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Like-Kind Exchange Relief for Taxpayers Affected by Hurricanes Florence and Michael: Relief Beyond Taxpayers in the Carolinas and Florida

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For taxpayers affected by Hurricanes Florence or Michael, the aftermath of the storm may cause significant disruption in their ability to monitor and complete transactions that were in process at the time of the disaster. For taxpayers that were in the midst of a like-kind exchange transaction under section 1031,[1] the failure to complete the exchange within the specific time requirements of section 1031 would typically result in the recognition of gain that the taxpayer originally intended to defer. The IRS has granted "affected taxpayers" with respect to Hurricanes Florence and Michael an extension of time to perform certain actions. This article explains how taxpayers—including those located outside the specific covered disaster area—affected by the disaster may qualify for this rare extension of time.

Sections 7508A and 17 of Revenue Procedure 2007-56[2] may provide relief for taxpayers in the midst of a like-kind transaction by extending the time periods within which certain steps of an exchange transaction must be completed. As a result of the presidential disaster declarations for Hurricanes

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[1] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

[2] 2007-2 C.B. 388.

Florence and Michael, taxpayers may have the ability to take advantage of a rare extension of time to complete their like-kind exchange transactions. As described below, this relief extends both to taxpayers located in the covered disaster areas and to taxpayers who are not located in a covered disaster area but may have a particular transaction that was affected by the disaster. Taxpayers affected by the disaster, including those located outside the specific covered disaster area, may qualify for an extension of time.

General Like-Kind Exchange Time Requirements

A taxpayer engaging in a deferred like-kind exchange under section 1031(a)(3) generally must:

- Specifically identify the potential replacement property no later than 45 days after the sale of the relinquished property; and
- Acquire some or all of the identified replacement property no later than 180 days after the sale of the relinquished property.[3]

If these statutory timing requirements are not met for a deferred like-kind exchange, the replacement property is generally considered not to be like-kind to the relinquished property.

Similarly, a taxpayer engaging in a reverse like-kind exchange using the parking safe harbor of Revenue Procedure 2000-37[4] must:

- Enter into a qualified exchange accommodation agreement no later than five days after the exchange accommodation titleholder ("EAT") acquires qualified indicia of ownership of the replacement property or relinquished property;
- Specifically identify the potential relinquished property, if the replacement property is held by the EAT, no later than 45 days after the EAT acquires qualified indicia of ownership of the replacement property; and
- Acquire the replacement property from the EAT and sell the identified relinquished property to a third party no later than 180 days after the EAT acquires qualified indicia of ownership of the parked property.

In addition, for a reverse exchange, the combined time that the relinquished property and replacement property may be held by an EAT cannot exceed 180 days. Failure to satisfy the timing requirements of the parking safe harbor generally results in the transaction not being treated as an exchange.

Each of these time requirements for the taxpayer to act under section 1031(a)(3) and Revenue Procedure 2000-37 may be postponed by the IRS under Revenue Procedure 2007-56 as a result of a

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[3] Section 1031(a)(3).

[4] 2000-2 C.B. 308.

presidentially declared disaster. In particular, following a presidentially declared disaster, the IRS may issue a news release or other guidance authorizing a postponement of time to perform specific acts for "affected taxpayers" as defined in the guidance.

In addition to the specific relief that may be provided by the IRS in its news release or other guidance, section 17 of Revenue Procedure 2007-56 extends relief to certain transferors of property in a like-kind exchange transaction that were affected by the disaster, including those who are not "affected taxpayers" under the relevant news release ("Section 17 Relief"). An affected taxpayer under an IRS news release may use Section 17 Relief in lieu of the relief otherwise provided by the IRS news release.[5]

Specific Relief Granted for Hurricanes Florence and Michael

The IRS has issued a news release granting "affected taxpayers" with respect to Hurricane Florence until January 31, 2019, to perform certain time-sensitive actions, including the general timing requirements described above for a deferred like-kind exchange in section 1031(a)(3) and the parking safe harbor of Revenue Procedure 2000-37.

For Hurricane Florence, the extension of time applies to actions with respect to a like-kind exchange required by:

- Affected taxpayers in North Carolina that were originally due on or after September 7, 2018, and before January 31, 2019;[6] and
- Affected taxpayers in South Carolina that were originally due on or after September 8, 2018, and before January 31, 2019.[7]

For Hurricane Michael, the IRS has issued a news release granting "affected taxpayers" until February 28, 2019, to perform certain time-sensitive actions, including the general timing requirements described above for a deferred like-kind exchange in section 1031(a)(3) and the parking safe harbor of Revenue Procedure 2000-37.

For Hurricane Michael, the extension of time applies to actions with respect to a like-kind exchange required by:

- Affected taxpayers in Florida that were originally due on or after October 7, 2018, and before February 28, 2019.[8]

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[5] Section 4.02 of Rev. Proc. 2007-56.

[6] NC-2018-03 (as updated Sept. 28, 2018).

[7] SC-2018-01 (as updated Oct. 3, 2018).

[8] FL-2018-04 (as updated Oct. 14, 2018).

