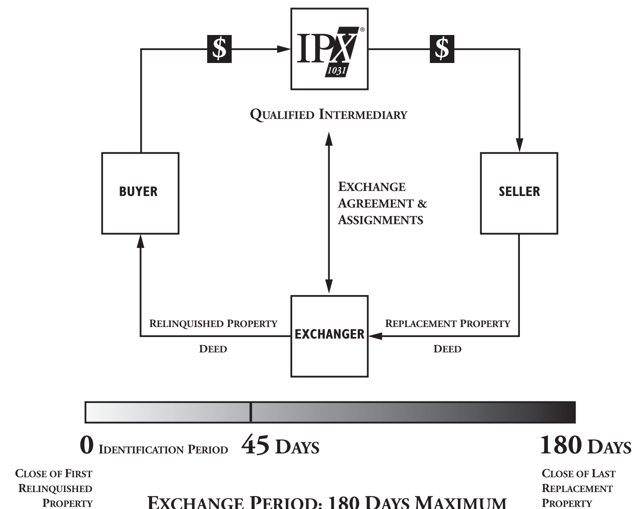
The Delayed Exchange

There is a common misconception that all tax deferred exchanges are complicated and require all properties, relinquished and replacement, to close concurrently. Fortunately, the most common exchange variation, the delayed exchange (also referred to as a deferred or *"Starker"* exchange, *Starker v. U.S.*, 602 F.2d 1341), provides Exchangers with more flexibility and options in acquiring the replacement property than the simultaneous exchange. The delayed exchange begins when the Exchanger's first relinquished property is sold and is completed when the last replacement property is acquired within the prescribed exchange period. To provide the required notice to the relinquished property buyer(s) and the replacement property seller(s), the Purchase and Sale Contract for each property should include an "exchange cooperation".



The use of a Qualified Intermediary (also known as an "Accommodator" or "Facilitator") is the most common method used to complete a valid delayed exchange quickly and easily. The Qualified Intermediary is an independent party to the exchange transaction, who performs the function of creating the reciprocal trade of properties for the exchange, holds the exchange funds, and supplies the necessary exchange documents, such as the Exchange Agreement, Assignments, and Closing Instructions. The Exchanger assigns the rights in the Sale Contract for the relinquished property and in the Purchase Contract for the replacement property to the Qualified Intermediary, who essentially becomes the "seller" of the relinquished property and the "buyer" of the replacement property. To avoid actual or constructive receipt of the exchange funds by the Exchanger, the proceeds from the sale of the relinquished property are held by the Qualified Intermediary until they are needed for the acquisition of the replacement property. In both simultaneous and delayed exchanges in which a Qualified Intermediary is used to create the reciprocal exchange of properties, the IRS allows "direct deeding" of the relinquished property from the Exchanger to the buyer and of the replacement property from the seller to the Exchanger, thereby avoiding the necessity of the Qualified Intermediary holding title to any property. Revenue Ruling 90-34, 1990-16 C.B. 552; Treas. Reg. §1.1031(k)-1(g)(4)(iv),(v). Direct deeding avoids the assessment of double state, county, or local documentary transfer taxes and any liability on the part of the Qualified Intermediary for environmental hazards that may exist on the property.

The Treasury Department issued Regulations in 1991 that clarified the acceptable methods to properly identify replacement property. Treas. Regs. §1.1031(k)-1(b)-(e). First, the Exchanger must receive all replacement property within the earlier of 180 days after the date on which the Exchanger transferred the first relinquished property, or the due date (including extensions) for the Exchanger's tax return for the tax year in which the transfer of the first relinquished property occurs. Second, the Exchanger must identify the replacement property to be acquired by the end of the Exchange Period within 45 days of the transfer of the first relinquished property. These time periods are very strict and cannot be extended even if the 45th day or 180th day falls on a Saturday, Sunday, or legal holiday. The proper identification of replacement property is critical, and if it is not made in a timely manner, the exchange fails and the entire transaction is taxable. The rules are as follows: (a) the replacement property identification must be in writing and signed by the Exchanger, (b) it must be delivered by mail, fax, or hand delivery to a party to the exchange transaction (usually the Qualified Intermediary) by midnight of the 45th day, (c) the replacement properties must be unambiguously described, such as by a street address, tax lot number, legal description, or the like, and (d) the Exchanger may list up to three properties of unlimited value, but if more than three properties are listed, their total aggregate fair market value may not exceed 200% of the aggregate fair market value of the relinquished property. It is essential in a delayed exchange to adhere to these rules and deadlines established for identifying and acquiring the replacement property. **Failure to comply with these rules may result in a failed exchange.**

Investment Property Exchange Services, Inc. cannot provide advice regarding specific tax consequences. Investors considering an IRC §1031 tax deferred exchange should seek the counsel of their accountant and attorney to obtain professional and legal advice. © 2008 Investment Property Exchange Services, Inc.