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BENEFITS BRIEF

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# Puerto Rico Treasury Department Issues Additional Guidance on Eligible Distributions to Participants Affected by Hurricane Maria

The Puerto Rico Treasury Department ("PR Treasury") has issued Administrative Determination No. 18-02 to clarify certain provisions of the previously issued Administrative Determination No. 17-29 which granted relief on eligible distributions (including, hardship withdrawals) to participants in Puerto Rico tax qualified retirement plans who were affected by Hurricane Maria. For a summary of the guidance in AD 17-29, see our Groom Brief (available here).

**Administrative Determination No. 18-02**

On January 17, 2018, the PR Treasury issued Administrative Determination No. 18-02 ("AD 18-02," and available here in Spanish) to clarify and expand certain provisions of Administrative Determination No. 17-29 ("AD 17-29").[1] AD 17-29 provides that certain distributions from a qualified retirement plan ("Qualified Plans") under Section 1081.01 of the Puerto Rico Internal Revenue Code of 2011, as amended ("PR Code"), made by an "Eligible Individual" from September 20, 2017 to June 30, 2018 ("Eligibility Period"), requested to cover losses or expenses incurred by a Qualified Plan participant or beneficiary because of Hurricane Maria ("Eligible Expenses") would qualify as a distributable event under the PR Code ("Eligible Distributions") and will enjoy a preferential tax treatment.

*Eligible Distributions*

AD 18-02 clarifies that the term "Eligible Distributions" includes distributions of employee and employer contributions (including after-tax contributions), earnings, and amounts for which the tax was pre-paid (after-tax contributions and tax pre-paid amounts are defined as "Exempt Amounts" in AD 18-02). Consequently, all amounts distributed, including Exempt Amounts, must be included when calculating the $10,000 maximum amount of tax exempt Eligible Distributions ("Tax Exempt Eligible Distribution") and the $100,000 maximum amount of Eligible Distributions under AD

[1] AD 18-02 also clarifies provisions related to Eligible Distributions from Puerto Rico individual retirement accounts ("PR-IRAs") and provides that the relief under AD 17-29 is also applicable to distributions from non-deductible PR-IRAs ("Roth PR-IRAs").

17-29. In addition, AD 18-02, provides that in calculating the $10,000 cap on Tax Exempt Eligible Distribution, you must first use all Eligible Distributions of taxable amounts (e.g., contributions and earnings) made in year 2017, and then the Eligible Distributions of Exempt Amounts made in such year.

*10% Preferential Tax Rate*

The 10% preferential tax rate on Eligible Distributions in excess of $10,000 is applicable only with respect to Eligible Distributions of taxable amounts. Consequently, the 10% tax withholding is required only with respect that portion of the Eligible Distribution that does not constitute an Exempt Amount.

*Distributions in Excess of the AD 17-29 Limits*

An Eligible Individual who requests more than one Eligible Distribution must make sure that the total Eligible Distributions received during the Eligibility Period do not exceed $100,000 (including taxable and Exempt Amounts). In addition, Eligible Distributions in excess of $10,000 must be subject to a tax withholding of at least 10%.

AD 18-02 clarifies that the $10,000 maximum Tax Exempt Eligible Distribution amount is a per Eligibility Period limit and not per taxable year. That is, if the $10,000 cap is completely used in year 2017, no exemption would be available in 2018.

An Eligible Individual who either receives Eligible Distributions of taxable amounts in excess of the $10,000 limit during the Eligibility Period or receives total Eligible Distributions in excess of the $100,000 limit during the Eligibility Period will lose the tax exemption benefit on the $10,000 and the 10% preferential tax rate. That is, the total amounts distributed would not constitute an Eligible Distribution and will be subject to the ordinary income tax rates.

*Sworn Statement*

AD 17-29 requires that, along with the request for an Eligible Distribution, a Participant must provide the employer or plan administrator a Sworn Statement including certain information ("Sworn Statement"). AD 18-02 provides that an Eligible Individual who has previously received an Eligible Distribution (not exceeding $100,000) and subsequently requests another Eligible Distribution must include the following in the Sworn Statement:

- Certification about Eligible Distributions previously requested or received must include:
    - Amount distributed,
    - Date of distribution, and
    - Amount withheld, if any.

- Certification about Tax Exempt Eligible Distributions previously requested or received must include:
  - A statement that the Eligible Individual has not previously requested a waiver from the tax withholding on the first $10,000 of Eligible Distributions. If the Eligible Individual has previously received an Eligible Distribution which was not subject to withholding, the individual must certify the following:
    - Amount of the requested or received Eligible Distribution that was not subject to withholding, and
    - Date of the distribution.

AD 18-02 includes a model Sworn Statement in Spanish (available here) in compliance with both AD 17-29 and AD 18-02. The use of the model is optional and may be modified or substituted by the plan administrator. In addition, AD 18-02 clarifies that it is not required to supplement a Sworn Statement executed prior to the issuance of AD 18-02, to the extent the Sworn Statement complies with the requirements of AD 17-29.

*Eligible Distributions Issued Prior to AD 17-29*

Distributions from qualified retirement plans made during the Eligibility Period but before the issuance of AD 17-29 may qualify as Eligible Distributions to the extent:

- The participant provides the plan administrator with the Sworn Statement in compliance with AD 17-29 (due on or before January 31, 2018, or such other later date established by the plan administrator or employer for such purpose), and
- The 10% tax withholding on the taxable amount of the Eligible Distribution is made and deposited with the PR Treasury.

If the withholding was not made at the time of distribution, the Eligible Individual must pay the amount that should have been withheld to the employer or plan administrator, along with the request for an Eligible Distribution and the Sworn Statement. This relief is available only until January 31, 2018, and the tax withheld must be deposited with the PR Treasury by February 15, 2018. Such amount withheld will be deemed a withholding for the month of December of 2017, and will not be subject to the payment of interest, surcharges or penalties if deposited by the deadline. Any tax withholding in excess of the amounts required by AD 17-29 may be claimed as a refund by the participant on his individual income tax return.

*Types of Plans*

AD 18-02 clarifies that the provisions of AD 17-29 apply with respect to all PR Code tax qualified retirement plans that provide for in-service withdrawals, including but not limited to, hardship withdrawals. Consequently, Eligible Distributions may be made from Keogh, profit-sharing, stock-bonus, and money purchase plans, to the extent: (i) in compliance with AD 17-29, (ii) the plan provides for in-service withdrawals, and (iii) the distribution is made in cash.

*Lump Sum-Distributions*

Lump-sum distributions on account of retirement, death, plan termination or separation from service made during the Eligibility Period may qualify as Eligible Distributions to the extent in compliance with the requirements of AD 17-29 and AD 18-02, including the $10,000 and $100,000 limits and the 10% tax withholding, as applicable. Amounts in excess of $100,000 will continue to be subject to the applicable withholding and taxation rules of PR Code Section 1081.01(b).

*Deposit of Tax Withheld*

Taxes withheld on Eligible Distributions must be timely deposited at the PR Treasury using Form 480.9A and Code 0260.

*Reporting*

Eligible Distributions and taxes withheld thereon must be reported on Form 480.7C, Informative Return – Retirement Plans and Annuities. A sample of the 2017 Form 480.7C is available here.