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TY:

LEGEND:

Applicant =
Parent =
Date 1 =
Holding =
Bank-Sub =

Dear

This responds to your request for a private letter ruling dated November 9, 2009, on the eligibility of Applicant to serve as a qualified intermediary (QI) and as a trustee of a qualified trust (QT) for like-kind exchanges under § 1031 of the Internal Revenue Code, including for exchanges in which it is a successor to a prior QI following a corporate reorganization.

FACTS

1. General Information.

Applicant, a national banking association and subsidiary of Parent, provides banking, financial and trust services to its customers, which include services as trustee to trusts for the benefit of its customers. Other subsidiaries of Parent, which also are banks and trust companies, provide banking, financial and trust services to their customers, including services as trustees of trusts for the benefit of their customers.

One of the services provided by Applicant is the facilitation of deferred like-kind exchanges under § 1031 of the Code. Applicant serves as a QI, as defined in § 1.1031(k)-1(g)(4)(iii) of the Income Tax Regulations for many of its customers.

2. Combining of QI and Trustee in One Entity.

To accommodate the demand by customers for greater security in § 1031 exchanges, Applicant proposes to structure exchanges to utilize QTs, as defined in § 1.1031(k)-1(g)(3)(iii), simultaneously with QIs, as defined in § 1.1031(k)-1(g)(4). The QTs will hold the exchange funds during the exchange period. Applicant will serve as trustee for these QTs and as QI in the same transactions.

3. QI Merger.

Effective on Date 1, Parent acquired Holding and thereafter dissolved it. Bank-Sub, a subsidiary of Holding, became a subsidiary of Parent. Bank-Sub is a national banking association that also serves as a QI in deferred like-kind exchanges under § 1031.

Parent plans to merge Bank-Sub into Applicant, pursuant to 12 U.S.C. § 215a, in a transaction intended to qualify as a tax-free reorganization under § 368(a)(1)(D) of the Code. At the time of the reorganization, Bank-Sub will be a party to numerous exchange agreements as QI. In this capacity, it will hold exchange proceeds resulting from the transfer of relinquished property by its customers and for which replacement property is not yet purchased. In such cases, as a result of the reorganization, Applicant will succeed to and become custodian of the exchange proceeds held by Bank-Sub under those exchange agreements. Applicant will also become a party to the exchange agreements as the successor to Bank-Sub in the reorganization by operation of 12 U.S.C. § 215a.

RULINGS REQUESTED

Applicant requests rulings concerning (1) whether Applicant may simultaneously serve as a QI and as trustee of a QT for the same customer in a single transaction; (2) whether Applicant's service, or the service by any member (affiliate) of the same controlled group as Applicant, as trustee of a trust for the benefit of a customer, constitutes a routine financial and trust service that will not cause Applicant to be a disqualified person; and (3) whether Applicant, following the merger of Bank-Sub into Applicant, will be deemed the same QI as Bank-Sub with regard to pending like-kind exchanges for which Bank-Sub was serving as QI before the merger.

APPLICABLE LAW

Section 1031(a) of the Code provides that no gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if

such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.

Section 1.1031(k)-1 of the regulations provides rules for the application of § 1031 to “deferred exchanges” (exchanges in which, pursuant to an agreement, the taxpayer transfers property held for productive use in a trade or business or for investment (the “relinquished property”) and subsequently receives property to be held either for productive use in a trade or business or for investment (the “replacement property”)). If the taxpayer actually or constructively receives money or property which does not meet the requirements of § 1031(a) in the full amount of the consideration for the relinquished property, the transaction will constitute a sale, and not a deferred exchange, even though the taxpayer may ultimately receive like-kind replacement property. Section 1.1031(k)-1(g) provides several safe harbors the use of which will result in a determination that the taxpayer is not in constructive receipt of money or other property for purposes of § 1031. Moreover, more than one safe harbor can be used in the same deferred exchange, but the terms and conditions of each must be separately satisfied. See § 1.1031(k)-1(g)(1).

Section 1.1031(k)-1(g)(3)(i) provides that in the case of a deferred exchange, 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 will be made without regard to the fact that the obligation of the taxpayer's transferee to transfer the replacement property to the taxpayer is or may be secured by cash or a cash equivalent held in a qualified escrow account or in a qualified trust.

Section 1.1031(k)-1(g)(3)(iii) provides that a qualified trust is a trust wherein--

(A) The trustee is not the taxpayer or a disqualified person (as defined in § 1.1031(k)-1(k)), except that the relationship between the taxpayer and the trustee created by the qualified trust will not be considered a relationship under § 267(b)), and

(B) The trust agreement expressly limits the taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of the cash or cash equivalent held by the trustee as provided in § 1.1031(k)-1(g)(6).

Section 1.1031(k)-1(g)(4)(i) of the regulations 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)(i) applies only if the agreement between the taxpayer and the qualified intermediary

expressly limits the taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property held by the qualified intermediary as provided in § 1.1031(k)-1(g)(6).

Section 1.1031(k)-1(g)(4)(iii) provides that a qualified intermediary is a person who--

(A) Is not the taxpayer or a disqualified person (as defined in § 1.1031(k)-1(k)), and

(B) Enters into a written agreement with the taxpayer (the "exchange agreement") and, as required by the exchange agreement, acquires the relinquished property from the taxpayer, transfers the relinquished property, acquires the replacement property, and transfers the replacement property to the taxpayer.

Section 1.1031(k)-1(k)(1) provides that a disqualified person is a person described in § 1.1031(k)-1(k)(2), (k)(3), or (k)(4).

