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Agency Coordination and Opportunity Zones

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AGENCY COORDINATION AND OPPORTUNITY ZONES

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The Opportunity Zone (OZ) program, which is designed to provide place-based equity investments into certain low-income communities, has potential upsides and pitfalls. The program is complicated, and it implicates numerous spheres of policy expertise. But currently, it is mostly administered by the Internal Revenue Service (IRS) as a tax program.

This Essay seeks to find a technical-managerial solution to some of the problems of the OZ program, and that is agency coordination. It would have the IRS and the Office of Tax Policy (OTP) work with other agencies with expertise in place-based investment programs to administer the OZ program. It outlines the benefits and potential problems of coordination and discusses what tools could help improve this endeavor. It also proposes that the coordinated effort attempt to engage communities that live in OZs further in guiding the program.

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INTRODUCTION

The Opportunity Zone (OZ) program, one of the centerpieces of the 2017 Tax Cuts and Jobs Act (TCJA), is another in a long line of place-based tax incentives to improve certain distressed areas in the United States.[1] And, unlike the TCJA at large, OZs have bipartisan provenance and support. Senator Cory Booker (D-NJ) continues to serve as one of the Democrats loudly supporting a major program that came into existence under a Republican-supported tax law that passed with few Democratic votes.[2]

Furthermore, many state governors also appreciate the OZ program. That is because, as structured, they have a great deal of latitude in determining what areas qualify for OZs.

But OZs have also had many problems. Recent reports have shown that many OZs and investments in them are of questionable value in reviving neighborhoods. Some already existing development projects have fallen into the OZ provisions' deferral of gain. Others have noted that many of the communities within OZs have little say in the types of development there. And there is an overall sense that the OZ program is, in the end, not really here to help economically disadvantaged people, but rather to help the financially well-off grow their wealth through limited tax requirements.

The rest of this issue catalogs these problems and some credible solutions regarding OZs. This short Essay instead focuses on something smaller, the question of whether the Internal Revenue Service (IRS), the primary federal agency involved in administering OZs, along with the Office of Tax Policy at the Department of Treasury (OTP), are up to this task of managing economic development for underserved communities.

1. *See* I.R.C. §§ 1400Z-1 to -2.

2. Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html [https://perma.cc/2P8X-SH84].

The management, administration, and oversight of OZs is beyond the IRS's capacity. The IRS, as it stands, does not have the requisite expertise to implement many desirable changes in the OZ program, were they to come to pass. The IRS does not really have the ability to work with states to ensure they are selecting OZs properly or providing them with technical support to be cost-effective. The IRS also cannot help in ensuring that community voices are heard. And the IRS may not be able to coordinate across the federal government to improve OZs and other community development-related programs effectively.

But the IRS still has an important role to play. The OZ program requires some complex investment entity structures to provide equity in development projects and businesses in the OZs. There are significant tax calculations and concepts embedded in the program. The IRS also has some visibility regarding other related tax programs that seek to revitalize neighborhoods.

This Essay draws on existing work on tax coordination. It proposes that rather than eliminating the IRS's role, the federal government select the OZ program as a prime candidate for tax coordination among the IRS, OTP, and other federal agencies in the community development space, such as the Treasury's Community Development and Financial Institutions (CDFI) Fund, the Department of Housing and Urban Development (HUD), and the Department of Agriculture (USDA) to better manage and monitor the program. Thus, it can draw on these agencies' expertise and help coordinate OZs with other programs and other tax expenditures to ensure that OZs work in concert and do not run at cross-purposes. This tax coordination could also help improve the lack of community input, as some of these other agencies have far better outreach mechanisms.

The Essay consists of three parts. Part I provides a brief overview of the OZ program and some of its problems. Particular attention is paid to the complex interweaving of tax and non-tax matters within the program itself.

Part II then outlines some of the benefits and pitfalls of agency coordination, with a particular focus on OZs. This Part considers why agency coordination makes more sense than moving the program out of the IRS's management.

Part III develops the way forward on coordination of OZs. Given the complexity of the program itself and the potentially large amounts of money involved, it suggests there should be a relatively intensive level of coordination. Part III also discusses some of the most useful tools from the agency coordination and tax coordination literature to facilitate coordination between the IRS and other agencies in this sphere. Finally, it also talks about how coordination can help to engage and empower citizens on the ground.

I. SOME OPPORTUNITY ZONE BASICS

This Part outlines some of the basics of the OZ program and highlights some of the problems others have mentioned regarding OZs, with a focus on matters that likely rely on the IRS's expertise and matters that fall outside the IRS's expertise.

A. Basics of the Program

The OZ program enacted in the TCJA is different from previous place-based community revitalization tax expenditures. While tax incentives like the New Markets Tax Credit (NMTC)[3] or the Low-Income Housing Tax Credit (LIHTC)[4] are designed to allow leveraging of debt-financing for development projects, OZs seek to create opportunities for equity investments and potentially unleash new amounts of capital into place-based economic development efforts.

