

The Big Opportunity: Does an Opportunity Zone Fund Work for Your Clients?

By: Andrew P. Doup, Esq. & Clint Edgington

Opportunity Zones (OZs) present immediate tax and investment opportunities for investors and entrepreneurs. Savvy tax and investment professionals who learn the nuances may add another revenue stream to their practice and will be rewarded through a stronger relationship with their client.

Whether you have a client who has, or will, earn a sizeable capital gain from investments or a business sale, or whether your client is considering structuring an OZ deal, they can save substantial tax dollars and accelerate their financial goals. Misinformation about the program abounds, and your sage counsel will be invaluable.

In addition to tax savings, OZs bring new economic prospects to America's underinvested areas. It's a classic win-win.



Andrew P. Doup, Esq.



Clint Edgington, CFA



BENEFITS

The benefits for investors can be amazing.

- **Defer** payment of capital gains taxes owed
- **Reduce** capital gains tax owed on that original asset by 15%
- **Never pay** capital gains taxes on the Opportunity Zone asset



Your Client's Process:

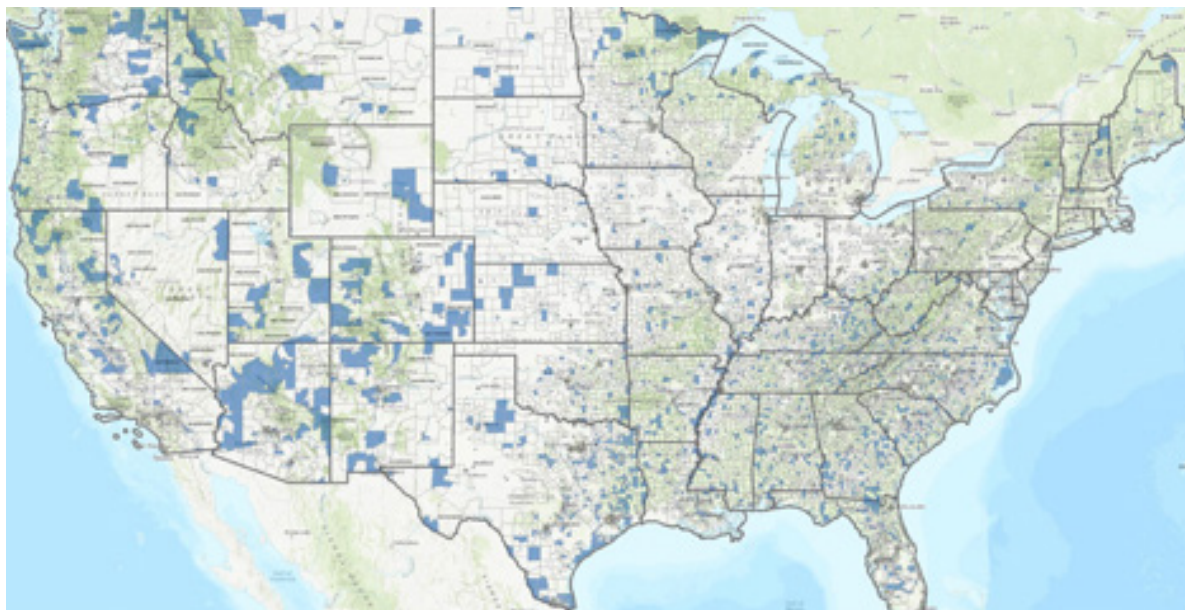
Is an OZ Fund right for your clients? This whitepaper is not intended as a technical guide; but a guide for your client conversations. Sage advisors will need to communicate a clarifying process to help a client's decision-making. To frame your guidance, we'll cover five key components of a solid process:

- **Program Overview:** What are the basic mechanics of the program and timelines?
- **Fund Requirements:** Understanding this will help you guide your client on the best options for them, whether it's investing in an OZ fund, creating their own, or simply paying their capital gains tax and not participating.
- **Client Situation:** No one knows your client better than you, and whether they have the 5 key characteristics of a successful Opportunity Zone investor.
- **Fund Selection:** We'll offer a decision framework to help you guide your client through the alternative options.
- **Due Diligence:** Because these funds will generally be long term and illiquid, a solid due diligence process is vital and requires input from both tax and investment professionals.



Program Overview

Created by the Tax Cuts and Jobs Act, over 8,700 tracts of land across the county have been designated as “Opportunity Zones,” providing new and compelling tax incentives for rethinking where and how to do business.



