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Date:
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LEGEND:

Firm A =

Sub B =
Sub B1 =
Sub C
Bank C1 =

Bank C2 =

Dear

This responds to your request for a private letter ruling, dated May 8, 2007, regarding the eligibility of Bank C2 (hereinafter "Proposed QI") to serve as a qualified intermediary (QI), as defined in § 1.1031(k)-1(g)(4) of the Income Tax Regulations. Specifically, the ruling requested is that certain services provided by members of a controlled group of which Proposed QI is a member will not result in Proposed QI being a disqualified person with respect to the clients for whom the services are performed.

FACTS:

Firm A provides, directly or through its subsidiaries, financial services to its clients. One of its wholly-owned subsidiaries, Sub B, is in the business of providing investment advisory, brokerage and financial planning services. Sub B wholly owns Sub B1, which is in the business of advising on insurance matters and selling insurance and annuity products. Other wholly-owned subsidiaries of Firm A include Sub C and Bank C1. Sub C wholly owns one other bank subsidiary, Proposed QI. Bank C1 is both a retail bank and a trust company. It provides an array of trust and estate services traditionally associated with trustees in addition to retail banking services. Proposed QI is a bank that provides retail banking services.

Firm A wishes to expand its range of services to include the facilitation of like-kind exchanges under § 1031 of the Internal Revenue Code. To serve as QI in these exchanges, Firm A plans to use Proposed QI. Proposed QI's customers will include current clients of Firm A's subsidiaries.

LAW & ANALYSIS:

Section 1031(a)(1) provides that no gain or loss is recognized on the exchange of business or investment property if the owner exchanges the property for like-kind business or investment property. However, if a taxpayer in a deferred like-kind exchange actually or constructively receives money or other non-like-kind property before actually receiving like-kind replacement property, gain is recognized on the exchange. To assist taxpayers in structuring deferred exchange transactions in a way that avoids actual or constructive receipt of non-like-kind property, § 1.1031(k)-1(g) establishes safe harbors, including the allowance of a qualified intermediary to facilitate exchanges.

Section 1.1031(k)-1(g)(4)(i) provides that, in the case of a taxpayer's transfer of relinquished property involving a qualified intermediary, the qualified intermediary is not considered the agent of the taxpayer for purposes of § 1031(a). In such a case, the taxpayer's transfer of relinquished property and subsequent receipt of like-kind replacement property is treated as an exchange, and the determination of whether the taxpayer is in actual or constructive receipt of money or other property before the taxpayer actually receives like-kind replacement property is made as if the qualified intermediary is not the agent of the taxpayer.

Section 1.1031(k)-1(g)(4)(iii) provides, in part, that a 'qualified intermediary' is a person who is not the taxpayer or a disqualified person as defined in § 1.1031(k)-1(k).

Section 1.1031(k)-1(k)(2) provides, in part, that a disqualified person is a person who is an agent of the taxpayer at the time of the transaction, which includes a person who has acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or broker within the 2-year period ending on the date of the transfer of the relinquished property. For this purpose, the following services are not taken into account:: (i) services for the taxpayer with respect to exchanges of property intended to qualify for nonrecognition of gain or loss under § 1031; and (ii) routine financial, title insurance, escrow, or trust services for the taxpayer by a financial institution, title insurance company, or escrow company.

Section 1.1031(k)-1(k)(4)(i) provides that a disqualified person also includes any person bearing a relationship described in either § 267(b) or § 707(b) (determined by substituting in each section "10 percent" for "50 percent" each place it appears) to an agent described in § 1.1031(k)-1(k)(2). For example, except as provided in

§ 1.1031(k)-1(k)(4)(ii), an exchange accommodator would be a disqualified person with respect to an exchanging taxpayer if a member of the controlled group of which the accommodator is a member acts as a stockbroker for that exchanging taxpayer within two years before the exchange.

Under § 1.1031(k)-1(k)(4)(ii), § 1.1031(k)-1(k)(4)(i) does not apply to a bank (as defined in § 581) or a bank affiliate if the bank or bank affiliate would be a disqualified person under paragraph § 1.1031(k)-1(k)(4)(i) solely because it is a member of the same controlled group (as determined under § 267(f)(1), substituting "10 percent" for "50 percent" where it appears) as a person who has provided investment banking or brokerage services to the exchanging taxpayer within two years of the exchange.