The main tax benefits of an OZ stem from two areas, gain deferral and a potential increase in the basis to cover those deferred gains.[5] Generally, there are funds — called Qualified Opportunity Funds (QOF) — that pool equity investments from various investors into projects in an OZ.[6] The investors then get to defer the tax on the gain they earned on the QOF investment until the sale or exchange of that investment or December 31, 2026, whichever is earlier.[7]

Furthermore, the investor in a QOF can increase the basis of their QOF investment. If they hold the QOF investment for at least five years, then 10% of the deferred gain is added to the basis.[8] If they hold it for at least seven years, then 15% of the deferred gain is added to the basis.[9] And if they hold it for at least ten years, the investor can essentially eliminate all gain by electing to change the basis

3. I.R.C. § 45D.
4. *Id.* § 42.
5. *Id.* § 1400Z-2.
6. *Id.* § 1400Z-2(d).
7. *Id.* § 1400Z-2(b).
8. *Id.* § 1400Z-2(b)(2)(B).
9. *Id.*

amount to the fair market value of the QOF investment on the date of the sale or exchange.[10]

QOFs can invest either in interests in Qualified Opportunity Zones (QOZ) Businesses, which earn 50% of their gross income from within the QOZ, or in QOZ property, which is tangible property that a QOF purchased and uses in a trade or business.[11] For QOZ property, the property must either have its original use commence with the QOF or the QOZ Business using it or be substantially improved by the QOF or the QOZ Business. The property must also have at least 70% of its use within the QOZ during 90% of the time the QOF or QOZ Business held the property.[12]

QOZ are certain census tracts that meet particular requirements as low-income areas, similar to the requirements under the NMTC, or a census tract contiguous to a low-income area provided that the median income there does not exceed 125% of the median family income of the adjacent low-income census tract.[13] States then select no more than 25% of those eligible tracts within the state to be QOZ,[14] and the Treasury then determines whether they qualify and grants the designation. [15]

The OZ program, as envisioned, includes multiple parties. There are investors.[16] There are the QOFs, special purpose entities for this program.[17] There is the federal government.[18] There are state governments.[19] And there are the businesses and communities themselves that fall within a QOZ.[20] The story sounds like one of doing well by doing good, but commentators have started to highlight some problems.[21]

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10. *Id.* § 1400Z-2(c).
11. *Id.* §§ 1400Z-2(d)(2), (3).
12. *Id.*
13. *Id.* §§ 1400Z-1(c)(1), (e).
14. *Id.* § 1400Z-1(d)(1).
15. *Id.* § 1400Z-1(b)(1)(B).
16. *Id.* § 1400Z-2(b).
17. *Id.* § 1400Z-2(d)(1).
18. *See id.* § 1400Z-2 (establishing a federal tax law creating the OZs).
19. *Id.* §§ 1400Z-1(b), (d).
20. *See id.* § 1400Z-1(b).
21. *See, e.g.*, Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82, 92 (2020) (critiquing OZs along three dimensions of (1) use, noting that many OZ business and projects are not useful to the community; (2) transparency, observing that OZs have limited reporting requirements; and (3) participation, stating that there is almost no public or governmental participation on the projects in an OZ); Martin A Sullivan, *Opportunity Zone Investment Is Concentrated in Less-Distressed Zones*, 171 TAX NOTES FED. 1871, 1871 (2021) (discussing studies that

B. Concerns with OZs

Others in this Symposium pointed out that OZs have had numerous pitfalls.[22] This section highlights some of the challenges OZs face relevant to this Essay.

One considerable concern is that many areas that governors chose to designate as OZs were areas that already had significant economic growth.[23] Indeed, some significant projects that used OZ financing were already planned prior to the program's development.[24] Many OZ projects may thus be inframarginal investments, meaning that they would have occurred without the existence of the program.[25] If the program falls too heavily on such inframarginal effects, it may not be economically efficient.

Additionally, some critics have raised concerns that areas designated as OZs are not the areas facing the most significant economic challenges.[26] The ability to use census tracts adjacent to some of the most low-income and distressed areas may mean that investment may not occur in the areas with the greatest need. Furthermore, even among those census tracts that qualify based on their status as low-income tracts, some of these tracts have greater needs for investment than others. The lack of technical understanding of those needs and how best to meet them, along with potential political pressures, may lead governors to designate OZs that do not truly help the most low-income communities. This misguided designation may then further blunt some of the desired gains in place-based economic development. Furthermore, this

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highlight these problems with some OZs); Michelle D. Layser, *Nonprofit Participation in Place-Based Tax Incentive Transactions*, 48 FORDHAM URB. L.J. (forthcoming Oct. 2021); Anika Singh Lemar, *An Opportunity Zone Falls in a Forest*, 48 FORDHAM URB. L.J. (forthcoming Oct. 2021).

22. *See, e.g.*, Layser, *supra* note 21; Lemar, *supra* note 21.

23. Jeff Ernsthausen & Justin Elliott, *One Trump Tax Cut Was Meant to Help the Poor. A Billionaire Ended up Winning Big*, PROPUBLICA (June 19, 2019, 4:00 AM), https://www.propublica.org/article/trump-inc-podcast-one-trump-tax-cut-meant-to-help-the-poor-a-billionaire-ended-up-winning-big?token=MZ4huG2khovdFzdzgBUWYctqeKrXQgA5 [https://perma.cc/8UJ6-EQF5]; Drucker & Lipton, *supra* note 2.

24. *See* sources cited *supra* note 23.

25. *See, e.g.*, Ernsthausen & Elliott, *supra* note 23 (showing an inframarginal investment by Under Armour's Kevin Plank who was already going to make the investments regardless of the OZ designation).

26. *See* BRETT THEODOS, BRADY MEIZELL & CARL HEDMAN, URB. INST., DID STATES MAXIMIZE THEIR OPPORTUNITY ZONE SELECTIONS? 3 (2018), https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_7.pdf [https://perma.cc/YX3K-LKRQ] (noting that many areas designated as OZs already had significant flows of investments).

combination of flexibility and lack of technical support in trying to find the communities of greatest need and how best to help them with an OZ designation increases the concerns of inframarginal investments.[27]

Further concerns come from the fact that many of the OZ projects may not have significant community input or benefits. It is unclear whether there is a significant attempt with projects financed through QOFs to solicit input from the members of the community whom they serve. Most of these communities consist of, by definition, low-income people.[28] They live in underinvested communities. Many are Black or of other racial and ethnic minorities. These groups have thus traditionally had lower rates of participation and suffered political disempowerment. OZs may exacerbate these problems because of the lack of input that they provide for the community.

