

801.1(c)

**Verne, B. Michael**

**From:** [REDACTED]  
**Sent:** Tuesday, July 15, 2008 4:04 PM  
**To:** Verne, B. Michael  
**Subject:** RE: Section 1031

Mike:

Our client's situation also arises from a Section 1031 "like kind" exchange, but our client intends to structure a reverse exchange (the informal opinion you identified addresses a "forward" deferred Section 1031 exchange). Both structures involve the sale of "relinquished property" and the corresponding purchase of "replacement property." What differentiates the "forward" from the "reverse" Section 1031 exchange is that the former contemplates the taxpayer's first identifying "relinquished property," while the latter contemplates the "replacement property" being first identified. The principal issue addressed by the informal opinion was whether the transfer to an Exchange Accommodation Titleholder ("EAT") of bare legal title to the relinquished property (with the transferor retaining beneficial ownership and control) qualified for the exemption provided by §802.30(a) of the FTC's rules. Our client's question is whether transfer by a third party seller to an EAT of bare legal title to the replacement property (with all other indicia of beneficial ownership being transferred to our client) constitutes a separate asset acquisition subject to the HSR Act. The underlying principle and analysis appear similar to that in the informal interpretation you cited.

More specifically, here's our client's situation.

Company A has entered into a contract to acquire certain assets from Company B. HSR filings were made, and the waiting period for that transaction has expired.

Company A wishes to take advantage of the provisions of Section 1031 of the Internal Revenue Code, by engaging in a reverse Section 1031 exchange. Under this procedure, Company A will identify certain "like kind" assets that it will sell to an otherwise unrelated third party. The assets to be sold to the third party are referred to as "Relinquished Assets." HSR filings for those transfers would be made separately, if required. The assets that Company A has contracted to acquire from Company B are referred to as "Replacement Assets."

Pursuant to Section 1031 and safe harbor rules promulgated by the IRS, Company B will transfer legal title to the Replacement Assets to one or more EATs. This will be accomplished pursuant to Qualified Exchange Accommodation Agreements between Company A and the EATs. These agreements will require the EATs to lease the Replacement Assets to Company A on a triple-net basis with nominal payments, permit Company A to control and manage the Replacement Assets, and permit Company A to sell the Replacement Assets to third parties. Company A will loan to the EATs the funds necessary for the EATs to purchase title to the Replacement Assets from Company B. Neither Company B nor the EATs will have any involvement in the operation of the assets or business. As a result of these Qualified Exchange Accommodation Agreements, the only indicium of beneficial ownership that the EATs will hold during this interim period is bare legal title, which will be held for the sole benefit of Company A.

Under IRS Rev. Proc. 2000-37, the IRS safe harbor rules, Company A must identify the to-be-Relinquished Assets within 45 days after transfer of legal title to the EATs and must complete the sale of those assets to third party buyers no later than 180 days after transfer of legal title to the EATs. Under the contractual arrangements between the parties, sale of the Relinquished Assets results in a simultaneous transfer to Company A of the legal title to the Replacement Assets previously held by the EATs. This must be accomplished no later than 180 days after transfer of legal title to the EATs. Transfer of this sole remaining indicium of beneficial ownership to Company A completes the reverse Section 1031 exchange, and Company A then receives favorable tax treatment on its on its disposition of the Relinquished Assets. If Company A is unable to complete the sale of sufficient Relinquished Assets prior to the expiration of the 180 day period, then the Qualified Exchange Accommodation Agreements between Company A and the EATs obligate the EATs to transfer to Company A legal title to the Replacement Assets (and Company A loses the tax benefits of a Section 1031 exchange).

Our client seeks an informal interpretation that the transfer from Company B to Company A of all the indicia of beneficial ownership of the Replacement Assets except bare legal title constitutes the acquisition that was the subject of the previous HSR Act filings by Company A and Company B, and that the transfer of legal title by Company B to the EATs and inevitably from the EATs to Company A in compliance with Section 1031 safe harbor rules is not itself an asset acquisition subject to the HSR Act.

Please treat this e-mail as a confidential communication. We would be happy to answer any questions you may have, or provide you with any additional information upon request.

7/15/2008

I would agree that the transfer from B to A of all indicia of beneficial ownership except legal title is still an acquisition the assets by A and would be covered by the earlier filing. I also agree that neither the transfer of title from B to the EATS nor the transfer of title from the EATS to A is an acquisition of assets.

BW  
7/17/08

K. WALSH CONCURS