Opportunity Zones were designed to incentivize the reinvestment of an estimated \$6 trillion in private, unrealized capital gains into designated areas that have failed to recover from the Great Recession. These designated areas cover the entire country and they vary widely in their economic and geographic characteristics. While some areas are what we consider “low income,” many are not. Anyone who has strolled the East End in Manhattan may be surprised that it is an Opportunity Zone census tract!

Tax Benefits and Deadlines that Impact Your Client

Normally, a profit resulting from the sale of an asset is taxed at a maximum capital gains rate of 20%.

Defer the Original Capital Gain Tax

Now, Congress (and many states) gives taxpayers the option of deferring payment of that tax until year-end 2026 by reinvesting that profit into an Opportunity Zone Fund (“Fund”) within 180 days of realizing their capital gain. The Fund then reinvests the proceeds into eligible Opportunity Zone property (“OZ Property”). If the original capital gain was realized in a pass-through entity, that entity can choose to invest in a Fund within 180 days.

Reduce the Original Capital Gain Tax

If invested for five years, investors will have their original capital gains tax liability reduced by 10%. This is structured as a step-up in basis.

If invested for seven years, the investor receives another 5% tax break on the original amount deferred, for a total 15% tax-break. The amount of tax deferred becomes due and payable by year-end 2026, so investors *must invest by year-end 2019* to achieve the full 15% reduction provided by the seven-year investment timeline. The 10% reduction phases out two years later (year-end 2021), and temporary deferral of the original tax liability is gone by year-end 2026.

Eliminate Capital Gain Tax on Fund

If the OZ Fund investment is held for at least ten years, then the Fund's sale of its OZ Property will be treated by the IRS as 100% tax-free. All OZs are scheduled to expire by year-end 2028, but investments made prior to this expiration date will continue to accrue tax-free gains until 2047.

Eliminate Depreciation Recapture on Fund?

As an inquisitive advisor, your fees will be well earned in analyzing how your client will or will not receive a depreciation tax deduction and potentially avoid depreciation recapture upon exit. While the IRS's April 2019 proposed regulation is clear that an eligible investor who sells an OZ Fund interest will be exempt from depreciation recapture with respect to assets held by the OZ Fund; this exemption does not seem to apply to gains recognized on the sale of assets by the underlying OZ Business. We expect further clarifying language on this subject.

In addition, as capital gains have not yet been paid on the original asset, the initial tax basis for the taxpayer will be \$0. Therefore, without prudent structuring the taxpayer will likely not be able to take depreciation deductions until the step up in basis that occurs in year 5, and/or 7. The April 2019 language did clarify that a taxpayer's outside basis in a Fund can be increased by the share of the Fund's debt, if structured appropriately, under regular partnership tax rules.

How it Works: An Example:

Consider the following simplified hypothetical that highlights the basic timing rules and tax mechanics. On July 1, 2019, Audrey sells her business and several stocks for a \$1 million profit. Assuming 20% long-term capital gains rate, Medicare surtax of 3.8%, and State taxes of 5%, Audrey's tax liability is \$288,000.

Rather than pay this tax to the IRS on her 2019 return, Audrey works with her CPA, John, to analyze if investing the \$1m in a Fund within 180 days of her sale is right for her. John and Audrey decide that Audrey is a good fit and move forward with an investment in a Fund.

Audrey's Timeline:

- July 1, 2019: Audrey realizes her capital gain.
- December 27, 2019: Audrey's deadline to invest in a Fund (180 days later)
- July 1, 2024: Audrey receives a 10% step-up in basis on her \$1 million investment because she has held the investment for five years.
- July 1, 2026: Audrey receives an additional 5% step-up in original basis because she has held the investment for seven years.
- December 31, 2026: Audrey's original assets' deferred capital gains tax becomes due and payable. She now has reduced her deferred capital gain from \$1 million to \$850,000, and her capital gain tax liability goes down from \$288,000 to \$244,800
- 2029: On the 10th anniversary of her Fund investment she is eligible for a tax-free exit of the Fund.

If Audrey's Fund appreciates 6% per year and she sells the Fund for \$1.79 million, she can then elect to step up her basis in the Fund to an amount equal to the sale price, resulting in *no tax* on the sale. Having paid her \$244,800 capital gains tax bill in 2026, Audrey's total after-tax profit during the ten-year investment period is \$546,048.

Had Audrey not invested in a Fund and instead paid the original capital gains taxes and invested the remaining \$712,000 in a similar non-OZ Fund asset, she would have netted a total after tax profit of only \$112,915.

By investing in a Fund, Audrey benefited by \$433k!

