

The 45-Day 1031 Identification Checklist

What Every Real Estate Owner Needs to Know Before the Clock Runs Out

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Why This Checklist Matters

The moment a relinquished property closes escrow, two statutory clocks begin running simultaneously under IRC Section 1031: a **45-day identification period** and a **180-day closing period**, both measured in calendar days with no extension for weekends, holidays, or a slow search (the only exception is a federally declared disaster under Rev. Proc. 2007-56 and Rev. Proc. 2018-58). There is no mechanism to pause, reset, or appeal these deadlines once the relinquished property closes.

Commercial, multifamily, and land sellers face a predictable pattern: strong demand for the sale, then a scramble to identify qualified replacement property that does not reintroduce the same management burden the seller was trying to exit. Missing the 45-day window, or closing on a property that does not satisfy the identification rules, converts the entire deferred gain into a current tax event. That exposure typically stacks three layers: federal and state long-term capital gains tax, the 3.8% Net Investment Income Tax (NIIT) under IRC Section 1411, and unrecaptured Section 1250 depreciation recapture, which is capped at a 25% federal rate and applies on top of ordinary capital gains treatment. The combined effect is materially higher than a simple "capital gains only" estimate.

This checklist is organized around the statutory timeline itself, followed by two distinct response paths: **Path A**, direct like-kind replacement using a working interest in producing oil and gas property, and **Path B**, a boot mitigation approach using an intangible drilling cost (IDC) deduction election when a full exchange cannot be completed or when boot is unavoidable. Use it as a working document with your qualified intermediary (QI), CPA, and attorney, not as a substitute for their review.

45

Day Identification Window

Calendar days from closing to identify replacement property

180

Day Closing Period

Calendar days from closing to complete the exchange

25%

Depreciation Recapture Cap

Federal rate cap on unrecaptured Section 1250 gain

3.8%

NIIT Exposure

Net Investment Income Tax under IRC Section 1411

Before You Begin

Complete these foundational steps before any clock-driven action. Getting these right protects the entire exchange.

Confirm Closing Date

Confirm the exact closing date of the relinquished property. This date, not the contract date, starts both the 45-day and 180-day clocks.

Verify QI Engagement

Confirm a qualified intermediary was engaged **before** the relinquished property closed. A QI engaged after closing cannot facilitate a valid exchange.

Confirm Fund Routing

Confirm exchange proceeds were routed directly to the QI and never touched by the exchanger, even briefly.

Gather Financial Data

Gather the relinquished property's basis, depreciation schedule, and debt payoff figures so your CPA can estimate the deferred gain at stake.

Identify Your Situation

Identify which situation applies to you: actively inside the 45-day window, transitioning out of hands-on property management, or already facing a missed deadline or unavoidable boot.