The result could then be that OZ projects may not benefit the community. For example, people in the community may want certain businesses to employ people who live in the QOZ in high-paying jobs and provide them training. But a QOZ Business may not employ people who live in the OZs in the higher-paying jobs that they provide in say, technology.[29] Communities may also want people who live in the OZ to own and operate QOZ Businesses. However, given that the investment decisions are made without community input, there may be few QOZ Businesses that draw on owners and operators who come from that area.[30] Another related idea is that the developments and QOZ Businesses may not provide services to fill

27. *See id.* at 2.

28. I.R.C §§ 1400Z-1(c)(1), (e).

29. *See* BRETT THEODOS ET AL., URB. INST., AN EARLY ASSESSMENT OF OPPORTUNITY ZONES FOR EQUITABLE DEVELOPMENT PROJECTS: NINE OBSERVATIONS ON THE USE OF THE INCENTIVE TO DATE V–VII (2020), https://www.urban.org/sites/default/files/publication/102348/early-assessment-of-opportunity-zones-for-equitable-development-projects.pdf [https://perma.cc/43PG-QEXV] (noting that few mission- and community-driven investments are occurring, great benefits are flowing mainly to wealthy capital holders, and few jobs are created within the OZs); De Barbieri, *supra* note 21, at 87–92 (comparing two projects, one in Topeka, Kansas that provides a community benefit and one in Portland, Oregon that mainly serves to create high-end office space and luxury apartments); Jim Tankersley, *A Trump Tax Break Is Not Spurring Job Creation, Study Finds*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/17/business/trump-opportunity-zone-jobs.html [https://perma.cc/L8C5-4NAN].

30. *See* sources *supra* note 29.

the community need.[31] Thus, these concerns over community needs, and the specter of gentrification,[32] also play a role.

Finally, if many of the benefits of economic development and mobility are not met but OZs do provide a return on investment, the program just becomes a way for wealthy individuals and entities to receive gains without paying taxes.[33] That undermines the overall goal of these types of tax expenditures.

C. The Complexities of OZs

Beyond those concerns, the program itself is complex. As the diversity of scholarly interests in this issue shows, trying to avoid the problems outlined above requires expertise across numerous dimensions.[34]

The OZ program is a tax program, drawing on intricate issues of taxation and a need to follow flows of funds. The IRS and OTP need to administer the key tax aspects of this program, like ensuring the basis is properly tracked and gain is either sheltered or captured back. OZs also may interact with other tax programs that encourage economic development in distressed areas.

But tracking basis and gains and following the flow of funds is not enough. Ensuring that OZs work requires an understanding of the various interplays of policy spheres. It requires looking at business investment. It requires understanding urban development and land use policy in urban areas. In rural areas, the unique characteristics of rural economic development are important as well. Land use questions come into play. And having some ability to engage with the communities that are in OZs is also important to avoid some of these problems.[35]

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31. *See* Drucker & Lipton, *supra* note 2 (noting developments for luxury buildings and hotels); Ernsthausen & Elliott, *supra* note 23 (discussing Under Armour as the big beneficiary of an OZ in Baltimore, Maryland).

32. To be fair, what constitutes gentrification is a debated topic. This Essay merely notes that there is this concern with OZs and their operation.

33. *See generally* THEODOS ET AL., *supra* note 29; Drucker & Lipton, *supra* note 2; Ernsthausen & Elliott, *supra* note 23.

34. *See* Sullivan, *supra* note 21, at 1876.

35. This level of complexity is also revealed in some of the proposed changes to OZs mentioned in this issue and by others like researchers at the Urban Institute. Should these changes become part of OZs then the pressure and lack of capacity at the IRS and OTP would become even greater. *See* THEODOS ET AL., *supra* note 29, at 34–36 (listing recommendations and key benefits to the mission-driven nature of investments and the subsequent community effects).

Additionally, there are numerous programs that the federal government has outside of OZs and outside of the tax laws that encourage economic development.[36] There should be some harmonization across these programs to prevent them from running at cross-purposes and thereby frustrating economic development goals.

Furthermore, OZs require some interplay with and monitoring of state and local government by the federal government. That type of monitoring also requires some expertise and savvy negotiation skills.

But the IRS and OTP are not well designed to address these concerns on top of the already complicated set of tax concepts within the OZ program. The result then is a program that, even if flawlessly designed, might face some of the problems outlined in Part I because it is not managed and administered effectively. Some potential ideas for addressing this issue are presented in the next section.

II. AGENCY COORDINATION FOR OPPORTUNITY ZONES

Agency coordination is perhaps a useful way to solve some of the problems of OZs. It does not solve problems inherent in the design of OZs. But it does propose a useful means of addressing the managerial and administrative concerns and could thus improve OZs should the federal government keep and potentially modify the program.

This Part first introduces the concept of coordination and its benefits. The focus is on the OZ program itself. It then addresses some of the concerns around coordination that proper coordination design may address.

A. Agency Coordination and its Benefits

Agency coordination is the idea that agencies should work together to solve certain public problems.[37] These types of problems often are

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36. *EDA Programs*, U.S. ECON. DEV. ADMIN., https://www.eda.gov/programs/eda-programs/ [https://perma.cc/WR8F-AT2J] (last visited Aug. 31, 2021).