HYPOTHETICAL AFTER-TAX VALUE

	Non-Qualified Opportunity Fund	Qualified Opportunity Fund
Original Capital Gain <i>from sale of prior investment</i>	\$1,000,000	\$1,000,000
Tax Rate	28.8%	28.8%
Tax on original capital gain	(\$288,000)	Deferred
Investable amount after tax	\$712,000	\$1,000,000
Compounded annual return	6%	6%
Appreciation over 10 years	\$563,084	\$790,848
Tax on appreciation after 10 years	(\$162,168)	\$0
Long term capital gains taxes paid in 2027 on original capital gain	\$0	(\$244,800) <i>30% of 850k basis stepped up to 15%</i>
Total growth above original capital gain after 10 years net of taxes paid	\$112,915	\$546,048

In this simplified example, Audrey has maximized the Opportunity Zone tax benefits and received \$433,000 in additional benefits.

This oversimplified example does not include the potential benefit of a depreciation deduction without recapture. If John helped Audrey find a Fund that gave Audrey these potential benefits, this could add an additional \$50k-\$100k of benefits.



OZ Fund Requirements

While the program is fairly straightforward for the Fund investor, the IRS requires more than a Fund's investment properties merely being located in an Opportunity Zone. Thus, it is critical that Funds comply with these regulations in order to provide the taxpayer the intended tax-preferred treatment.

Qualifications for a Fund:

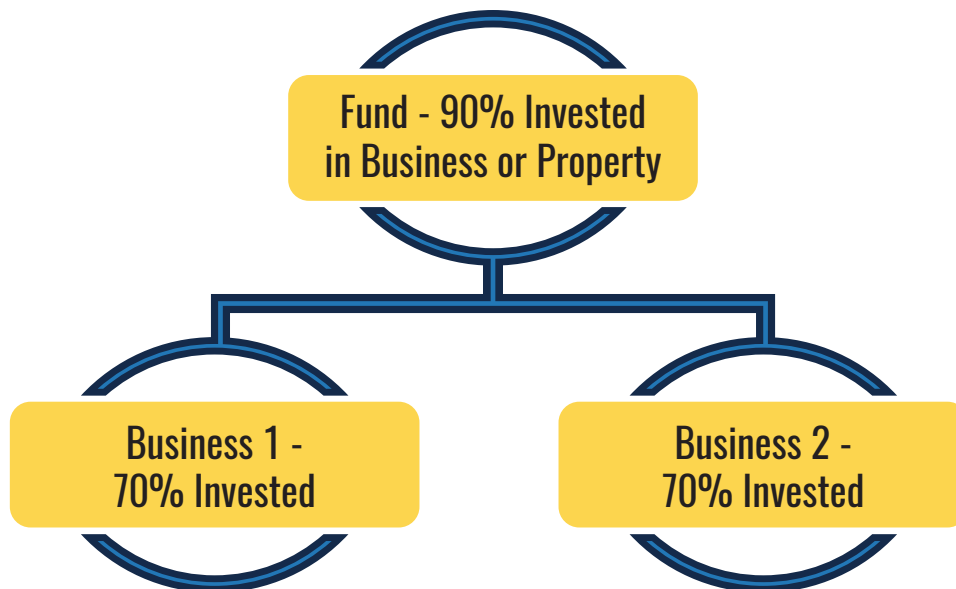
OZ Property

A Fund must hold at least 90 percent of its assets in "OZ Property," which generally means qualified business property ("OZ Business Property"), or a qualified company ("OZ Business")

OZ Business Property

If the investment is made into tangible business property, merely being located in an OZ is not enough. The property must be "QOZ Business Property," which means that it must be (1) purchased from an unrelated party, and (2) at least 70% of the property's use must be located in the Opportunity Zone.

Many Funds will be structured under the following scenario in order to reduce the total amount of assets required to be invested in OZ Property and to simplify their testing of that.



“Substantial Improvement” Requirement

For already-existing business property that has been placed in service, such as an apartment building, the property must be substantially improved after the investment, meaning the cost of renovations must at least equal the cost of purchase, minus the land.

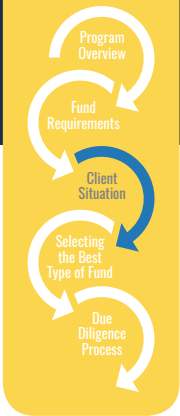
An already-existing property that has not been depreciated or amortized — such as a new commercial build or a homeowner’s primary residence — would qualify as OZ Business Property under an “original use” exception.

