

## Cannabis Investors Eye Opportunity Zones, but Legal Questions Persist

By Paul Demko

03/06/2020 05:03 AM EST

The heavily taxed marijuana industry sees opportunity in President Donald Trump's massive tax cut package.

Cannabis investors have been eyeing [Opportunity Zones](#) as a potential boon for the financially struggling industry. Under that provision of the [2017 tax bill](#), companies can reap tax benefits by investing in areas designated as distressed by the federal government.

Federal law bans marijuana companies from deducting standard business expenses like salaries and benefits, leading many to [rack up huge tax bills](#). The Opportunity Zone program is seen by many as an enticing way to at least partially offset that financial stress. They also think it fits with efforts to ensure that legalization actually benefits neighborhoods hit hardest by criminal drug penalties.

“If we're able to ... help a local black or minority entrepreneur realize their dream of owning a cannabis dispensary, I would gladly lease this building to them within an opportunity zone,” said Erik Murray, CEO of Oak Investment Funds, which is developing a prime piece of real estate in downtown Los Angeles. “I think it's one of the things that opportunity zones should be doing.”

But because marijuana remains illegal under federal law, it's unclear if cannabis businesses can take advantage of the tax benefit.

Nowhere in the statute does it prohibit investments in marijuana businesses from qualifying. It's not among the list of “sin business” that are explicitly prohibited, unlike liquor stores, massage parlors, gambling establishments and even golf courses.

In addition, nothing in the [accompanying regulations](#), which were finalized by the IRS in December, states that marijuana businesses are excluded. In fact, they're not addressed in any way whatsoever in the 500-plus pages of rules for Opportunity Zones.

James Mann, a tax expert at Greenspoon Marder, argues that the silence from the Treasury Department indicates that investments in marijuana businesses are clearly allowed.

“It's very hard to prove a negative,” said Mann, who represents Oak Investment Funds. “There's no indication from anyone in any official capacity in the IRS that they don't agree with what I'm saying.”

But even though the statute and regulations don't explicitly prohibit cannabis investments, the counter-argument goes, it's difficult to believe that lawmakers were trying to create tax breaks for businesses that they deem to be engaged in illegal narcotics trafficking.

“There are very clearly two camps,” said Ira Weinstein, a cannabis expert with accounting firm CohnReznick. “One saying, ‘It’s not listed as a sin business, so, by definition, it’s okay.’ The other saying, ‘The mere fact that it’s illegal is just a non-starter.’”

Treasury Secretary [Steven Mnuchin](#) has been asked about the issue by lawmakers on at least two occasions. In May of last year, Mnuchin said he would defer to IRS guidance, but also made it clear that he thinks marijuana businesses should be excluded. “We should not have those businesses in the Opportunity Zones,” Mnuchin said.

Last month, he was asked about it again, but offered no insight about whether cannabis investments are fair game. “I’m going to have to get back to you on the specifics,” he said.

The IRS did not respond to a request from POLITICO for clarity about its stance on the issue.

Sen. [James Lankford](#) (R-Okla.), who queried Mnuchin on the issue on both occasions, and who represents a state with a rapidly growing medical marijuana market, doesn't think pot shops should qualify for the tax break. “It’s difficult to [give] a federal tax benefit to something that is against federal law,” Lankford said at the hearing last month.

Even though there's no mention of marijuana businesses in either the statute or accompanying regulations, some tax experts point to the “anti-abuse” rule as a potential tool that the IRS could wield to prevent investors from taking advantage of Opportunity Zones.

“When the IRS writes an anti-abuse rule, they don't want to specify all the parameters, because they want it to be flexible enough that they can apply it on a case-by-case basis,” said Lisa Zarlenga, an attorney at Steptoe & Johnson who has written extensively about Opportunity Zones. “There's always going to be a little bit of uncertainty.”

But Mann dismisses this line of argument.

“Saying the anti-abuse rules would apply to these transactions is just grasping at straws,” Mann said. “Non-compliance with the tax system is a big enough problem without people further reducing respect for the system by making up rules that don't exist.”

Further clarity is unlikely to arrive anytime soon. That's because companies are just starting to file tax returns that reflect Opportunity Zone investments. If the IRS were to launch audits of these investors — the most likely means of cracking down on misuse of the program — that likely wouldn't be known until next year at the earliest.

“It will be a good long time before an audit tells us much,” said David Shapiro, a tax law expert at Saul Ewing Arnstein & Lehr. “You're going to have to really do some very careful soul-

searching here and have a long discussion because this is a risk we can't say you're ever going to be free of.”

Murray is comfortable with that risk after getting legal advice from Mann.

The parcel of land owned by his company is just down the street from the Los Angeles Convention Center and the Staples Center arena. A flyer designed to entice tenants notes that more than 200,000 cars pass by the location each day and envisions a cannabis dispensary as the anchor tenant.

However, Murray said that’s just one possible vision for the development.

“Whether the property ends up with a cannabis tenant or not is somewhat inconsequential to us,” he said. “We are a real estate company. We are arm's length as a landlord. We do not touch the plant.”