eligible gain to invest in a QOF although its partners would be liable for tax on said gain, Treasury should take this opportunity to clarify that CFCs are entitled to similar treatment where their Subpart F Income would similarly be subject to tax "under subtitle A … if section 1400Z-2(a)(1) did not apply[.]," Reg. §1.1400Z2(a)-1(b)(11) requires that gain is only eligible for investment under Code Sec. 1400Z-2 if the gain "is treated as a capital gain for Federal income tax purposes …." Further, the gain "would be recognized for Federal income tax purposes and subject to tax under subtitle A of the Code before January 1, 2027 …." Under the above hypothetical, we have assumed that the gain from the sale of stock would represent capital gain. However, this gain would be taxed at ordinary income rates as Subpart F income, and the ultimate tax liability for this capital gain would be paid by the U.S. shareholder of the CFC. Reg. §1.1400Z2(a)-1(b)(11) does not specify that the tax for a gain must be paid by the entity that incurs such gain or that the "eligible gain" must be taxed as at capital gain rates.

In sum, even following the issuance of the Final Regulations, ambiguity still remains regarding whether (i) a gain may still qualify as an "eligible gain" if the gain results in another entity incurring a tax liability as a result, or (ii) whether an otherwise capital gain that results in ordinary income to a shareholder may qualify as an "eligible gain."

B. Final Regulations: CFC as a QOF

Notably, the Final Regulations provide guidance with respect to a commenter that requested that "a United States shareholder investor in a QOF that is a CFC organized in a U.S. territory be permitted to make Code Sec. 1400Z-2(c) elections with respect to assets sold by the CFC, thereby eliminating any subpart F income or tested income resulting from these transactions." In this circumstance, the CFC is organized as the QOF—whereas the above hypothetical involves a CFC as the electing investor. The commenter analogized this circumstance to the rules under proposed Reg. §1.1400Z2(c)-1(b)(2)(ii), providing that owners of a QOF partnership or QOF S corporation, in certain circumstances, may make an election under Code Sec. 1400Z-2(c) with respect to their distributive or *pro rata* shares of capital gain from the QOF's disposition of assets.

The Final Regulations rejected this position and provided as follows:

> However, the rules for income inclusions with respect to CFCs are not analogous to those for partnerships or S corporations. Unlike partnerships and S corporations, CFCs are not treated as flow-through entities for purposes of the Code. Additionally, in contrast with partnerships and S corporations, only certain U.S. taxpayer owners of CFCs (United States shareholders) are required to have current income inclusions with respect to CFCs, and these United States shareholders are required to currently include in gross income only certain income earned by a CFC (for example, subpart F income). These rules effectuate the policies underlying the subpart F and global intangible low-taxed income under section 951A(a) (GILTI) regimes—to prevent United States shareholders from deferring or eliminating U.S. tax on certain income by earning such income through CFCs. Such policies generally are not applicable to partnerships and S corporations, which generally are treated as flow-through entities for purposes of the Code. See H.R. Rep. No. 1447 at 57-58 (1962); S. Rep. No. 1881 at 78-80 (1962); S. Comm. on the Budget, Reconciliation Recommendations Pursuant to H. Con. Res. 71, S. Print No. 115-20, at 370 (2017).

As noted above, the situation rejected by the Final Regulations involves a QOF as a CFC—not the CFC as the investing entity. Accordingly, the rejection of a CFC as a QOF is not a direct analogy to a CFC as an investor in a QOF. However, the Treasury's reasoning underlying this rejection provides a counter point against allowing a CFC to invest in a QOF and defer capital gain that might otherwise represent Subpart F income or GILTI.