OZ Businesses

If the investment is made into a company, then the company must be an “OZ Business,” which is a business entity organized for that specific purpose, treated as a corporation or partnership for tax purposes. After formation, the company must satisfy four elements:

- At least 70% of the tangible property owned or leased by the company must be QOZ Business Property (as defined above);
- At least 50% of the company’s total gross income, services performed, or amounts paid for services must occur within a QOZ;
- At least 40% of its intangible property must be used in the active conduct of such business; and
- The company must have a written schedule to spend working capital to the extent that more than 5% of its property is attributable to non-qualified financial property, such as long-term debt.

One of the most important things for you and your clients to understand is that the Fund’s problems could become your client’s problems if they fail to meet any of the requirements. They could be hit with not only your original tax liability but penalties and interest by the IRS. This is why due diligence, which we discuss in detail below, is so very important.



Client Situation

To determine if this is a good program for your clients, you'll need to consider the following:

Eligible Capital Gains

Congress has dictated that all capital gains are eligible. For all capital gains, the investor has 180 days from the point of realizing the gain to make an investment in the Fund. If the investor is a pass through entity (i.e. S Corp or LLC electing partnership tax status), the entity could reinvest for 180 days after, or, when those gains drop down to the individual taxpayer on December 31 of that year, that starts the 180-day clock.

Your client should rely on you to determine what constitutes eligible gains as it depends on the taxpayer's individual facts and circumstances. If you choose not to specialize in Opportunity Zone compliance, working hand in hand with another CPA who specializes in the Opportunity Zone rules and their effect on corporate and pass-through taxation can mitigate the risks of making a non-qualifying investment, as well as triggering an inclusion event that would terminate deferral.

Size of Investment

Investing in a Fund will require tax and investing analysis. In Audrey's case, John helped weight the options; and the benefits greatly outweighed the cost of analyzing and dealing with the requirements, but that may not be true in all cases. It would be similarly important to weigh the costs and benefits of conducting this initial OZ analysis.

Section 1231 Gains

Section 1231 gains, which relate to the sale of property of businesses, are not eligible investments until 12/31 of that year due to the IRS's position that they must be netted with any Section 1231 losses.

Rule of Thumb

If your capital gains are less than \$50,000 it likely does not make sense to pursue this.

Your Client's Tax Rates

If you believe your client's income and therefore capital gains rates will increase substantially by the time the deferred capital gains taxes are due in 2026, this could move you away from a Fund investment depending upon how substantial the advantage of the tax-free exit is to you.

Your Client's Professional Team

The strength of your advisory team is vital in determining if an OZ Fund is right for you. As this is a new program, misinformation abounds and a strong advisory team will set you up for success.

- **CPA:** The CPA will be the MVP on the advisory team. The CPA will guide clients through determining the type of gain they have and the date it is eligible. In addition, the CPA should guide the client through requirements pertinent to their individual tax situation, as well as required tax filings. Your client must stay in close contact with you.
- **Financial Advisor:** A financial advisor will help guide the financial planning, including liquidity needs. In addition, they will be helpful in balancing the investment's lack of liquidity with the client's personal financial plan. Keep in mind your client will need to pay your original capital gain in 2026, and this must be considered.

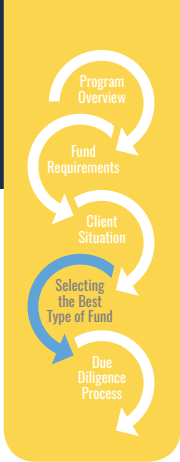
Your advisor's ability to assist with analysis on individual Funds that are available likely will depend upon whether their financial institution has any on their platform. Most of these products will be too new to be on many financial advisors' platforms. Therefore, the advisor won't receive compensation for the work and this could potentially disallow them from assisting you. Your advisors' offerings should not dictate whether this program makes sense for you. A few may file this under the "too hard" category and dismiss it out of hand.

- **Attorney:** The tax code contains statutory formation requirements for OZ Funds and OZ Businesses, so whether your client forms their own OZ Fund or subscribes to a third-party OZ Fund, it would be wise to enlist an attorney who specializes in Opportunity Zones to identify liability risks to their intended income tax treatment. An attorney could also advise your client on non-OZ matters, such as governance, control, voting, and information rights.

Ability to Hold Illiquid Assets

To receive the full OZ tax benefits, your client will need to be held for at least 10 years. Unlike investments in a stock or mutual fund, you will want to analyze it as though they will be in for the full period. In addition, most Funds in this space will not provide much liquidity until year 10.

In addition, the underlying real estate or businesses that the Fund will invest in are, by their nature, long-term holds with limited liquidity. You'll need to make sure your client does not need this capital for living expenses. You will also want to plan for their capital gain payment occurring in 2026.