While the term "agent" is not defined in § 1.1031(k)-1, the Supreme Court in *National Carbide Corp. v. Commissioner*, 336 U.S. 422 (1949), set forth factors that bear on whether a person is an agent of another. These factors include whether (1) the purported agent is operating in the name and for the account of the principal; (2) the purported agent binds the principal by its actions; (3) the purported agent transmits money received to the principal; and (4) receipt of income is attributable to the services of the employees of the principal and to assets of the principal. In addition, the Supreme Court stated that the agency-principal relationship cannot be founded solely on the fact that the principal owns the agent. Also the business purpose of the purported agent must be the carrying on of the normal duties of an agent. In *National Carbide*, the Supreme Court concluded that the absence of these factors and reliance on ownership of the purported agent by its parent indicated a fallacy in the agency argument made in that case.

The Supreme Court affirmed its previously-articulated agency analysis in *Bollinger v. Commissioner*, 485 U.S. 340 (1988). In *Bollinger*, the Court concluded that a corporation, which held record title to property for its shareholders, was the agent of the shareholders because it acted for its principals and held itself out as an agent in its dealings with third parties.

In the present case, Firm A, Sub B, Sub B1, Sub C, Bank C1, and Proposed QI are in the same controlled group (the Firm A controlled group). Thus, under § 1.1031(k)-1(k)(4)(i), Proposed QI could be disqualified from serving as a QI as a result of activities performed by the other members of the Firm A controlled group. It is our conclusion, however, that the services described in this ruling that are performed by members of the Firm A controlled group will not result in Proposed QI being a disqualified person.

With respect to Sub B1, the activities that it performs for its insurance clients do not, taking into account the factors and requirements discussed in *National Carbide*, result in an agency relationship between Sub B1 and its clients. Sub B1 does not operate in the name and for the account of its clients or bind its clients by its actions. It does not receive and transmit money for and to the client. Also, its income is not derived from the assets or employees of its clients; nor does it carry on any other duty of an agent for

its clients. At no time does Sub B1 satisfy any of the factors or requirements for agency to exist as to its clients. Also, it does not provide any of the services listed in § 1.1031(k)-1(k)(2) that would make it a deemed agent of a client for purposes of the disqualified person rules of § 1.1031(k)-1(k).

Further, the trust and retail banking services rendered to customers by Firm A's trust and banking subsidiaries, Bank C1 and Proposed QI, do not establish an agency relationship of the kind described in either *National Carbide* or *Bollinger.* Moreover, the banking and trust services performed by Bank C1 and Proposed QI constitute routine financial or trust services rendered by financial institutions within the meaning of § 1.1031(k)-1(k)(2(ii) that are not taken into account in determining whether a prospective QI is a disqualified person. The trust services rendered by Bank C1 include principal and income accounting, fiduciary income tax services, distribution and valuation services, charitable trust services, bill payment, probate related services, and discretionary investment and asset management services. The routine banking services performed by Bank C1 and Proposed QI include consumer and small business lending, home financing, margin lending and other extensions of credit, retirement services and custodial services, check writing, direct deposit, online bill payment and fee-refunded ATM transactions. These services are properly classified as routine financial or trust services and are not taken into account in determining whether Proposed QI is a disqualified person under § 1.1031(k)-1(k).

Finally, under § 1.1031(k)-1(g)(4)(i), Proposed QI's services in connection with § 1031 exchanges will not cause Proposed QI to be an agent of a client engaging in a § 1031 exchange. In addition, under § 1.1031(k)-1(k)(4)(ii), the fact that Proposed QI will be a member of a controlled group that includes an investment banker or broker (Sub B) will not disqualify Proposed QI from providing QI services to investment clients of Sub B.

RULING:

Provided Bank C2 (Proposed QI herein) is a bank as defined in § 581 of the Code, Proposed QI will not be a disqualified person, as defined in § 1.1031(k)-1(k), by reason of performance by Firm A and its affiliates of the above-described investment advisory, brokerage, private planning, insurance, trust and retail banking services for Proposed QI's customers and clients.

CAVEATS:

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed regarding services performed by members of the Firm A controlled group that are not expressly mentioned in this private letter ruling. The rulings contained in this letter are based upon information and representations submitted by the applicant taxpayer, Firm A, and accompanied by penalty of perjury statements executed by an appropriate party. While this office has

not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

Michael J. Montemurro
Branch Chief, Branch 4
(Income Tax & Accounting)

Enclosure (1)