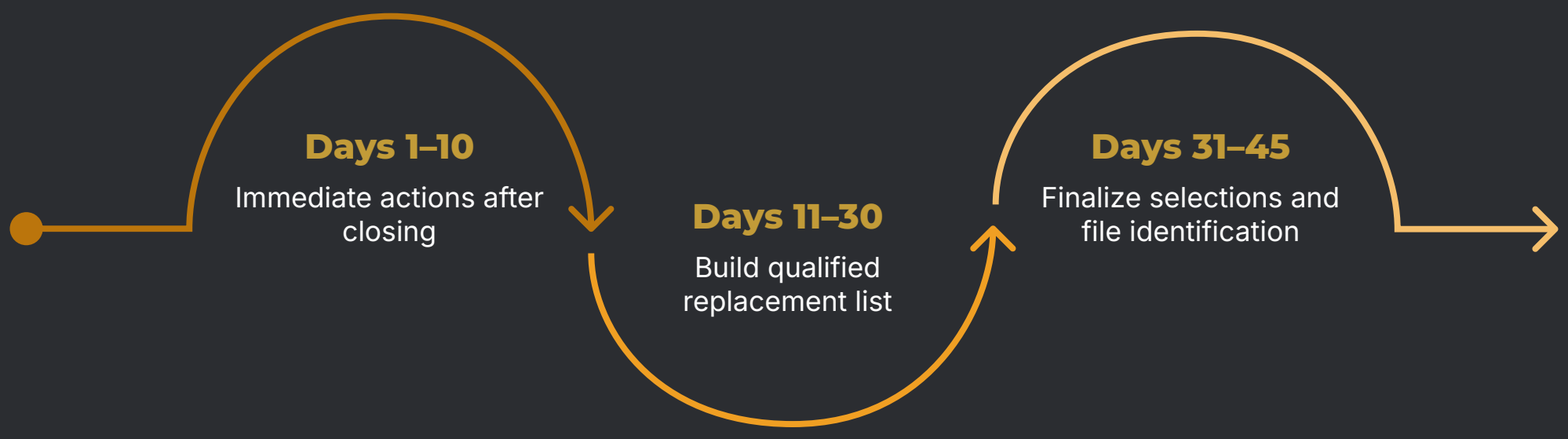
Calendar Key Deadlines

Calendar Day 45 and Day 180 immediately, counting from the closing date, and set reminders at least one week before each deadline.

Choose Identification Strategy

Decide early whether your identification strategy will use the **Three-Property Rule**, the **200% Rule**, or the **95% Rule**, since this shapes how many candidates you need to source.

The 45-Day Timeline: Stage by Stage



Days 1–10: Immediate Actions After Closing

- [ ] Verify the QI has received and acknowledged the exchange funds in writing.
- [ ] Open a parallel search for qualified replacement property categories, including both traditional real estate and real property interests such as oil and gas working interests.
- [ ] Request working interest opportunity summaries that include lease name, well name, operator, and county or state location, since these details are required for a legally sufficient identification.
- [ ] Confirm with your CPA whether your specific transaction involves any related-party considerations under IRC Section 1031(f), which carries its own two-year holding requirement.
- [ ] Discuss with your attorney whether a tax opinion letter is advisable given the asset class and size of the deferred gain.
- [ ] Begin preliminary due diligence conversations with any energy operator or sponsor under consideration, including a request for title and operating agreement documentation.

Days 11–30: Building Your Replacement Property List

- [ ] Narrow your replacement property candidates to a shortlist that fits your chosen identification rule (three properties of any value, unlimited properties under 200% of relinquished value, or unlimited properties with a 95% acquisition requirement).
- [ ] Confirm each working interest candidate is held directly, or through a structure that does not limit liability, since a standard LLC or LP fund unit does not qualify as like-kind real property for exchange purposes.
- [ ] Request documentation confirming the working interest represents a direct ownership stake in the oil and gas lease, not an indirect interest in a pooled entity or fund unit.
- [ ] Review Revenue Ruling 68-331 with your advisor. It holds that a lessee's working interest in a producing oil and gas lease, held for productive use in a trade or business or for investment, is like-kind to a fee interest in real estate under Section 1031(a).
- [ ] Confirm the operator's production history, well status, and any pending regulatory or title matters.
- [ ] Draft your written identification letter in advance so it is ready well before Day 45, listing each candidate property with an unambiguous legal description (for a working interest, this means lease name, well name or API number, and county/state).
- [ ] Confirm your CPA has modeled the projected deferred gain, NIIT exposure, and depreciation recapture under both a completed exchange scenario and a fallback boot scenario.

Days 31 to 45: Finalizing and Filing Your Identification

⚠ Day 45 is a hard deadline. Missing it converts your entire deferred gain into a current tax event. Do not wait until the last day.

- [ ] Finalize your identification letter and confirm it is signed by the exchanger (not merely an advisor on the exchanger's behalf).
- [ ] Confirm delivery of the identification letter to the QI, or to another party who is not a disqualified person, before midnight on Day 45.
- [ ] Verify the recipient of the identification is not a disqualified person. Disqualified persons include the exchanger's attorney, CPA, employee, investment banker, or real estate agent who performed services in the prior two years, as well as certain relatives.
- [ ] Confirm the identification is unambiguous. Street address and legal description for real estate, or lease name, well name, and county/state for a working interest.
- [ ] If circumstances change, confirm you can revoke and resubmit a replacement identification at any time before the Day 45 deadline closes.
- [ ] Re-confirm the identification rule you are using (Three-Property, 200%, or 95%) and verify your list complies with that rule's specific limits.
- [ ] Retain a timestamped copy of the final identification letter and delivery confirmation for your records and for Form 8824 preparation.