Finding the Right Fund

If an OZ Fund investment is right for your client, you may decide to help your client choose the type of OZ Fund that is right for them. While most tax professionals are not naturally inclined to help select individual investments; giving clients a process will be greatly appreciated, as financial advisors may be restricted in this area. The easiest way to begin this process is to review the risk and return of the different types of underlying assets. This may differ for different investors, as someone who has invested in Venture Capital in the past may have more of a comfort level with Venture Funds rather than Real Estate.

There will be three types of basic investments:



If you were to choose Real Estate, it's helpful to categorize by the different levels of risk to determine your best fit. Think of this like a balancing act where you may have an aggressive *Strategy/Action*, but you can tamp down the risk by investing in a more conservative *Asset Type*.

When determining the appropriate Real Estate vehicle, we consider the following factors:

Strategy

- **Core:** This is the most conservative strategy with generally the lowest expected returns. It is a purchase of a performing asset with no real renovations or tenant lease up required. Generally just purchased for income needs.
- **Core Plus:** Purchase and light renovations with some minor tenant lease-ups.
- **Value Add:** Purchase and either major renovations or changes in management with significant lease-ups required.
- **Opportunistic:** Complicated projects requiring major capital investment and complete tenant turnover or lease-up required.

A Word on Risk

Due to the "substantial improvement" test requiring the QOZB to invest a significant amount into the asset; these Funds will almost all *be classified in the riskiest real estate strategy:*

Opportunistic

Asset Type

This is the type(s) of Real Estate we will be investing in. Will it have relatively stable rents and a diverse set of tenants that don't require significant capital needs when tenants turn over, such as with single-family homes? Or, will it require significant buildouts at tenant turnover and is economically sensitive, such as with new office buildings.

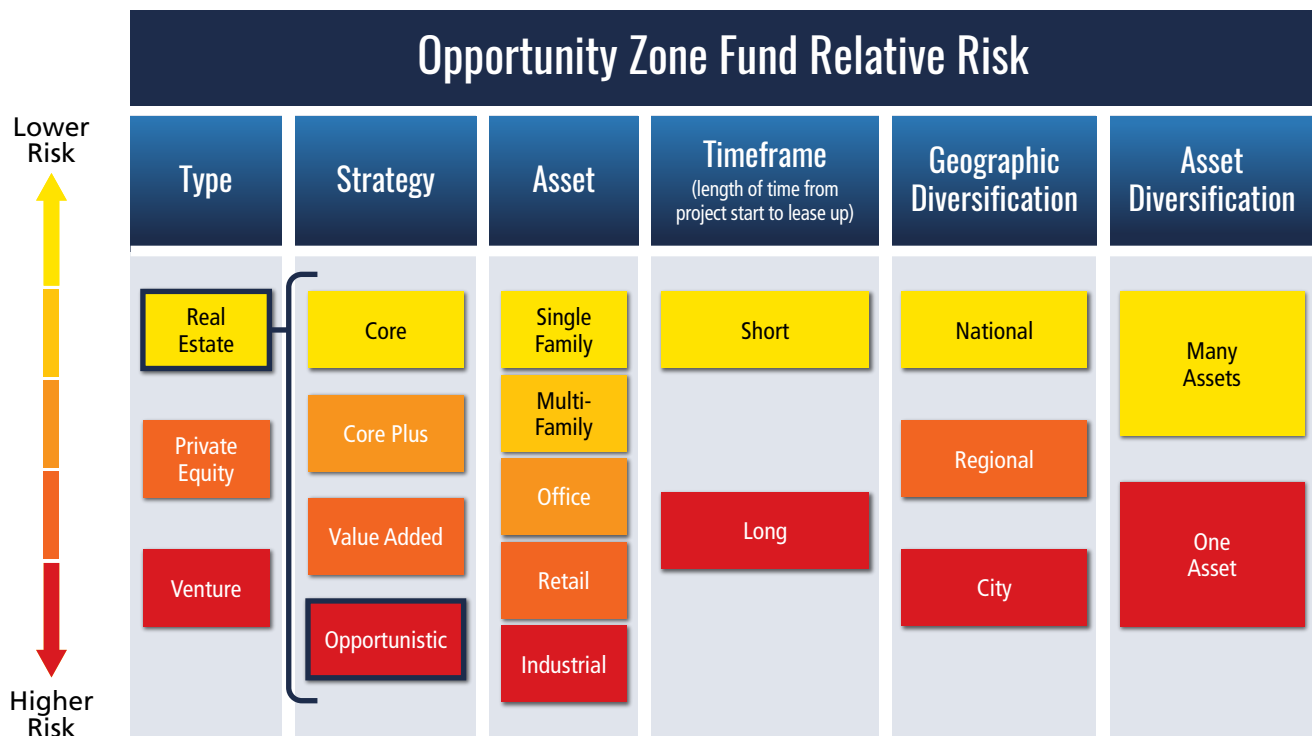
Timeframe to Lease-Up

If there is a shorter conversion period from the purchase of an asset to when a tenant is placed it is inherently less risky. By way of example, buying raw unentitled land to develop will likely take years to develop and sell or place tenants in it. By that time, our economy may look different, or it may become an uneconomic strategy.

Diversification

The greater the geographic diversification and the number of assets, the more conservative an investment becomes.

Due to the "Significant Improvement" requirement, almost all OZ Funds focusing on Real Estate will be "Opportunistic." Should an investor want to be more conservative, they would likely want to offset that risk by choosing more conservative *Asset Types, Timeframe to Lease-Up, and Diversification.*

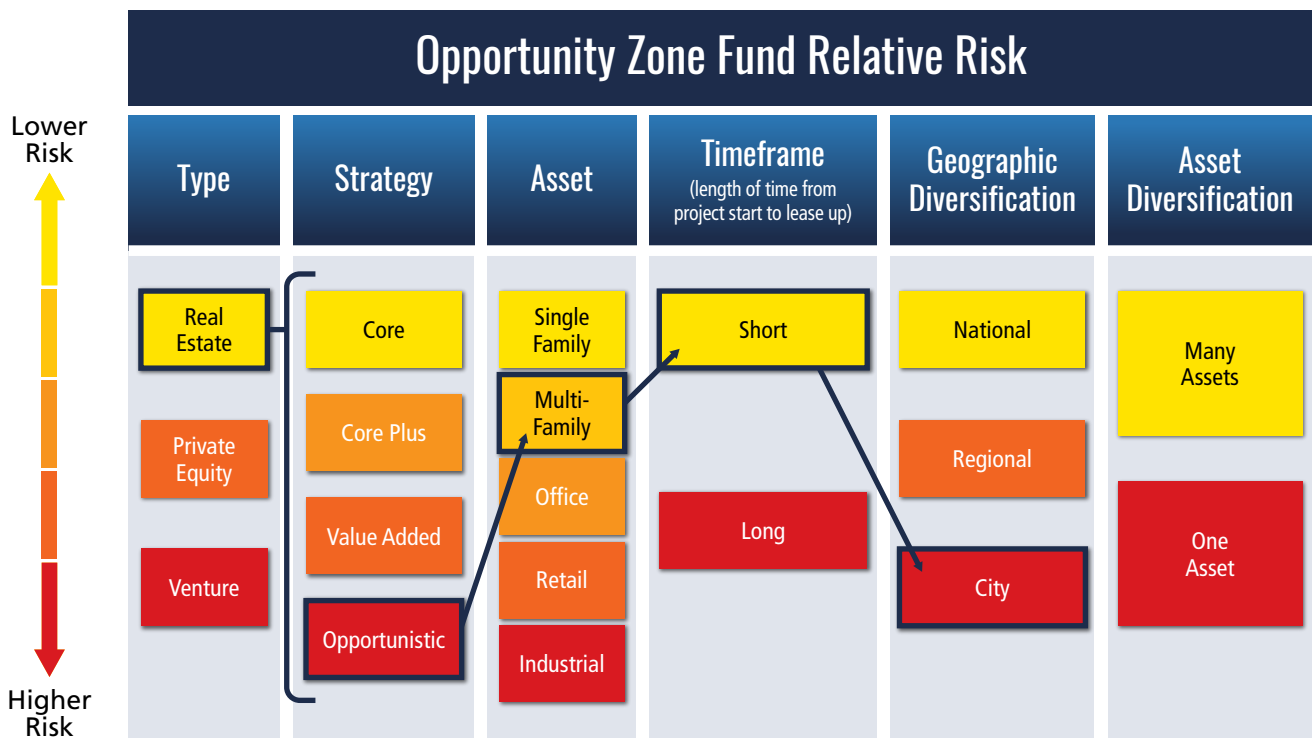


These are not hard-and-fast rules of risk/return. For example, a highly-leveraged risky multifamily apartment complex may be riskier than an office building with no leverage.

If your client would prefer to keep a relatively lower risk profile due to the lack of liquidity and long term hold, you may guide your client to choose a Fund dictated below that is involved with smaller multifamily apartment complexes.

On the other hand, if your client would like to be aggressive, you may want to choose Funds whose strategy is buying undeveloped land and developing it. The expected returns should be commiserate with the risk of the total strategy.

In Audrey’s example from earlier, below is what her risk/return looked like. In short, while an opportunistic strategy was employed, she tamped down her risk by investing in a relatively lower asset: multifamily apartments.





Due Diligence

Once you and your client have reduced the pool to a select type of Fund, you can begin due diligence on the different Funds available to you. We recommend an initial due diligence process that mirrors that process you would undertake for any private placement. Due to the detailed nature of a good due diligence process, this is only intended to be a broad overview to give you an idea of the components of a process.

If an OZ Fund is raising outside capital, they are required under securities laws to have various securities filings to exempt them from certain public registration and filing requirements. As such, you have fewer protections and a “buyer beware” thought process must be employed. If you have not reviewed any of these in the past, you would be well advised to seek professional help that is experienced in this.

Once requested, the OZ Fund will supply you and your client with a Private Placement Memorandum, Subscription Agreement, and sometimes a Business Plan.

- **Private Placement Memorandum (PPM):** A legal document providing prospective investors a description of the company, terms of the offering, risks, and fees. These are also referred to as “Offering Memorandum” or “Offering Document”.
- **Subscription Agreement:** This will be the legal document that effectuates the sale of the OZ Fund to your client.
- **Business Plan:** This may also be embedded in the PPM that will provide details on the assumed investment strategy and assets.

Additional Items We Request

Generally, most investors stop at a scan of the PPM, so this list of requests may seem unusual to the OZ Fund. We recommend your client and their advisors conduct initial due diligence prior to requesting it in order to winnow down the potential Funds. Then provide the OZ Fund with some of your due diligence so they know they’re sending information to a serious potential investor.

- **Operating Agreement:** This is the legal document that will govern the rights and responsibilities of the different parties.
- **Models:** The PPM and business plan will likely have a cash flow model that is based on various assumptions. Reviewing those assumptions and “shocking” them up and down can give you an idea of the levers of risk and return. There is no government entity assuring that their assumptions, and therefore the “target rate of return” that will be shown, is reasonable. It is up to your client and their advisory team. The financial advisor should be able to help you with the modeling.

General Due Diligence:

Exclusion Process

- **Minimum Required Investment:** Greater than the investment your client wishes to place
- **Analysis of the Parties:** If competence and character of the parties give you pause, move on.

- **Compliance with Securities Laws:** If your client is not provided with the relevant legal documents and the OZ Fund is raising capital and doesn't tell you which securities exemption, the costs of lack of compliance will ultimately be borne by the Fund (and its investors). In addition, this omission demonstrates a lack of competence (and perhaps character) that likely exists in other areas.

Detailed Due Diligence on Remaining Funds

- **Entity Structure Sketch:** Many Funds will be structured to have a holding company, a Fund entity, and one or multiple "Joint Venture" entities. There are many variations on the optimal structure and we always sketch out the various entities' ownership structure and cash flows.
- **Waterfall Analysis:** After you've sketched out the ownership structure, be aware of how the cash flows and profits are allocated. Importantly, many times the cash flows/profit structure will change depending on the performance of the Fund.
- **Fee Analysis:** Determine whether the level of fees is reasonable for the activity being performed. In the case of real estate investments, keep in mind that the fees are really what is required to run an operating business. Generally, there will be an overall asset management fee levied as an annual charge as a percentage of the value of the fund, a "carry" or profit sharing, and development fees. Play close attention to the full fee structure and any fees to affiliates. For the "carry", you should analyze whether the profit is shared on each asset, a "deal by deal" carry or if it's a "fund level carry". A fund level carry will net out all the gains and losses and then share profit, which is more advantageous to the investor.

While your client can buy a mutual fund that purchases publicly traded stocks that has fees of only .5% of the assets per year, these Opportunity Zone funds will be inherently more work from an operating perspective. Do not rely solely on the PPM "term sheet" or summaries of the fees. It is vital to dig down into the underlying Affiliate and Related Party Transactions to get a full extent of the fees.

- **Legal Rights:** Your client will have very limited ability to control the management of the Fund. However, you need to understand these limitations.
- **Transparency:** This is more art than science. There are ways to either bury negative disclosures and ways to have a candid conversation about the drawbacks to a strategy. In the example in the box to the right, in touting how low their fees were while they were compensated by affiliated transactions (which isn't necessarily a bad thing), they failed the test of transparency.
- **3rd Party Due Diligence Reports (if available):** While only the largest Funds will afford the costs to employ a 3rd party due diligence team, it's helpful to see if they're available. This will only be provided upon request and if you're serious in their view, as the 3rd Party providers generally charge for each investor to review them. "Mick Reports" are the most well known in the industry.
- **Securities Compliance:** The securities laws generally require offers and sales of investment contracts to be either registered with the SEC or state securities division, or exempt from registration. Securities regulators impose hefty fines for noncompliance, and thus, investors should obtain adequate assurances of compliance with federal and state securities laws.