37. For some of the key literature on this matter, see generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-509, MANAGING FOR RESULTS: OMB IMPROVED IMPLEMENTATION OF CROSS-AGENCY PRIORITY GOALS, BUT COULD BE MORE TRANSPARENT ABOUT MEASURING PROGRESS (2016) [hereinafter U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-509]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-220, MANAGING FOR RESULTS: IMPLEMENTATION APPROACHES USED TO ENHANCE COLLABORATION IN INTERAGENCY GROUPS (2014); U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-1022, MANAGING FOR RESULTS: KEY CONSIDERATIONS FOR IMPLEMENTING INTERAGENCY COLLABORATIVE MECHANISMS (2012) [hereinafter U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-1022]; EUGENE BARDACH, GETTING

highly complicated and overlap the jurisdictions of multiple agencies. Agency coordination can take many forms with varied levels of intensity.

One of the major benefits of agency coordination is that it can often draw on the expertise of various agencies together.[38] Many policy problems are complex and require different viewpoints and expertise to address them. Agency coordination provides a means for drawing on the vast set of expertise and approaches within the federal government to address a problem in a way that produces a better solution. Additionally, having various experts with different backgrounds from agencies with varied missions and cultures prevents groupthink. While harmonizing the varied viewpoints could be difficult, it ultimately produces better outcomes on policy.

That need is particularly clear in OZs. As noted above, OZs are, first and foremost, a tax program. They have huge complexities in taxation. But there is also a great deal of complexity in place-based economic development. Some targets of place-based development are in distressed areas in the urban core while others occur in rural parts of the country. These issues could also overlap with questions of land use, labor markets, environmental concerns, and housing. Addressing sustainable economic development for underserved and distressed communities is a daunting task that requires numerous expert viewpoints.

Another benefit is that working together reduces agencies acting at cross-purposes and creating conflicting regulatory plans.[39] Frequently, agencies administer more than one program that affects a policy sphere. Agencies also promulgate regulations within a given policy sphere. When you have multiple agencies working in such a sphere, cross-purpose policies can arise where the administration of some programs and regulations undermine other programs and regulations. That can lead to problems in trying to obey regulatory

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AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP (1998); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Blaine G. Saito, *Tax Coordination*, 38 GA. ST. L. REV. (forthcoming 2022) [hereinafter Saito, *Tax Coordination*].

38. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-1022, *supra* note 37, at 9–10, 13–14; Freeman & Rossi, *supra* note 37, at 1171–72, 1184–85; Marisam, *supra* note 37, at 184–85; Renan, *supra* note 37, at 213; Saito, *Tax Coordination*, *supra* note 37, at 15–17.

39. *See* Freeman & Rossi, *supra* note 37, at 1150–51; Saito, *Tax Coordination*, *supra* note 37, at 17–18.

commands or unnecessary tradeoffs between various federal programs.

Here, OZs can harness the benefits of agency coordination to avoid cross-purpose federal programs. Many agencies outside of the IRS and OTP have some stake in this matter. Any agency involved in place-based economic development programs would ideally work together with the IRS and OTP to have these programs reinforce one another. Further, it is important that the regulations for these programs work in harmony.

Agency coordination can work well in allowing for resource efficiency.[40] Traditionally, writers who talk about overlapping agency jurisdictions in a policy sphere talk about the benefits of redundancy — that is creating similar capacities in multiple agencies. But redundancy is expensive. In fact, in the tax sphere, the IRS and OTP often build redundancies not to help mitigate the probability of regulatory failure in some broad policy sphere but instead to make sure they can administer the tax code itself.

With OZs, given that it is such a large and complex tax program, having the IRS and OTP go it alone would mean massive resource and staffing commitments. Unfortunately, the IRS and OTP have, in recent years, seen significant cuts in funding.[41] Even if pledges that President Biden and Congressional Democrats have made to increase IRS funding go forward, most of those will likely go to areas that were starved of funds, like auditing wealthy people.[42] The lack of resources then means that it is unlikely that the IRS will invest in program management aspects of the OZ program like collecting and sharing smart practices to encourage meeting the greatest needs of communities to states, localities, and private actors. Furthermore, it is similarly foolhardy to expect other agencies to use resources to develop the necessary expertise in tax accounting and the interactions

40. Freeman & Rossi, *supra* note 37, at 1182–84; *see also* Marisam, *supra* note 37, at 190; Saito, *Tax Coordination*, *supra* note 37, at 18–19.

41. *See, e.g.*, Yeganeh Torbati, *Bipartisan Infrastructure Deal Could Make It Harder for Tax Cheats to Elude IRS*, WASH. POST (June 28, 2021, 2:45 PM), https://www.washingtonpost.com/business/2021/06/26/irs-enforcement-infrastructure/ [https://perma.cc/MBU3-CYG7] (discussing a new bill that would increase IRS funding after decades of budget cuts).

42. Press Release, U.S. Dep't of the Treasury, Investing in the IRS and Improving Tax Compliance (Apr. 28, 2021), https://home.treasury.gov/news/press-releases/jy0150 [https://perma.cc/GGZ9-KLWM]; *see also* Press Release, U.S. Dep't of the Treasury, Statement by Secretary Yellen on the President's FY22 Discretionary Funding Request (Apr. 9, 2021), https://home.treasury.gov/news/press-releases/jy0117 [https://perma.cc/4JDH-FRQ8].

of OZs with other parts of the tax law. Thus, here too, coordination could provide a major benefit to the OZ program.

Coordination can also help limit agency capture.[43] A single agency administering a program is often captured by interest groups that work with that agency frequently. When another agency joins forces with the agency involved in the program, that same interest often does not have the same influence over this new agency as it may have had over the first agency involved. To capture effectively, that interest group will need to capture both agencies, not just the first agency with which it had a relationship.[44] Furthermore, different agencies often have capture risk by different sets of interest groups.[45] Agency coordination with another agency can also allow agencies to play interference. For example, where two separate interest groups each seek to capture separate agencies, by coordinating, the agencies can play the interests groups off of each other. This can provide the two agencies greater space and freedom to implement policy and manage programs.