For purposes of these extensions, "affected taxpayers" are those listed in section 301.7508A-1(d)(1) and include the following:

- Individuals who live in the covered disaster area
- Businesses whose principal place of business is located in the covered disaster area
- Taxpayers not in the covered disaster area, but whose records necessary to meet a deadline are in the covered disaster area
- All relief workers affiliated with a recognized government or philanthropic organization assisting in the relief activities in the covered disaster area
- Any individual visiting the covered disaster area who was killed or injured as a result of the disaster[9]

The covered disaster area for Hurricane Florence in North Carolina, as of September 28, 2018, included the following counties: Beaufort, Bladen, Brunswick, Carteret, Columbus, Craven, Cumberland, Duplin, Greene, Harnett, Hoke, Hyde, Lenoir, Johnson, Jones, Lee, Moore, New Hanover, Onslow, Pamlico, Pender, Pitt, Richmond, Robeson, Sampson, Scotland Wayne, and Wilson.[10]

The covered disaster area for Hurricane Florence in South Carolina, as of October 3, 2018, included the following counties: Chesterfield, Darlington, Dillon, Florence, Georgetown, Horry, Marion, and Marlboro.[11]

The covered disaster area for Hurricane Michael in Florida, as of October 14, 2018, included the following counties: Bay, Calhoun, Franklin, Gadsden, Gulf, Hamilton, Holmes, Jackson, Jefferson, Leon, Liberty, Madison, Suwannee, Taylor, Wakulla, and Washington.[12]

Section 17 Relief

In addition to the relief authorized by the IRS news releases, section 17 of Revenue Procedure 2007-56 provides specific relief for taxpayers engaging in like-kind exchanges that are affected by a presidentially declared disaster. Under section 17 of Revenue Procedure 2007-56, for affected taxpayers and certain other transferors of property, if the original performance deadline would fall on or after the date of the presidentially declared disaster, the following dates are postponed by 120 days or

[9] NC-2018-03 (as updated Sept. 28, 2018); SC-2018-03 (as updated Oct. 3, 2018); FL-2018-04 (as updated Oct. 14, 2018).

[10] NC-2018-03 (as updated Sept. 28, 2018)

[11] SC-2018-01 (as updated Oct. 3, 2018)

[12] FL-2018-04 (as updated Oct. 14, 2018).

to the last day of the general disaster extension period authorized by an IRS news release (i.e., January 31, 2019), *whichever is later*:

- The last day of the 45-day identification period in either a deferred like-kind exchange under section 1031(a)(3) or a reverse exchange parking safe harbor exchange under Revenue Procedure 2000-37;
- The last day of the 180-day exchange period in either a deferred like-kind exchange under section 1031(a)(3) or a reverse exchange parking safe harbor exchange under Revenue Procedure 2000-37; and
- The last day of the 5 day period of time for entering into a written agreement with an EAT under Revenue Procedure 2000-37.[13]

In addition, if an identified replacement property (in the case of a deferred exchange) or an identified relinquished property (in the case of a reverse parking safe harbor exchange) is substantially damaged by the presidentially declared disaster, the last day of the 45-day identification period in section 1031(a)(3) or Revenue Procedure 2000-37 is postponed by 120 days or to the last day of the general disaster extension period authorized by an IRS news release (i.e., January 31, 2019), whichever is later, even though the original expiration of the identification period was prior to the date of a presidentially declared disaster.[14]

However, in no event may a postponement period extend beyond (1) the due date (including extensions) of the taxpayer's tax return for the year of the transfer, or (2) one year.[15]

In addition to extending the time periods during which a taxpayer must act, Section 17 Relief extends beyond the "affected taxpayers" in the covered disaster areas. In particular, *any taxpayer* who sold its relinquished property in a deferred like-kind exchange or had an EAT acquire qualified indicia of ownership of property on or before the date of the presidentially declared disaster qualifies for the extended time periods provided in section 17 if the taxpayer:

- Is an "affected taxpayer" as defined in the IRS news release or other guidance announcing tax relief for the victims of the specific presidentially declared disaster; or
- Has difficulty meeting the original deadlines due to the presidentially declared disaster.[16]

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[13] Section 17.02(1) of Rev. Proc. 2007-56.

[14] Section 17.03 of Rev. Proc. 2007-56.

[15] Section 17.02(1) of Rev. Proc. 2007-56.

[16] Section 17.02(2) of Rev. Proc. 2007-56.

The following circumstances are specifically listed as examples of situations that may cause a taxpayer, who is not otherwise an affected taxpayer, to have difficulty meeting the original section 1031 deadlines because of a disaster:

- The relinquished property or replacement property is located in the covered disaster area
- The principal place of business of any party to the transaction (for example, the qualified intermediary or EAT) is located in the covered disaster area
- Any party to the transaction (or an employee of that party who is involved in the section 1031 transaction) is killed, injured, or missing as a result of the presidentially declared disaster
- A document prepared in connection with the exchange or a relevant land record is destroyed, damaged, or lost as a result of the presidentially declared disaster
- A lender decides not to fund either permanently or temporarily a real estate closing due to the presidentially declared disaster or refuses to fund a loan to the taxpayer because flood, disaster, or other hazard insurance is not available due to the presidentially declared disaster
- A title insurance company is not able to provide the required title insurance policy necessary to settle or close a real estate transaction due to a presidentially declared disaster[17]

As a result of these extensions of time, taxpayers who were affected by Hurricanes Florence and Michael may qualify for an extension of time within which to complete their like-kind exchange transactions. Taxpayers who are in the midst of an exchange, even those not located in Florida or North or South Carolina, who may need additional time to complete a transaction should determine if they qualify for this rare extension of time.

[17] *Id.*