Don't Rely Solely on the Term Sheet

In reviewing an OZ Fund recently, the Term Sheet touted an "industry low" .5% management fee and 5% profit allocation; yet when reviewing their affiliates, it was obvious that they owned their "affiliates", who were paid quite handsomely for the development and management of the assets.

- **Liquidity/Distribution Rights:** As a long term investment, there will likely be limited rights of liquidity and distributions on the timing of your choice. Be sure to delineate between what is a “right” your client has and when/if the Fund is able to rescind that right.
- **Preferred Distribution:** Some Funds may have a “Preferred Distribution” between 3%-5% per year. This “Pref” will impact the waterfall of cash flows, but does not likely give the right to get the 3-5% per year; only that your client will receive that “Pref” before any profit sharing allocation occurs.
- **Quarterly/Annual Liquidity:** Some Funds may set an amount that the Fund is able to redeem on a regular timeframe. Perhaps as much as 5% per quarter is allowed to be withdrawn across the Fund, of which your client would be able to take your pro-rata amount out. Many of these liquidity rights are able to be rescinded by the management team if they believe this will hurt the Fund. With illiquid assets, this is not necessarily a bad thing, but not understanding it is.
- **Exit Strategy:** This is vital for the OZ Fund industry, however it will be difficult for them to plan what will be the most economical exit strategy in 10 years. However, the important thing is that there is a general thought process that is occurring and it complies with the OZ rules and maintaining the tax-free exit for your client.

OZ-Specific Due Diligence

This will be difficult for an investor without significant understanding of the different OZ requirements to adequately review. Most sophisticated investors, however, can likely get an idea of the competence of the counter party in hearing the responses and if they're open to sharing any of their compliance processes. We have seen many smaller Funds that are claiming OZ eligibility that obviously don't qualify and pass the various tests.

- Corporate compliance for QOZ rules
 - OZ Property scrub
 - Substantial improvement scrub
 - Asset test compliance and written working capital requirements
- QOZ business complexities
 - Incoming investor assets matched with capital needs
- Ability to raise required capital for the asset(s) they are purchasing
 - If a Fund is raising a certain amount of capital for a certain asset and they don't hit their minimum capital needs, they will likely need to return the capital to you.
 - You will likely be out of your 180 day window, will likely miss the opportunity and, as a result, pay your original capital gains tax with penalties and interest!

Social Impact

This program is in place so we can help those communities that have been underinvested. If a fund checks you and your client's investing boxes, let your client put their money where their heart tells them it will do good!

For the right investor, the benefits of the new OZ tax regime are compelling. Pairing the right investment with the right investor optimally results in an opportunity to do well, and also to do some good.



Clint Edgington, CFA

Partner

Beacon Hill Investment Advisory



BEACON HILL
INVESTMENT ADVISORY

Clint Edgington leads Beacon Hill Investment Advisory's investment team. Beacon Hill provides advisory and family office services to business owners to simplify their financial lives; including their businesses, their retirement plans, and their public and private investment holdings.

Beacon Hill works with business owners' teams of tax, M&A, and legal professionals to evaluate and invest, in a tax efficient manner, in private and direct investments; primarily focused on private debt, direct real estate, and small to middle market buyout and equity investments.

Clint has created, and is the manager of, his family's private Opportunity Zone Fund.

Find more information on Clint at

www.beaconhilladvisory.com/clint-edgington

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Andrew P. Doup

Attorney

Kegler Brown Hill + Ritter



Andrew Doup advises taxpayer-investors, fund managers, developers, and entrepreneurs on tax-preferred qualified opportunity zone transactions.

Andrew and Kegler Brown's team of corporate, tax, real estate, and securities attorneys were among the first to structure real estate and venture capital Opportunity Zone funds in Ohio, and have since been recognized as national experts in this area. Kegler Brown informs state and local public policy decisions through their growing network of private and public economic development leaders.

Andrew serves as a trusted advisor, creating additional value for clients by helping manage their risk of liability throughout the business lifecycle. He counsels on choice of entity, corporate structuring, finance, management, acquisitions, and dispositions. A combat veteran, Andrew approaches problems with a combination of creativity and attention-to-detail that enables his clients to make business decisions with confidence.

Find more information on Andrew at

www.keglerbrown.com/doup