With OZs, different agencies also have different interest groups that are more likely to capture them. The IRS and OTP are most likely captured by sophisticated taxpayers, like financial interests that operate QOFs. But other agencies, like HUD are more likely captured by interests related to the direct development of OZs. Having more than the IRS and OTP running the OZ program should reduce capture and allow the IRS, OTP, and a coordinating agency to play those interests off each other. For example, developers and QOF managers may not have identical goals. Recognizing those divergent interests, the IRS and OTP working, say, with HUD could exploit those differences to create greater room for them to manage the program better or even seek out other voices.

Finally, and quite important given some of the problems surrounding OZs, different agencies often have different constituencies and dissimilar ways to access members of the public. Indeed, while other agencies may not be perfect, the IRS and OTP are perhaps the least likely of the agencies at the federal level to engage effectively with the needs of community members directly affected by OZ projects. Coordination in this area, then, provides a

43. Freeman & Rossi, *supra* note 37, at 1186–87; Saito, *Tax Coordination*, *supra* note 37, at 19.

44. *See* sources cited *supra* note 43.

45. *See* sources cited *supra* note 43.

more effective means to reach out to these people and allow their voices to provide input.

B. Coordination Pitfalls

Coordination is not magical, and it is often not easy. There are some common pitfalls regarding coordination. But the appropriate tools can address these pitfalls.

The first concern is that there could be indeterminacy, turf fights, or other forms of unproductive conflict. Indeterminacy arises when agencies for some reason or another, usually because of some conflict, cannot reach a resolution on the policy.[46] Turf fights occur when an agency tries to overclaim within a policy space to exclude other actors.[47] These forms of conflict arise sometimes from agencies aggrandizing themselves or agencies that have major viewpoint differences and are unwilling to compromise on those differences. Conflicts like these can also arise when agencies and their employees do not understand the other agency and its culture. A sense of unfamiliarity and a lack of trust can lead to these forms of unproductive conflict.[48]

Another problem is, the opposite of indeterminacy and turf wars, the loss of all conflict.[49] Conflict and competition among agencies can sometimes be productive leading agencies to race to implement programs better and faster than others. Ironically, the loss of conflict leads to the very groupthink that agency coordination seeks to avoid.[50] Here, the differences in culture and agency goals can help avoid this loss. If agencies in the coordination effort have different goals and outlooks, the risk of this problem is greatly reduced.

Successful agency coordination then requires threading the needle between these two poles by using the various tools described below.

In the case of OZs, the larger concerns resulting from indeterminacy stem less from confrontation but more from a sense of

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46. *See* Marisam, *supra* note 37, at 210.

47. BARDACH, *supra* note 37, at 178–80; Marisam, *supra* note 37, at 210–12; Saito, *Tax Coordination*, *supra* note 37, at 20–21.

48. *See* sources cited *supra* note 47.

49. *See* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1384–85 (2017) (noting that conflict can often be beneficial); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 212–14 (2006); Saito, *Tax Coordination*, *supra* note 37, at 20–23.

50. *See* Farber & O'Connell, *supra* note 49, at 1422; *see also* Gersen, *supra* note 49; Saito, *Tax Coordination*, *supra* note 37, at 21–23.

neglect and inexperience in working together.[51] The IRS and OTP are not known for working with other agencies to implement, administer, and manage tax programs that have other policy effects well.[52] The lack of experience of working with others and the intrinsic complexity of working in the tax area can lead to misunderstanding of other agencies' cultures by the IRS and OTP, and vice versa.[53] That leads to a lack of trust and raises the risk that when the agencies work together, they may not answer key questions or undertake important actions. This indeterminacy means that people are then left in a lurch.[54] It also provides an opportunity for actors to use the program in ways that Congress and others did not intend by increasing private gains and reducing the communal economic gains.

C. Coordination Versus Reorganization

Given the challenges of coordination and the pitfalls noted above, some may argue that the best solution would be to reorganize the matter and remove the program from the IRS and OTP. That call though may not work well with OZs.

First, the OZ program relies heavily on tax concepts and is embedded within the tax laws. Changes to the program could affect other parts of the tax law. To ensure that the tax laws somewhat cohere, the IRS's and OTP's involvement is important. Additionally, changes in the tax law could affect the OZ program itself. Understanding those effects is also important to managing the program and its incentives. But to understand those effects, one needs to have an overall understanding of the tax laws. Thus, having the IRS and OTP involved to handle these issues and to provide tax expertise is important.

Second, the OZ program also involves monitoring finances and QOF. The IRS is traditionally good at this type of monitoring and enforcement. Keeping the IRS involved then allows the OZ program to rely on and leverage this expertise.

Third, the IRS and OTP have an overview of the entire Code and Treasury Regulations and could find areas of overlap between these programs and other tax programs for place-based economic development. They are in the best position to ensure these tax place-

51. *See* Saito, *Tax Coordination*, *supra* note 37, at 20–21.
52. *Id.*
53. *Id.*
54. *Id.*

based economic devolvement programs within the Code work well together.

Fourth, reorganization itself is also not costless. Many of the pitfalls of duplication one seeks to avoid by having the IRS and OTP solely in charge of OZs would be replicated if another agency were solely administering the program. Furthermore, reorganizations do not always go smoothly.

Thus, coordination seems to be the best route to address the program. The means to prevent some of the problems of agency coordination among the IRS, OTP, and other federal agencies is to structure the agency coordination in an intentional way. That involves using both structural and managerial tools to ensure that coordination for the OZ program works well. The next section addresses these coordination tools and how to use them within the OZ program.

III. STRUCTURING OZ AGENCY COORDINATION

Avoiding the pitfalls of coordination and seeking the highest level of gain requires a proper structuring of agency coordination and the use of the proper tools.

