April 20, 2020

The Honorable Steven T. Mnuchin
Secretary of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Dear Secretary Mnuchin:

The undersigned real estate associations thank the Treasury Department and the Internal Revenue Service for issuing Notice 2020-23, updating Notice 2020-18 to provide for extensions of certain time-sensitive acts. We sincerely appreciate the Administration's effort to provide taxpayer relief for like-kind exchanges as we requested in correspondence sent March 23, 2020. A copy of that letter is attached.

As discussed in detail below, we write today to seek clarification that with respect to like-kind exchanges described in Section 1031 that Section 17 of Rev. Proc. 2018-58 applies. Additionally, given the severity of the COVID-19 crisis, we also request that the Administration provide an additional modification applicable to like-kind exchanges. Specifically, we request that March 13, 2020, be deemed to be the beginning date of disaster relief for like-kind exchanges, that each day of the disaster period from March 13 to July 15, 2020 be treated as the date of the federally declared disaster, and that taxpayers with one like-kind exchange deadline falling within the disaster period be permitted to an extension of both deadlines.

**Request for Clarification of the Application of Section 17 of Rev. Proc. 2018-58**

Our first request is to ask for clarification of the relief granted that is related to time-sensitive acts listed in Rev. Proc. 2018-58, specifically as related to Section 1031 like-kind exchanges. Notice 2020-23 at page 6 states:

> *The Secretary of the Treasury has also determined that any person performing a time-sensitive action listed in either §301.7508A-1(c)(1)(iv) of the Procedure and Administration Regulations or Revenue Procedure 2018-58, 2018-50 IRB 990 (December 10, 2018), which is due to be performed on or after April 1, 2020, and before July 15, 2020 (Specified Time-Sensitive Action), is an Affected Taxpayer.*

Unlike typical disaster relief notices, such as TN-2020-01 (March 6, 2020) granting tax relief for Tennessee victims of storms and flooding, which specifically reference Section 17 of Rev. Proc. 2018-58 (Section 17), pertaining to like-kind exchanges of property, Notice 2020-23 makes no reference to Section 17. Although 3.02 of Rev. Proc. 2018-58 seemingly applies Section 17 automatically once Treasury invokes its authority under section 7508A, the absence of a specific reference to Section 17 has created confusion as to the exact form of relief granted.

Notice 2020-23 postpones to July 15 only those time-sensitive acts occurring on or after April 1 and before July 15. Section 17.02(1) would afford affected taxpayers engaged in like-kind exchanges much-needed additional relief. Section 17.02(1) would allow a taxpayer who began an exchange on or before the date of the disaster to extend the 45-day identification and 180-day exchange period, or the corresponding safe harbor deadlines for parking transactions described in Rev. Proc. 2000-37, by the later of 120 days or the last day of the disaster extension period. We are uncertain if the general reference in Notice 2020-23 to Rev. Proc. 2018-58 is intended to incorporate the relief granted in Section 17.

Section 17.02 states:

*(1) The last day of a 45-day identification period set forth in §1.1031(k)-1(b)(2)(i) of the Income Tax Regulations, the last day of a 180-day exchange period set forth in §1.1031(k)-1(b)(2)(ii), and the last day of a period set forth in section 4.02(3) through (6) of Rev. Proc. 2000-37, 2000-2 C.B. 308, modified by Rev. Proc. 2004-51, 2004-2 C.B. 294, that fall on or after the date of a federally declared disaster, are postponed by 120 days or to the last day of the general disaster extension period authorized by an IRS News Release or other guidance announcing tax relief for victims of the specific federally declared disaster, whichever is later. However, in no event may a postponement period extend beyond: (a) the due date (including extensions) of the taxpayer's tax return for the year of the transfer (See §1.1031(k)-1(b)(2)(ii); or (b) one year (See section 7508A(a)).*

**Request for Additional Relief Given Severity of COVID-19 Crisis**

Given the severity of the COVID-19 crisis, we also request that the Administration provide an additional modification applicable to like-kind exchanges. Specifically, we request that March 13, 2020, the date of the President's emergency declaration under the Stafford Act related to the COVID-19 pandemic, be deemed to be the beginning date of disaster relief under Section 17 and that each day of the disaster period from March 13, 2020 to July 15, 2020 be treated as the date of the federally declared disaster. Due to the extenuated, ongoing nature of the COVID-19 pandemic disaster, we believe that this is consistent with the intent of Section 17. We further request that if the end of the 45-day identification period or the end of the 180-day exchange period applicable to like-kind exchanges falls within the modified Notice 2020-23 disaster period of March 13, 2020 and July 15, 2020, that the deadline to complete each of those actions be extended by the later of 120 days or to July 15, 2020, but not later than the due date for filing the taxpayer's tax return for the year in which the exchange began. Finally, we request clarification that the relief is automatic, but not mandatory. Taxpayers could elect out of the extension and rely upon their original deadlines as long as they have not performed any act that would be deemed to be acceptance of the relief postponement.

The pandemic-related governmental restrictions and Stay at Home orders in place across the country, along with the fear of catching or spreading a life-threatening disease, have threatened the ability of taxpayers to complete like-kind exchanges. Identifying properties for trade purposes requires travel and a confidence in both the expected cash-flow stream and the value of potentially acquired property. Closing on an identified property requires these same conditions plus extensive due diligence by the buyer, lender and other third-party contractors. All of these necessary steps are currently unfeasible due to travel restrictions, quarantine, properties being locked down, office closures of title / escrow companies and governmental recording offices.

Under present circumstances, the ability to retroactively revise an identification is needed because properties identified by a 45-day deadline that preceded the full onset of the pandemic may no longer be viable or the value may have fallen to a degree that a closing is no longer feasible. The occupancy and income of a property identified for acquisition may have dropped so far that the value may currently be beneath the seller's mortgage balance and hence not marketable until sometime in the distant future when revenue recovers. Similarly, a change in status or value of an identified property may impact the willingness of lenders to accept it as collateral. Affected taxpayers may need to identify different or additional properties.

It must be noted that COVID-19 affects every part of the nation and is not a localized disaster. As a result of the nationwide impact and the resulting effect upon asset valuations, the ability to travel and perform necessary due diligence, we believe the additional relief request is justified and beneficial to the economy at large. Indeed, like-kind exchange acquisitions carry an economic benefit far beyond the taxpayer doing the exchange. Transactional activity stimulates a stream of jobs and revenue among professionals and businesses ancillary to the real estate exchange, for example, real estate brokers, lenders, title and property insurers, appraisers, surveyors, inspectors, contractors, architects, attorneys, building suppliers and more. Additionally, like-kind exchanges encourage funds to continue to be invested in real estate, and acquirers of property often invest additional funds to upgrade newly acquired properties.

Please consider the following examples to illustrate these points and how they would be alleviated by the requested relief:

***Example 1*: Under Notice 2020-23 without the application of Section 17:** Exchange begins April 1, 2020. The 45-day identification period ends on May 16, 2020, which would be extended to July 15, 2020, because it falls within the disaster relief period. The last day of the 180-day exchange period, September 28, 2020, would be unchanged because September 28, 2020, does not fall within the defined disaster period. Thus, the taxpayer would have only 75 days after identifying potential replacement properties to actually close on the acquisition(s).
***Under Request in this Letter to Apply Section 17*,** the taxpayer could extend the identification period by 120 days (165 days total) to September 13, 2020, and the exchange period by 120 days (300 days total) to January 26, 2021, because each 120 day extension is later than July 15, the end of the defined disaster period.
***Under Request in this Letter to Apply Additional Modification***, the result is the same as applying Section 17.
***Application of Automatic, but not Mandatory Relief:*** Taxpayer does not identify any replacement property by May 16, 2020 and notifies the Qualified Intermediary that he elects out of disaster extensions. Exchange terminates on day 45.

***Example 2*: Under Notice 2020-23 Without the Application of Section 17:** Exchange begins November 15, 2019. The 45-day identification period ends on December 30, 2019. The last day of the 180-day exchange period is May 13, 2020, which would be extended to July 15, 2020.
***Under Request in this Letter to Apply Section 17*,** the taxpayer could not extend the 45-day identification period. The exchange period would be extended by 120 days (300 days total) to the later of July 15, 2020 (last day of disaster period) or September 10, 2020 (300th day), but not later than the due date (including extensions) for filing the taxpayer's 2019 tax return.
***Under Request in this Letter to Apply Additional Modification*,** the taxpayer could extend both the identification date and the exchange period by 120 days (165 days for identification and 300 days to complete the exchange) or to July 15, whichever is later. Thus, the identification period would be extended to July 15, 2020, and the last day of the exchange period would be extended to September 10, 2020, but not later than the due date (including extensions) for filing the taxpayer's 2019 tax return.
***Application of Automatic, but not Mandatory Relief:*** Taxpayer notifies the Qualified Intermediary (or other accommodator, e.g. Exchange Accommodation Titleholder) on or before May 13, 2020 that he elects out of disaster extensions. Exchange terminates on day 180.

***Example 3*: Under Notice 2020-23 Without the Application of Section 17:** Taxpayer begins an exchange on January 5, 2020. Taxpayer's 45-day deadline is February 19, 2020, which would not be extended. Taxpayer's 180-day deadline is July 3, 2020, which would be extended by only 12 days to July 15, 2020.
***Under Request in this Letter to Apply Section 17 with Additional Modification:*** Taxpayer's 45-day identification deadline would be postponed to the later of May 18, 2020 (165th day) or July 15, 2020 (last day of disaster period). Taxpayer's 180-day deadline would be postponed until October 31, 2020 (300th day), being the later of 120 days or the end of the disaster period.
***Application of Automatic, but not Mandatory Relief:*** Taxpayer accepts the disaster relief extension by submitting, on May 10, 2020, a revised list of identified properties to the Qualified Intermediary (or other accommodator, e.g. Exchange Accommodation Titleholder). On June 10, taxpayer decides to abandon the exchange. Because taxpayer has accepted the relief, taxpayer can use the remainder of the disaster relief extension to rescind the identification, and the exchange will terminate on July 15, 2020, the last day of the disaster period.

***Example 4**: Under Notice 2020-23 Without the Application of Section 17:* Taxpayer begins an exchange on July 12, 2020. Taxpayer's 45-day identification deadline is August 26, 2020 and the 180-day deadline is January 8, 2021. Neither deadline would be postponed because they both fall after the last day of the disaster period.
***Under Request in this Letter to Apply Section 17 with Additional Modification:*** Taxpayer's 45-day identification deadline would be postponed by 120 days to December 24, 2020. Taxpayer's 180-day exchange period would be postponed by 120 days to the earlier of May 8, 2021 ($300^{th}$ day) or the due date (including extensions) of the taxpayer's tax return for 2020, being the later of 120 days or the last day of the disaster period.
***Application of Automatic, but not Mandatory Relief:*** Taxpayer accepts the disaster relief extension by submitting, on December 24, 2020, a list of identified properties to the Qualified Intermediary (or other accommodator, e.g. Exchange Accommodation Titleholder). On February 1, 2021, taxpayer decides to abandon the exchange. Because taxpayer has accepted the relief, taxpayer's exchange will terminate on the earlier of May 8, 2021 ($300^{th}$ day) or the due date (including extensions) of the taxpayer's tax return for 2020.

We believe that the examples above demonstrate that while well intentioned, the relief provided in Notice 2020-23 is insufficient. Given that potential replacement properties are identified often before contract negotiations have begun, even under normal circumstances, it is unlikely that a commercial real estate transaction could be entered into, put under contract, inspections, loan underwriting and appraisals, and all other necessary contract obligations and contingencies completed within the timing permitted by Notice 2020-23. Under the current pandemic conditions, even as the governmental restrictions begin to be lifted, it would be impossible.

While applying Section 17 would be beneficial, we believe additional relief is well warranted given the severity, ongoing impact, and national scope of COVID-19. The pandemic has not only upended the normal transaction process, it has also upended the economy and with it, underwriting criteria and property values, the extent of which is not yet fully known. In order to ensure liquidity in real estate markets, taxpayers need the relief provided under Section 17 along with the additional modification requested.

## Summary

In sum, we request clarification that affected taxpayers under Notice 2020-23 may avail themselves of the postponement provisions of Section 17. We further request that March 13, 2020, be deemed to be the beginning date of disaster relief for like-kind exchanges and that each day of the disaster period from March 13 to July 15, 2020 be treated as the date of the federally declared disaster. Additionally, we request that if the end of the 45-day identification period or the end of the 180-day exchange period applicable to like-kind exchanges falls within the disaster period, that the deadlines to complete both of those actions be extended by 120 days or to July 15, 2020, whichever is later. This relief would give taxpayers who may have commenced, or who wish to commence an exchange, the necessary time to identify and / or close on a replacement property. Taxpayers, many of whom are small to mid-sized businesses and middle class investors, should not have to be concerned about the possibility of having to pay significant capital gains taxes because like-kind exchange transactions cannot be completed due to the disruption caused by the coronavirus pandemic. The funds they would have to utilize to meet such tax obligations would only further reduce liquidity in real estate markets.

We are grateful for the opportunity to submit these comments for consideration and appreciate the efforts you and your staff are making to assist taxpayers during this unprecedented crisis. Should you have any questions, please do not hesitate to contact Suzanne Goldstein Baker (312.504.1031 / suzanne.baker@ipx1031.com) or Cindy Chetti (202.974.2328 / cchetti@nmhc.org).

Sincerely,

Alternative & Direct Investment Securities Association (ADISA)
American Seniors Housing Association
Asian American Hotel Owners Association
Building Owners and Managers Association (BOMA) International
CCIM Institute
Federation of Exchange Accommodators (FEA)
Institute of Real Estate Management
Institute for Portfolio Alternatives (IPA)
International Council of Shopping Centers (ICSC)
Mortgage Bankers Association
National Apartment Association
National Association of Home Builders (NHBA)
National Association of REALTORS®
National Multifamily Housing Council
NAIOP, the Commercial Real Estate Development Association
Nareit
REALTORS® Land Institute
Society of Industrial and Office REALTORS®
The Real Estate Roundtable

cc:

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