C. Final Regulations: Code Sec. 1231

Finally, the Treasury and Service extensively addressed whether Code Sec. 1231 gains qualified as gain that is eligible for investment under Code Sec. 1400Z-2. Code Sec. 1231 generally governs the character of a taxpayer's gains or losses with respect to Code Sec. 1231 property not otherwise characterized by Code Sec. 1245 or 1250.[21] Under Code Sec. 1231(a)(1), if a taxpayer's aggregate gains from each sale and exchange (each gain, a Code Sec. 1231 gain) during the taxable year exceed the taxpayer's aggregate losses from each sale and exchange (each loss, a Code Sec. 1231 loss), the taxpayer's Code Sec. 1231 gains and Code Sec. 1231 losses are treated as long-term capital gains and long-term capital losses, respectively. However, several provisions of the Code may apply to limit the long-term capital treatment otherwise potentially provided under Code Sec. 1231(a)(1). For example, Code Sec. 1245—applicable to sales, exchanges, or dispositions of depreciable tangible and intangible property—functions to re-characterize recognized gain as ordinary income (as defined in Code Sec. 64) to the extent depreciation or amortization has been allowed or allowable with respect to such property. Further, Code Sec. 1250 provides a similar recapture rule with regard to sales, exchanges, or dispositions of depreciable real property that is not considered to be Code Sec. 1245 property, and Code Sec. 1250 functions to re-characterize gain as ordinary income to the extent the gain exceeded straight-line depreciation.

The preamble to the Final Regulations provides as follows:

> Accordingly, the Treasury Department and the IRS have retained in the final regulations the general rule set forth in the proposed regulations that limits eligible gains to gains treated as capital gains for Federal income tax purposes. For purposes of section 1400Z-2(a)(1), eligible gains generally include gains from the disposition of capital assets as defined in section 1221(a), gains from the disposition of property described in section 1231(b), and income treated as capital gain under any provision of the Code, such as capital gain dividends distributed by certain corporations. For this purpose, both long-term capital gain and short-term capital gain may be determined to be eligible gain under the section 1400Z-2 regulations. However, consistent with section 64, any gain required to be treated as ordinary income under subtitle A, such as section 1245 recapture income, is not eligible gain.

As indicated by the preamble and the text of the Final Regulations, the Treasury and Service have clearly taken the approach that only capital gain qualifies as "eligible gain," even though a plain reading of the text of Code Sec. 1400Z-2 does not restrict "gain" to capital gain. Further, the Final Regulations generally exclude capital gain that is treated as ordinary income.

In the above hypothetical, we have assumed that the sale of stock by the CFC represents capital gain. However, as noted above, this capital gain would result in Subpart F income that would be taxed as ordinary income. While the Subpart F income of the CFC's U.S. shareholder would be *taxed* as ordinary income, the mechanics of the Subpart F tax regime do not change the character of the gain that would ultimately generate such income.

VI. Conclusion

In sum, the Final Regulations provide taxpayers with much needed clarification regarding certain issues related to the election of Federal income tax benefits provided by Code Sec. 1400Z-2. However, the Final Regulations do not address whether a CFC that incurs a capital gain may potentially defer such gain—with the ultimate result of also deferring Subpart F income or GILTI. The Final Regulations, proposed regulations, legislative intent underlying Code Sec. 1400Z-2 provide both arguments for and against Treasury and the Service allowing such deferral. On the one hand, CFC's have some analogous tax characteristics to passthrough entities. Further, if the Treasury and Service allowed deferral of Subpart F income and GILTI through investment in a QOF, this would also satisfy the purposes underlying both Code Sec. 965 (the transition tax) and Code Sec. 1400Z-2—allowing tax-efficient repatriation by tying it to investment in distressed communities while also generating jobs for distressed communities. However, while the text of Code Sec. 1400Z-2 does not restrict applicable gains to capital gains, the Final Regulations have clearly taken the approach that only capital gains qualify for investment in a QOF—a circumstance that complicates the deferral of Subpart F income that is taxed as ordinary income.

ENDNOTES

1 The Tax Cuts and Jobs Act of 2017, P.L. 115-97, 131 Stat. 2054, 2184 (2017).

2 Unless otherwise indicated, all "section" or "§" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §," "Temp. Treas. Reg. §," and "Prop. Treas. Reg. §" references are to the final, temporary, and proposed Treasury Regulations, respectively, promulgated thereunder (collectively, the "Treasury regulations"), all as in effect as of the date of this article.

3 83 FR 54279 (Oct. 29, 2018) (REG-115420-18).

4 The deferral rule only applies to gains from a sale or exchange with an unrelated person that are invested in a qualified opportunity fund within a 180-day period following the sale or exchange. Code Sec. 1400Z-2(a)(1). The taxpayer must elect for deferral treatment. *Id.* A taxpayer may not make the election for a sale or exchange that occurs after December 31, 2026. The taxpayer's initial basis in the QOF is zero as the investment is of only the gain from the prior sale or exchange. Code Sec. 1400Z-2(b)(2)(B)(i). However, the taxpayer's basis is increased by an amount equal to 10% of the deferred gain once the investment has been held for at least five years. Code Sec. 1400Z-2(b)(2)(B)(iii). Further, the taxpayer's basis is further increased by an amount equal to 5% of the deferred gain once the investment has been held for seven years. Code Sec. 1400Z-2(b)(2)(B)(iv).

The taxpayer's gain is deferred until the earlier of: (1) the sale or exchange of the investment, or (2) December 31, 2016. Code Sec. 1400Z-2(b)(1). Upon the earlier of these two events, the taxpayer must recognize gross income equal to the lesser of the excluded gain or the then current fair market value of the investment (reduced by the taxpayer's basis in such investment. Code Sec. 1400Z-2(b)(1).

If the taxpayer holds the investment on December 31, 2026, the taxpayer's basis is increased by the amount of gain recognized on December 31, 2016. Code Sec. 1400Z-2(b)(2)(A). Further, if the taxpayer holds a QOF investment for at least 10 years, the taxpayer may elect to increase the taxpayer's basis to "equal … the fair market value of such investment on the date that the investment is sold or exchanged." Code Sec. 1400Z-2(c).

5 83 FR 54279 (Oct. 29, 2018) (REG-115420-18).

6 84 FR 18652 (May 1, 2019) (REG-120186-18).

7 In comparison, the proposed regulations provided, in relevant part, that gain "is eligible for deferral under section 1400Z-2(a), if the gain: (A) Is treated as a capital gain for Federal income tax purposes; [and] (b) Would be recognized for Federal income tax purposes before January 1, 2027, if section 1400Z-2(a)(1) did not apply to defer recognition of the gain …."

8 *See, generally, Grecian Magnesite Mining*, 149 TC 63 (2017).

9 *See* Code Sec. 897(c).

10 Fifteen percent under Code Sec. 1445(a) and 10% under Code Sec. 1446(f)(1).

11 *See, e.g.*, Code Sec. 1445(c)(1)(C).

12 *See* Code Sec. 1446(f)(3) and Reg. §1.1445-3(b).

13 *See* Reg. §§1.1445-2(d)(2)(i) and 1.1446(f)-2(b)(6)(i).

14 The definition of a CFC is found under Code Sec. 957(a).

15 For purposes of Subpart F, U.S. shareholders are U.S. persons who own 10% or more of the voting power or value of the shares of stock of a foreign corporation. Code Sec. 951(b); Reg. §1.951-1(g). A U.S. person is defined as a citizen or resident of the United States, a domestic partnership, a domestic corporation, or a domestic trust. Code Secs. 957(c), 7701(a)(30).

16 Code Secs. 951(a)(1)(A) and 951A(a).

17 Code Sec. 952(a).

18 FPHCI is defined to include the portion of a CFC's gross income which consists of (A) dividends, interest, royalties, rents and annuities, (B) gain from certain property transactions, (C) gain from commodities transactions, (D) foreign currency gains, (E) income equivalent to interest, (F) income from notional principal contracts, and (G) payments in lieu of dividends. Code Sec. 954(c).

19 "Gross foreign base company income" represents a component in the calculation of Subpart F income.

20 Notably, Code Sec. 1400Z-2 does not differentiate between the type of gain (ordinary or capital) that may be invested in a qualified opportunity fund.

21 Code Sec. 1231(b) defines "section 1231 property" generally as depreciable or real property that is used in the taxpayer's trade or business and held for more than one year, subject to enumerated exceptions (for example, property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business).