Given that this program affects numerous policy spheres and has a great deal of complexity both in tax and non-tax areas, using several coordination tools in combination is likely important.

Success in coordination is not guaranteed. Working together across agency lines is hard. But without coordination, it is unlikely that the OZ program will work effectively. Below are some of the tools to aid in successful coordination.

This section first examines what agencies should be involved in the coordination. It then discusses how the centralized power of the Executive Office of the President, mainly the Office of Management and Budget (OMB) and OMB's subagency, the Office of Information and Regulatory Affairs (OIRA), can assist. It then delves down to tools and actions that the IRS and OTP can use to assist in the coordination effort. It closes by examining how the coordination effort may increase community involvement in OZs.

A. Agencies Involved

An essential first step is determining which agencies should participate in a coordination effort for managing OZs going forward.

Three other agencies come to mind for working in tandem with the IRS and OTP in administering OZs. The first is HUD. As the lead agency for rental housing in the United States, HUD administers numerous programs for place-based economic development outside of the rental housing sphere.[55] HUD could work to use OZs to leverage other important programs for revitalizing distressed areas like Community Development Block Grants (CDBGs).[56]

A second agency is USDA. The USDA does economic development focused on agriculture and rural areas. It has a preexisting working relationship with HUD as well as working on rental housing matters in rural areas.[57] The USDA also has contact with members of rural communities who often benefit from its programs.[58]

Finally, a third agency to consider is a subagency of the Treasury, the CDFI Fund. Along with the IRS and OTP, the CDFI Fund administers a sister program to OZs, the NMTC.[59] While OZs seek to attract equity capital, the NMTC attracts debt financing for place-based community economic development.[60] The strong overlaps between these programs' purposes and the existing strong relationship among the IRS, OTP and the CDFI Fund also support working together.[61]

Additionally, all three agencies have contacts and can work both with and push back against state and local entities. These agencies have experience not only enforcing rules against state and localities, but also monitoring them for what works well and serving as a source of support for interested states and localities looking to tailor certain smart practices. Such information is also useful to determine what changes need to be made to the OZ statute and regulations to help it evolve into a more effective program.

After identifying the agencies, the next question that arises is which agency should take the lead. At this point, since the IRS and OTP

55. *See* Blaine G. Saito, *Collaborative Governance and the Low-Income Housing Tax Credit*, 39 VA. TAX REV. 451, 484–85 (2020) [hereinafter Saito, *Collaborative Governance*]; *Programs of HUD*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/sites/dfiles/Main/documents/HUDPrograms2020.pdf [https://perma.cc/87FH-YGFC].

56. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633.

57. *Rural Housing Service*, U.S. DEP'T AGRIC., https://www.rd.usda.gov/about-rd/agencies/rural-housing-service [https://perma.cc/8WWE-ZEKT] (last visited Aug. 11, 2021).

58. *Id.*

59. *About Us*, CMTY. DEV. FIN. INST. FUND, https://www.cdfifund.gov/about [https://perma.cc/FNU2-H2ZB] (last visited Aug. 12, 2021).

60. *Id.*

61. *See* THEODOS ET AL., *supra* note 29, at VII (calling for more OZ investment in CDFIs).

have already taken significant steps in implementing OZs through regulations and publicizing them to investors in QOFs, it makes some sense to leave leadership of the program there for now.[62] But at some point, another agency could take the lead as the program develops and changes.

B. Coordination from OMB and OIRA

The OZ program has bipartisan backing from Congress, and is also a policy that even the Biden Administration wants to continue.[63] Given this political support, coordination efforts for OZs can call on the OMB and the OIRA.[64]

OMB can help in a few ways. First, it has some understanding of other coordination efforts within the federal government.[65] It serves as a potential storehouse for smart practices from the agencies involved in OZ coordination.[66]

OMB can also help in ensuring that the agencies receive resources to implement effective coordination.[67] That means ensuring that there is some budget authority to use many of the coordination tools and holding the agencies to account here.[68]

OIRA, as a subagency of OMB, can also help coordinate. While previously excluded from OIRA review, tax regulations, including those for OZs, now must go through the OIRA review process if they are considered economically significant.[69] Using this process can ensure that all agencies involved in the coordination effort on OZs get a proper say in the regulation process.

More importantly, OIRA's review of previous regulations also allows it to introduce the IRS and OTP to other agencies that may be interested in the OZ program going forward.[70] For the three agencies

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62. *See* Saito, *Collaborative Governance*, *supra* note 55, at 496 (noting that if coordination were to occur under the LIHTC, given its central role in operating the program and its enforcement powers, retaining IRS leadership would make sense).

63. *See* Sullivan, *supra* note 21, at 1876–77.

64. *See* Saito, *Tax Coordination*, *supra* note 37, at 54–56.

65. *See id.*

66. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-509, *supra* note 37, at 23–25, 28–30; Saito, *Tax Coordination*, *supra* note 37, at 55–56.

67. Saito, *Tax Coordination*, *supra* note 37, at 56.

68. *See id.*

69. *See id.* at 54–55; *see also* Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 478–82 (2018).

70. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840–43 (2013); Saito, *Tax Coordination*, *supra* note 37, at 54–55.

mentioned above as primary agencies to work with the IRS and OTP in the OZ program, OIRA review of newer regulations can serve as an initial point of contact. In doing so, intra-agency discussions can occur, which, in turn, can build trust among agency personnel. Furthermore, OIRA review and OIRA's involvement can also help facilitate other agencies outside those mentioned above that may have something to add to the OZ program's participation. For example, if more information is required regarding labor markets and job training, perhaps OIRA can invite the Department of Labor to comment on any proposed regulations to OZs.

