Section 1031.—Exchange of Property Held for Productive Use or Investment

26 CFR 1.1031(k)–1: Treatment of deferred exchanges.

T.D. 8982

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Definition of Disqualified Person

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations narrowing the definition of the term disqualified person for section 1031 like-kind exchanges. The amendments in the regulations are in response to recent changes in the federal banking law, especially the repeal of section 20 of the Banking Act of 1933 (commonly referred to as the Glass-Steagall Act). The regulations will affect the eligibility of certain persons to serve as escrow holders of qualified escrow accounts, trustees of qualified trusts, and qualified intermediaries.

DATES: *Effective Date*: These regulations are effective February 1, 2002.

Dates of Applicability: These regulations apply to transfers of property made by a taxpayer on or after January 17, 2001.

FOR FURTHER INFORMATION CONTACT: Brendan O'Hara, (202) 622–4920 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) under § 1.1031(k)–1. On January 17, 2001, the IRS and Treasury Department published in the **Federal Register** a notice of proposed rulemaking under section 1031 (REG–107175–00, 2001–13 I.R.B. 971) (66 FR 3924). The notice proposed to amend § 1.1031(k)–1(k) by narrowing the definition of the term *disqualified person*. Comments responding to the notice were received, and a public hearing was held on June 5, 2001. After considering the comments received in response to the notice of proposed rulemaking and the statements made at the public hearing, the proposed regulations are adopted as revised by this Treasury decision. The comments and revisions are discussed below.

Explanation of Provisions

Under section 1031 and the regulations thereunder, taxpayers may use a qualified escrow account, qualified trust, or qualified intermediary to facilitate a like-kind exchange. A requirement common to qualified escrow accounts, qualified trusts, and qualified intermediaries is that the escrow holder, trustee, or intermediary may not be the taxpayer or a disqualified person.

Section 1.1031(k)–1(k) defines a disqualified person to include an agent of the taxpayer at the time of the transaction. An agent includes a person that has acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or broker within two years of the taxpayer's transfer of relinquished property. However, in determining whether a person is a disqualified person, services provided by such person for the taxpayer with respect to section 1031 exchanges of property and routine financial, title insurance, escrow, or trust services provided to the taxpayer by a financial institution, title insurance company,

or escrow company are not taken into account. Under § 1.1031(k)–1(k)(4), a person that is related to a disqualified person, determined by using the attribution rules of sections 267(b) and 707(b), but substituting 10 percent for 50 percent, is also considered a disqualified person.

As a consequence of the Gramm-Leach-Bliley Act, Public Law 106–102 (Nov. 12, 1999), 113 Stat. 1341, and other changes in policy by the Federal Reserve System in recent years, many banks are, or are in the process of becoming, members of controlled groups that include investment banking and brokerage firms. These new relationships between banks and investment banking and brokerage firms may make it difficult for some banks to continue their traditional practices of providing qualified escrow, qualified trust, and qualified intermediary services without violating the disqualified person rules. To allow banks to continue to perform these services, the proposed regulations provide that a bank that is a member of a controlled group that includes an investment banking or brokerage firm as a member will not be a disqualified person merely because the related investment banking or brokerage firm provided services to an exchange customer within a two-year period ending on the date of the transfer of the relinquished property by that customer.

Treasury and the IRS received several comments on the proposed regulations. Some commentators argued that the proposed exception to the disqualified person rules would not fulfill its intended purpose, because most banks use non-bank subsidiaries or affiliates to serve as escrow holders of qualified escrow accounts, trustees of qualified trusts, or qualified intermediaries. These commentators recommended that the proposed exception be extended to apply to subsidiaries and affiliates of banks. In response to these comments, the final regulations extend the proposed exception to bank affiliates as well as banks. For this purpose, a bank affiliate is a non-bank corporation whose principal activity is rendering services to facilitate exchanges of property intended to qualify for nonrecognition of gain under section 1031 and all of whose outstanding stock is owned by either a bank or a bank holding company (within the meaning of section 2(a) of the Bank Holding Company Act of 1956, 12 U.S.C. 1841(a)).

Some commentators noted the discrepancy between the effective date set forth in the text of the proposed regulations (*i.e.*, applicable to transfers of relinquished property on or after the date of the final regulations) and the effective date set forth in the Preamble to those regulations (*i.e.*, applicable to transfers of relinquished property on or after January 17, 2001). In response to the comments, the final regulations adopt the earlier of the two effective dates, and thus apply in the case of transfers of relinquished property made by a taxpayer on or after January 17, 2001.

Other commentators expressed opposition to the proposed regulations, requesting that the regulations be withdrawn. The commentators maintained that the existing regulations provide adequate exceptions to the definition of disqualified person, and that an exception for the banking industry will erode the integrity and purpose of the disqualified person concept.

Treasury and the IRS continue to believe that the amendment to the regulations is appropriate and necessary for the reasons articulated in the Preamble to the proposed regulations. Banks and their affiliates are closely regulated institutions that have historically acted as neutral and independent holders of funds. Treasury and the IRS do not believe that recent changes to federal banking laws are likely to impinge on this role to any significant degree.

Finally, one commentator requested that the final regulations include the exception from the disqualified person rule set forth in section 3.03 of Rev. Proc. 2000–37 (2000–2 C.B. 308). Rev. Proc. 2000–37, published to facilitate reverse like-kind exchanges, provides a safe harbor for the qualification under section 1031 of certain arrangements between taxpayers and exchange accommodation titleholders and provides for the treatment of the exchange accommodation titleholder as the beneficial owner of the property for federal income tax purposes. Section 3.03 of the revenue procedure provides that services performed for the taxpayer in connection with a person's role as the exchange accommodation titleholder are not taken into account in determining whether that person or a related person is a disqualified person. Treasury and the IRS do not believe that this rule needs to be restated in these regulations. Consequently, the final regulations do not include the exception from the disqualified person rule set forth in Rev. Proc. 2000–37.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of the regulations is Brendan O'Hara, Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in the development of the regulations.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par 2. In § 1.1031(k)–1, paragraph (k)(4) is revised to read as follows:

§ 1.1031(k)–1 Treatment of deferred exchanges.

* * * * *

(k) * * *

(4)(i) Except as provided in paragraph (k)(4)(ii) of this section, the person and a person described in paragraph (k)(2) of this section bear a relationship described in either section 267(b) or 707(b) (determined by substituting in each section "10 percent" for "50 percent" each place it appears).

(ii) In the case of a transfer of relinquished property made by a taxpayer on or after January 17, 2001, paragraph (k)(4)(i) of this section does not apply to a bank (as defined in section 581) or a bank affiliate if, but for this paragraph (k)(4)(ii), the bank or bank affiliate would be a disqualified person under paragraph (k)(4)(i) of this section solely because it is a member of the same controlled group (as determined under section 267(f)(1), substituting "10 percent" for "50 percent" where it appears) as a person that has provided investment banking or brokerage services to the taxpayer within the 2-year period described in paragraph (k)(2) of this section. For purposes of this paragraph (k)(4)(ii), a bank affiliate is a corporation whose principal activity is rendering services to facilitate exchanges of property intended to qualify for nonrecognition of gain under section 1031 and all of whose stock is owned by either a bank or a bank holding company (within the meaning of section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)).

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Robert E. Wenzel,
Deputy Commissioner of Internal Revenue.

Approved January 25, 2002.

Mark Weinberger,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on January 31, 2002, 8:45 a.m., and published in the issue of the Federal Register for February 1, 2002, 67 F.R. 4907)