Days 46 to 180: Closing on Replacement Property

Once identification is filed, the focus shifts entirely to closing. Every item below must be confirmed before funds are released.

1 Taxpayer Name Match

Confirm your purchase and sale agreement (or working interest participation agreement) names the same taxpayer who sold the relinquished property.

2 QI Fund Release

Confirm the QI is prepared to release exchange funds directly to the closing or the operator, without the exchanger taking actual or constructive receipt.

3 Day 180 Verification

Verify the acquisition will close on or before Day 180, or the original tax return due date for the year of the relinquished sale, whichever is earlier.

4 Value and Debt Relief

Confirm the value and debt relief of the replacement property position meets or exceeds the value and debt relief of the relinquished property, to defer the full gain.

5 Document Review

Review final closing documents, operating agreements, and joint operating agreement (JOA) terms with your attorney before funding.

6 Form 8824 Preparation

Confirm your CPA is prepared to file Form 8824 reporting the exchange with your federal return for the applicable tax year.

7 Post-Closing Review

Schedule a post-closing review with your advisory team to confirm governance rights, reporting cadence, and ongoing documentation as an active JV member and working interest owner.

Path A: Direct 1031 Like-Kind Replacement

WORKING INTEREST QUALIFICATION

Use this path when your identification and closing deadlines remain achievable and you want to complete a full deferral.

Confirm Like-Kind Classification

Confirm your advisor and QI both understand that a working interest in producing oil and gas property is classified as real property for federal tax purposes and qualifies as like-kind to the real estate you sold, per Revenue Ruling 68-331.

Confirm Direct Ownership Structure

Confirm the working interest is held directly or through a structure consistent with direct ownership (such as a 761(a) election out of partnership treatment where applicable), not through an LLC, LP, or fund unit that shields liability or pools investor capital.

Verify Identification Description

Confirm the identification description includes lease name, well name or API number, and county/state, since generic descriptions are a common cause of a failed identification.

Request Operator Documentation

Request operator-level documentation on well production, reserves basis, and operating history to support both your due diligence and your attorney's exchange opinion.

Discuss Governance Rights

Discuss governance rights and operational involvement available to you as a working interest owner, since active participation and shared operational risk are part of the ownership structure, not a passive fund allocation.

Understand Ongoing Tax Treatment

Confirm your CPA understands the distinction between the exchange mechanics (Section 1031) and the ongoing tax treatment of the working interest once acquired, including depletion and IDC elections on future development.

Path B: Tax Boot Mitigation

IDC DEDUCTION UNDER IRC SECTION 263(C)

Use this path when the 45-day window has already closed without a sufficient identification, when suitable replacement property cannot be found in time, or when boot is unavoidable because replacement value or debt relief falls short of the relinquished property.

When Path B Applies

- 45-day window closed without sufficient identification
- Suitable replacement property cannot be found in time
- Boot is unavoidable due to value or debt relief shortfall

Path B Checklist Items

- ☐ Confirm with your CPA the exact dollar amount of boot or disqualified gain that will be recognized as taxable in the current year.
- ☐ Model the combined exposure: federal and state long-term capital gains tax, the 3.8% NIIT under IRC Section 1411, and unrecaptured Section 1250 depreciation recapture, capped at 25% federal, on the depreciation portion of the gain.
- ☐ Discuss with your advisor whether deploying capital directly into a working interest before year end allows an election under IRC Section 263(c) to expense intangible drilling costs in the year incurred, rather than capitalizing them.
- ☐ Confirm with your CPA that the magnitude of any IDC deduction depends on the specific drilling cost structure of the well, your individual tax circumstances, and the elections made, and should never be assumed at a flat percentage.
- ☐ Confirm the working interest is held directly, which is required for the deduction to offset active income under the working interest exception in IRC Section 469(c)(3), rather than being trapped as a passive loss.
- ☐ Review the at-risk limitation under IRC Section 465 with your CPA, since the deduction is capped at your actual economic exposure in the well.
- ☐ Ask your CPA whether excess IDC could trigger an AMT preference item under IRC Section 57(a)(2) given your overall income picture for the year.
- ☐ Confirm timing: capital must generally be deployed and the well spudded within the applicable tax year for the IDC election to apply to that year's boot.