Finally, OIRA and OMB can also assist the IRS and OTP and the coordinating agencies to develop and use the managerial coordination tools mentioned below. OIRA and OMB, by sitting in the Executive Office of the United States President and overseeing the entire executive branch,[71] can determine the smart practices in other agency coordination efforts and see if some of those can be adapted to the OZ program.[72] They can also serve as facilitators for negotiations. They can also continue to monitor the coordination and push the agencies to update their practices should the needs of the programs or the agencies change.

Thus, having some of this effort come from the top can help. But the lion's share of coordination work must come from the IRS and OTP itself. Below are some of the key tools that they should use in implementing coordination.

C. Managerial Coordination Tools

One of the most important ways to make coordination succeed is to employ managerial tools to make it work. Section C describes these tools.

i. Memorandum of Understanding

The Memorandum of Understanding (MOU) is perhaps the most venerable and well-known of the coordination tools.[73] MOUs are agreements between agencies in a coordination effort. They outline the roles, rights, and responsibilities of each of the actors. Even

71. *See* Saito, *Tax Coordination*, *supra* note 37, at 51, 54–56.
72. *See id.*
73. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-1022, *supra* note 37, at 25–26; *see also* Freeman & Rossi, *supra* note 37, at 1161–65; Saito, *Tax Coordination*, *supra* note 37, at 63–64.

though they are not legally binding,[74] agencies often act as if MOUs have some force behind them.[75]

The process of developing an MOU in the OZ context requires that the agencies outline the key program management, policy, and regulatory concerns with OZs. The MOU development process should then have the agencies engage in a discussion of the resources and expertise they can bring to the OZ program. The MOU should also outline how the agencies will engage with all the parties in the OZs, including key community voices. In short, the process of developing the MOU should help the parties work through their concerns and understandings of the program and their coordination.

On some of the details of what the MOU should contain, it should parcel responsibilities based on the agencies' expertise. In terms of trying to ensure that finances are in order and to maintain compliance, the IRS and OTP should be involved. But most of the programmatic responsibilities should fall in the hands of the non-tax agencies. These responsibilities include determining what types of projects are best at revitalizing distressed areas, engaging local communities to help assess their needs, and investigating whether OZ investments actually meet those needs.

The MOU should also outline the interaction of OZs and other place-based economic development programs. Indeed, it may help the same sets of agencies coordinate with the IRS and OTP on other place-based economic tax credits. These programs include but are not limited to the NMTC and LIHTC. Furthermore, it may also make sense to consider the managerial interactions between OZs and actual outlay programs like CDBGs. The goal is to have these programs work as harmoniously together as possible.

Finally, the MOU should also help outline how some of these other coordination tools below should work. It can provide the overall structure to ensure the other tools are successful in facilitating coordination. The MOU should also outline what resources need to come to bear on managing the OZ program.

ii. Information Sharing

Another vital part of successful coordination is sharing necessary information among the agencies as they work together.[76] A failure to

74. Freeman & Rossi, *supra* note 37, at 1165.

75. *See id.* at 1161–63 (finding that agencies sign MOUs for "a variety of purposes" and use these documents to outline clear goals among agencies).

76. Saito, *Tax Coordination*, *supra* note 37, at 64–66.

share information between the IRS and OTP and the other coordinating agency will lead to a failure in the effort.

For OZs, there are significant pieces of information that all the agencies involved need to know. Agencies should know what projects and QOZ Businesses that QOFs are funding. They should know what effect these investments have on the underlying community in an OZ. All agencies should also have access to some information as to what drives OZ investments and to see if investments in OZs also draw upon other tax and non-tax economic development programs.

But not all agencies involved in the coordinated management of the OZ program need to know everything that the IRS needs to administer the tax benefits. Most importantly, other agencies do not need to know the identities of investors in QOFs and the amount of deferred or forgone taxes on gains that each investor receives from a QOF investment. It is only the IRS that needs that information. Although, aggregate information here would be helpful for the coordinating agencies to manage the program.

To that end, then, the agencies should determine together how to structure the exchange of large amounts of important information regarding OZs and the various investments made while still protecting some level of taxpayer privacy.

Some of these moves in the OZ program right now not only require sharing of information but collection. Others have pointed out that now, under the current law, the IRS is collecting little information on OZs and their projects.[77] Most of the information for how much is invested in OZs comes from third-party sources.

That problem, though, gives Congress and others an opportunity to think intentionally about the information sharing regime for OZs. Traditionally, the IRS is prohibited from disclosing tax return information under I.R.C. § 6103. Furthermore, most coordination efforts do not meet the tax administration exception under I.R.C. § 6103(h).[78]

A useful way around this issue is to have more of the information other than the identities of QOF investors run through the partner agencies.[79] That information can, if needed for the tax benefits, then

77. De Barbieri, *supra* note 21, at 148–53 (noting the lack of annual reporting requirements and reporting for the selection of OZs).

78. *See* I.R.C. §§ 6103(j)(1)–(3), (5)–(6), (k), (l), (o); *see also* Saito, *Tax Coordination*, *supra* note 37, at 64–66.

79. *See* Saito, *Tax Coordination*, *supra* note 37, at 64–66.

be attached to the return of someone claiming the OZ tax benefits and to the QOF's return. That approach turns much of the information that all the agencies need into tax return information under I.R.C. § 6103.

iii. Line-Level Teams and Line-Level Outreach

Perhaps one of the most useful tools for coordination among the IRS and OTP and other agencies like HUD, USDA, and the CDFI Fund is creating joint teams of line-level employees. Line-level employees are civil servants who run the day-to-day operations of an agency like revenue agents, to help manage and monitor the OZ program.[80]

Often many of the different aspects of the OZ program interact in unusual ways. Trying to get a sense as to what is working best to spur the largest amount of growth in a way that the community in an OZ requires, as noted, different levels of expertise. Having line-level teams with people who have those different types of expertise allows the agencies to work together in a way that most immediately affects parties outside the federal government.