Section 1.1031(k)-1(k)(2) provides that the term "disqualified person" includes a person who is the agent of the taxpayer at the time of the transaction. For this purpose, 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 first of the relinquished properties is treated as an agent of the taxpayer at the time of the transaction. However, the performance of 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)(3) provides that a disqualified person also includes a person that bears a relationship to the taxpayer described in either § 267(b) or § 707(b) (determined by substituting in each section "10 percent" for "50 percent" each place it appears).

Section 1.1031(k)-1(k)(4)(i) provides, that except as provided in § 1.1031(k)-1(k)(4)(ii), a disqualified person 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 a person that is an agent as described in § 1.1031(k)-1(k)(2). A fiduciary of a trust and a beneficiary of such trust is a relationship described in §§ 267(b) and 707(b).

12 U.S.C. §215a(e) provides that, with respect to a corporate merger, the corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such

receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger.

ANALYSIS

1. Combined Use of One Entity as QI and as Trustee of a QT in the Same Transaction.

At the request of customers, Applicant wishes to combine its services as QI and as trustee of QTs. More than one safe harbor may be used in the same deferred exchange, provided that the terms and conditions of each are satisfied. Section 1.1031(k)-1(g)(1). For Applicant to be the trustee of a QT, it may not be a disqualified person (as defined in §1.1031(k)-1(k)) and the trust agreement must expressly limit the exchanger's rights to receive, pledge, borrow, or otherwise obtain the benefits of the cash or cash equivalent held by the trustee. For Applicant to be QI, it may not be a disqualified person (as defined in §1.1031(k)-1(k)), the exchange agreement must expressly limit the exchanger's rights to receive, pledge, borrow, or otherwise obtain the benefits of the cash or cash equivalent held by Applicant as QI and, as required by the exchange agreement, Applicant as QI must acquire the relinquished property from the exchange customer, transfer the relinquished property, acquire the replacement property, and transfer the replacement property to the exchange customer. If all of these requirements are satisfied by Applicant in a transaction, it will be both the QI and the trustee of a QT in that transaction. The fact that Applicant serves in both capacities in the same transaction is not a disqualification of either safe harbor and will not make Applicant a disqualified person.

2. The Trustee Function by Banks as Routine Trust and Financial Services.

Applicant represents that it provides banking, financial, and trust services to its customers, including services as trustee of trusts for the benefit of its customers. Applicant serves as QI for many of these same customers. In addition, other subsidiaries of Parent, in the same controlled group as Applicant, are also banks and trust companies. These affiliated entities also provide banking, financial and trust services to their customers, including services as trustees of trusts for the benefit of

their customers. Applicant is asking for a ruling that these relationships, both between itself and its own customers as trustee and beneficiary and between affiliated entities and its exchange customers, will not result in Applicant's classification as a disqualified person.

Service as a trustee by a bank or trust company constitutes a routine financial or trust service by a financial institution within the meaning of § 1.1031(k)-1(k)(2)(ii) of the regulations. Under this regulation, such services are not taken into account for purposes of classifying an entity as a disqualified person. Therefore, service by Applicant as trustee for the benefit of a customer in an exchange transaction will not cause it to be treated as a disqualified person with respect to a customer. For the same reason, Applicant will not be considered a disqualified person with respect to a customer merely because an entity in the same controlled group as Applicant performs trustee services for the customer.

3. Status of a Successor QI Following a Merger While an Exchange is Pending.

Under § 1.1031(k)-1(g) of the regulations, when a taxpayer uses a QI to facilitate a like-kind exchange under § 1031, the taxpayer is considered to have engaged in the exchange with the QI. Consequently, the QI which is the transferee of the relinquished property and the QI which is the transferor of the replacement property must be the same person.

In the case of the merger of Bank-Sub into Applicant, under 12 U.S.C. § 215a(e), every type of property and chose in action of Bank-Sub will be transferred to and vested in Applicant by virtue of the merger without any deed or other transfer. Bank-Sub's rights and obligations under all of its contracts will continue in Applicant and Applicant will be deemed to be the same party as Bank-Sub under those contracts. Most important, Applicant shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as "trustee, executor, administrator . . . and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by" Bank-Sub, as a merging bank, at the time of the merger. Thus, under 12 U.S.C. § 215a(e), Applicant is treated as the same person as Bank-Sub for purposes of pending like-kind exchanges in which Bank-Sub served a QI under § 1031 prior to the merger. Therefore, Applicant may serve as QI for like-kind exchanges initiated by Bank-Sub prior to the merger and conclude the transaction as if it were the same QI.

RULINGS

1. Applicant will not be a disqualified person as defined in § 1.1031(k)-1(k) of the regulations with regard to Applicant's service as a QI for a customer as a result of Applicant also serving as a trustee of such customer's QT.

2. Banking and trust services as a trustee performed by Applicant or by any bank or trust company that is a member of the same controlled group as Applicant (as determined under § 267(f)(1) of the Code (substituting “10 percent” for “50 percent” where it appears)) will constitute routine financial and trust services by a financial institution within the meaning of § 1.1031(k)-1(k)(2)(ii). Thus, the performance of such services by Applicant or any other bank or trust company in the same controlled group as Applicant for its exchange customers will not cause Applicant to be a disqualified person within the meaning of § 1.1031(k)-1(k).

3. After the merger of Bank-Sub into Applicant, Applicant will be regarded as the same person as Bank-Sub for purposes § 1.1031(k)-1(g)(4)(iii) with respect to exchanges for which Bank-Sub is serving as QI at the time of the merger. Accordingly, for exchanges pending at the time of the merger for which Bank-Sub is serving as QI, Applicant will be considered the transferee of the relinquished property.

CAVEATS:

Except as expressly provided herein, we express or imply no opinion concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the Applicant requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative(s).

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.

The rulings contained in this letter are based upon information and representations submitted by the Applicant and accompanied by a penalty of perjury statement

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.

Sincerely,

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

cc: