

18 Butler

Comments To the Committee Re: Section 352 - Real Estate Settlements

ATTN: Section 352-Real estate settlements

FinCEN has issued an Advance Notice of Proposed Rulemaking, requesting public comments pertaining to Section 352, specifically as to proper definition of "persons involved in real estate closings and settlements," the money laundering risks posed by such persons, and whether any such persons should be exempted from this requirement.

The author of this letter is President of Investment Property Exchange Services, Inc., the largest Qualified Intermediary in the United States. Investment Property Exchange Services, Inc. facilitated over 12,500 IRC Sec. 1031 like-kind exchanges during 2002. Investment Property Exchange Services, Inc. is a wholly owned subsidiary of Fidelity National Financial, the parent company of Fidelity National Title, Chicago Title, Ticor Title, Security Title, Alamo Title and American Title Insurance Companies.

Comments are respectfully submitted to Questions I) "What are the money laundering risks in real estate closings and settlements?" II) "How should persons involved in real estate closings and settlements be defined?" and III) "Should any persons involved in real estate closings or settlements be exempted from coverage under section 352?" listed in the Advance Notice, but comments will be limited to the application of an IRC Section 1031 like-kind exchange and the involvement of a Qualified Intermediary.

I. What are the money laundering risks in real estate closings and settlements?

IRC Sec. 1031 permits non-recognition of gain on transfer of an asset which has been held for investment, or used productively in a trade or business, if that asset is exchanged for a like-kind asset, to be similarly held for investment, or used productively in a trade or business, within the restrictions of IRC Sec.1031 and Treas. Regs. 1.1031 et seq. A Qualified Intermediary is an independent third party that facilitates like-kind exchanges under the Safe Harbor set out in Treas. Reg. 1.1031(k)-1(g)(4)(iii).

Like-kind exchanges are unlikely vehicles for any of the three stages of money laundering: placement, layering or integration, for the following reasons.

- 1) In order to commence an exchange of property, a customer must be a U.S. taxpayer with a substantial gain on sale to be realized, thus the need for a tax-deferral strategy.
- 2) A taxpayer conducting a like-kind exchange is required to have held the real estate for investment, typically a holding period of more than 2 years, very rarely less than 1 year.
- 3) The need for substantial gain, coupled with the long term holding requirement, is inconsistent with "flipping" or other money laundering activity.
- 4) If a taxpayer does not have a substantial gain or long term hold, there is no incentive for him to incur the extra costs of doing a 1031 exchange.

The lack of placement and layering opportunities will be discussed in the comments to Question II and III. Real estate is a well-recognized asset, and like any other well-recognized asset, it is capable of being used for integration. However, the additional costs of doing an IRC Sec. 1031 exchange, (the Qualified Intermediary's fee, additional attorney, accountant and tax preparation fees) on top of all of the other usual and customary costs of real estate transactions (attorney fees, accountant's fees, broker's fees, title insurance, survey, appraisal, etc.) make it unlikely that a Sec. 1031 exchange would be undertaken for integration purposes. The exchange adds neither increased legitimacy, nor any layers of complexity. It is purely a tax-deferral vehicle.

II. How should persons involved in real estate closing and settlements be defined?

Qualified Intermediaries should not be included within the definition of "persons involved in real estate closings and settlements" because their activities do not include any of the "guiding principles" outlined in the Advanced Notice.

- 1) As described above, Qualified Intermediaries are not engaged in a transaction (like-kind exchange) that is likely to be abused by money launderers.
- 2) Qualified Intermediaries are not in a position to identify suspicious conduct or any other illegitimate purpose of the underlying real estate transaction. Qualified Intermediaries are too far removed from the customers and any type of money

laundering transaction to be in a position to be aware of money laundering activity. Qualified Intermediaries do not attend real estate closings and rarely meet their customers in person. They more frequently deal with agents of the taxpayer, i.e. brokers, lawyers, etc., and most contact with taxpayers and agents alike, occurs by mail, fax and phone.

3) Qualified Intermediaries are not involved with the actual flow of funds in any manner which would permit identification of suspicious activity.

a) No placement activity occurs with a Qualified Intermediary.

b) Qualified Intermediaries do not ever receive cash.

c) Qualified Intermediaries receive funds in the form of wire transfers, bank checks, or title company checks. The Qualified Intermediary would not know if cash was used to purchase the wire transfer or the bank check, and if that were the case, the bank would have filed a Suspicious Activity Report.

4) No real layering opportunities exist in the context of a like-kind exchange. The numerous reportings by various parties make funds and transactions eminently traceable.

a) The real estate closing occurs prior to funds being sent to the Qualified Intermediary, after the closer or settlement agent has filed Form 1099 reporting the

amount of net proceeds of sale and the identity of the seller.

b) Real estate transactions are documented and recorded in indexed, easily accessible, public records in the county where the real estate is located.

c) Qualified Intermediaries file Form 1099s for all interest paid to taxpayers on funds they are holding.

d) All taxpayers file Form 8824 with their tax returns reporting the exchange. If they neglect to file a Form 8824, the IRS will use information from the 1099 filed at closing to assess capital gains tax, defeating the benefit of doing an exchange (deferral of the tax).

III. Should any persons involved in real estate closings or settlements be exempted from coverage under section 352?

Qualified Intermediaries should be exempt from coverage because they are too far removed from any of the three stages of money laundering: placement, layering, or integration.

1) By the time the Qualified Intermediary gets involved, the real estate sale transaction has already closed, and any money laundering activity would already have occurred. Customers of the Qualified Intermediary have already dealt with brokers, lawyers, mortgage lenders and others who would have required identification, and would be more knowledgeable of the underlying real estate transaction.

- 2) Funds received by the Qualified Intermediary are already "clean," coming in the form of a wire transfer, bank check or title company check.
- 3) Funds held by the Qualified Intermediary will be used either to acquire real estate in the name of the taxpayer, or will be returned to the taxpayer. The terms of the Exchange Agreement, and the requirements of the Safe Harbor, restrict the Qualified Intermediary's and the taxpayer's use of these funds while the exchange is pending.

Most Qualified Intermediaries are small businesses, with 10 or fewer employees, and the economic burden of inclusion within the definition of "persons involved in real estate closings and settlements" and coverage under Section 352 would be substantial. In sum, the lack of opportunity for Qualified Intermediaries to be in a position to be aware

of money laundering, the ample existing reporting requirements, allowing for easy tracking, the added costs to taxpayers of consummating an exchange, the long term holding requirement, and the need for substantial gain on sale, all make the risk of money laundering occurring in the context of a like-kind exchange transaction with a Qualified Intermediary remote, compared to the burden of being required to implement anti-money laundering procedures.

Thank you for your serious consideration of our position in this matter.

Sincerely,

Radah Butler

President

Investment Property Exchange Services, Inc.

888-771-1031

rbutler@fnf.com

www.ipx1031.com