Line-level teams, of course, can monitor compliance and take note of things that fall outside the stated goals of the OZ program, even if they are technically correct.[81] They can work together to ensure that, for example, QOZ Businesses are earning the required amount of gross income in the OZ. But they can also examine if the QOZ Business is employing more people from within the OZ or providing needed benefits to the area. They can also see if a development of QOZ property leverages other programs and how it does that effectively to create growth that is beneficial to the community. Thus, these line-level teams are not just there to enforce the program's rules, but they are also there to see what works and to see whether the program itself is meeting some of its stated goals.

Line-level teams can also look at how states have implemented the OZ program and how they decided what to designate as OZs.[82] While there is nothing preventing a state from choosing qualified areas as OZs, gathering the information as to what are the

80. *See* BARDACH, *supra* note 37, at 117–19; Saito, *Tax Coordination*, *supra* note 37, at 59–61.

81. *See* Saito, *Tax Coordination*, *supra* note 37, at 58–61 (discussing the benefits of line-level teams, which can better aid in administration and management).

82. *See id.* (arguing that line-level teams can help create a formal structure in the IRS that encourage coordination and creative problem solving).

characteristics where investment in an OZ has the greatest effect and has actual marginal effects is information that can then be shared with other states, should the program continue with a new round of designations.

Furthermore, these joint teams, because they have connections to other related economic development programs, can provide some means for non-federal government actors to work to leverage multiple programs together. Many of these place-based economic development programs, like OZs, NMTC, Low-Income Housing Tax Credits, and CDBGs, can together create synergistic effects to improve these areas.

These types of line-level teams can also serve as the eyes and ears of the agencies involved in coordination to members of the community.[83] They are the people who, working together, can engage the community in some of the listening sessions discussed below. Additionally, they are also ones that can reach out and get feedback from community organizations and nonprofits that work within a particular OZ to see how these OZs work. Many of the proposed reforms in this issue could thus leverage the mixed expertise of these line-level teams.

Finally, within the agencies themselves, having these mixed line-level teams helps all the agencies to understand other agencies' language and culture better.[84] They can also begin to create their own joint set of terms to discuss things. They can turn to their teammate immediately if they have a question about a matter that falls outside their expertise. They can serve as a source of trust-building. This can then improve the work that they do in this program.

D. Improving Community Input

Finally, while not entirely a tool of coordination, the coordination effort should seek to improve community input. This will allow the effort to potentially gain another base of support and help build internal support for coordination by providing a useful mission focus. It can create a view among the agencies that this program and their work is to serve these communities. Such a strong mission sense can help bind together some of the joint line-level teams and others who work on this program.

Additionally, this type of engagement draws on agencies outside of the IRS and OTP, thereby allowing the tax agencies to understand

83. *Id.*
84. *Id.*

the importance of working with others. As noted, three of the most likely candidates to work together on OZs — HUD, USDA, and the CDFI Fund — have public-facing engagement. Furthermore, a joint team that reaches out through one of these other agencies would likely not strike fear into the hearts of community members. Generally, many people when they hear from the IRS, tend to think they will be audited.

Of course, even with these connections, more community engagement and input are desirable to allow these communities to receive what they need and to have ownership over these programs. To that end, there are two approaches that could help.

First is to create listening sessions made up of relatively large groups of randomly selected community members affected by an OZ to talk to some agency line officials working on a joint team. While such participation is voluntary, it will be encouraged as a means for them to shape their community's future. Gathering input from a broad cross-section of people prevents overweighting the perspectives of only those who opt in. Those who typically do opt in, after all, tend to be more connected and more politically involved.

Second, especially since many of the people involved here are lower-wealth and lower-income, they should receive some compensation for their time. Such a move makes it more likely that someone will say yes when offered the random lot opportunity to participate in a community discussion.

While many may consider this matter a bit beyond what ordinary citizens can do, some work has been done in some jurisdictions with participatory budgeting. There has been some success in having citizens determine projects aided by teams of experts to provide input. The community engagement envisioned here then builds on some of these successes.[85]

Of course, many would argue that paying people is expensive. But if the program only has inframarginal effects and does not have a strong benefit to those living in those communities, the costs are greater. The result of choosing not to pay for such engagement may thus be pennywise and pound-foolish.

In the end, such a move not only strengthens agency coordination through greater mission focus and seeing the results and the effect of OZs on communities, but it also creates the opportunity to hear from

85. *See* Archon Fung, *Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future*, 75 PUB. ADMIN. REV. 513, 514 (2015).

individuals whose voices are too often ignored. In working with this program, this is a laudable goal.

CONCLUSION

Agency coordination is a managerial method consisting of various tools that can help improve the administration and the operation of the OZ programs. Doing so would allow better analysis and program management, stronger connections with other related programs, and improved relationships between the federal government and communities. Indeed, given the fact that it touches so many different policy spheres, OZs are ripe for coordination.

While difficult, such work is attainable through the proper use of managerial tools. Bringing together the agencies of the IRS and OTP, HUD, USDA, the CDFI Fund, and potentially others to work together will help to build a system of coordination.

Agency coordination for OZs could help make some marginal improvements to the program. But more importantly, agency coordination can help policymakers and others who want to improve the OZ program find effective ways to make these changes and improvements. Agency coordination also provides a platform and framework upon which any policy changes can build on the growing relationships between the tax agencies of the IRS and OTP and other agencies. This strengthened relationship should create long-lasting enhancements to the monitoring, management, administration, and enforcement of the OZ program. Hopefully, as time goes on, coordination will continue to spur further coordination and innovation and the fruits of coordination can be reflected in revisions and changes in the OZ program itself.