Timing Reminders and Warning Items

These are the most common failure points in a 1031 exchange. Review each item carefully with your advisory team.

Calendar Days Only

Day 45 is a hard deadline measured in calendar days from the relinquished property's closing date, not business days, and not from the contract date.

Concurrent Periods

The 45-day and 180-day periods run concurrently from the same closing date, not sequentially. There is no combined 225-day period.

Written Identification Required

A verbal or informal identification to your broker, QI, or advisor does not satisfy the requirement. The identification must be in writing, signed by the exchanger, and delivered to a non-disqualified party.

Correct Recipient Required

An identification sent to your own CPA or attorney, without also reaching the QI or another non-disqualified party, generally does not satisfy the delivery requirement. Confirm the correct recipient with your QI.

95% Rule Is High-Risk

Using the 95% Rule without a near-certain ability to close on 95% of identified value is a high-risk strategy and should be a last resort, not a default approach.

Entity Interests Don't Qualify

A partnership, LLC, or fund unit interest in an entity that owns qualifying real property does not itself qualify as like-kind property. The exchanger must hold title to the actual real property interest.

No Constructive Receipt

Taking actual or constructive receipt of exchange funds at any point, even temporarily, disqualifies the entire exchange.

Advisor Coordination, Final Verification & Sources

Final Advisory Checklist

- ☐ Confirm your QI has direct experience with resource-based or working interest exchanges, not only traditional real estate exchanges. This experience varies widely across the QI industry.
- ☐ Confirm your attorney has reviewed the specific identification language for any working interest candidate and confirmed it meets the unambiguous description standard.
- ☐ Confirm your CPA has modeled both the completed-exchange scenario and the boot scenario side by side, so you can make an informed decision as the deadline approaches.
- ☐ Confirm all identification and closing documents are retained in a single file for Form 8824 preparation and future reference.
- ☐ Confirm you understand the ongoing reporting structure (K-1 schedules, operator updates, governance participation) you will receive as an active JV member once the replacement property closes.
- ☐ Schedule a final review call with your full advisory team no later than Day 40 to confirm your identification is complete, accurate, and ready for delivery.

Before the Day 45 deadline arrives, you should be able to confirm, in writing and with your advisory team, exactly which path applies to your transaction: a completed identification supporting full deferral under Path A, or a boot mitigation plan under Path B that addresses the capital gains, NIIT, and depreciation recapture exposure on whatever portion of the gain cannot be deferred. The statutory clock does not pause for due diligence, financing delays, or a difficult search. Working through each stage of this checklist with your QI, CPA, and attorney well before the deadline gives you the structured, time-aware process this transaction requires, and keeps the decision in your hands rather than the calendar's.

Sources and References

- Internal Revenue Code Section 1031(a) and Treasury Regulation 26 CFR 1.1031(k)-1 (identification and receipt rules, Three-Property/200%/95% identification rules, disqualified person definitions).
- Revenue Ruling 68-331, 1968-1 C.B. 352 (working interest in a producing oil and gas lease held for productive use in a trade or business or for investment is like-kind to a fee interest in real estate).
- IRC Section 263(c) and Treasury Regulation 1.612-4 (election to expense intangible drilling costs in the year incurred).
- IRC Section 469(c)(3) (working interest exception to passive activity loss rules for directly held interests).
- IRC Section 465 (at-risk limitation on deductions).
- IRC Section 57(a)(2) (excess intangible drilling costs as an alternative minimum tax preference item for certain taxpayers).
- IRC Section 1411 (3.8% Net Investment Income Tax).
- Unrecaptured Section 1250 gain treatment, capped at a 25% federal rate on the depreciation portion of a real property sale gain.
- Revenue Procedure 2007-56 and Revenue Procedure 2018-58 (disaster relief extensions to exchange deadlines).
- IRS Form 8824 instructions (like-kind exchange reporting requirements).

Ready to protect your deferred gain before the clock runs out?

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