Internal Revenue Code §1031 and Private Placements

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1. Introduction

Despite the economic benefits that can be achieved by owning real estate (e.g., asset growth, income, and tax-deferral), many investors nearing retirement will soon come to the realization that they simply do not want to maintain a high level of involvement in managing their property. With the benefits of real estate ownership also come the duties of keeping the property in proper condition for tenants. Roofs must be repaired, electrical wiring and plumbing must be maintained, and common access areas must be kept safe to the public on a daily basis. Despite these nuances, many real estate owners may have also come to the realization that their retirement savings are less than what they had planned. After all, the investment growth experienced by many in the stock market of the late 1990s was followed by a problematic bear market. Over the past several years, we once again are seeing investment growth similar or exceeding that of the late 1990s. For understandable reasons, investors seeking income for retirement as well as diversification within their asset portfolios may be interested in maintaining a certain amount of their wealth in real estate.

Some real estate investors face planning issues. Some might hold lofty aspirations of becoming owners in an institutional-grade commercial real estate property, but they might also lack the financial resources on their own to accomplish such. Others, who have undertaken the task of trying to exchange real estate on a tax-deferred basis, may have learned the hard way that the real planning problem lies within the timing deadlines for identifying and closing on the replacement real estate (as discussed below). Consequently, the development of structured securities offerings by real estate companies (called sponsors herein) has provided investors a more streamlined access to institutional-grade commercial real estate properties while also providing expert guidance through the exchange process.

2. What is an Internal Revenue Code Section 1031 Exchange?

A properly structured Internal Revenue Code ("IRC") Section 1031 Exchange ("§1031" or a "§1031 Exchange") allows an investor to sell a property, to subsequently reinvest the proceeds of such sale into a new property, and to defer all capital gain taxes resulting from that the sale of the relinquished property. IRC §1031(a)(1) states:

> 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.

To understand the protection offered under §1031, consider the following example:

- Assume an investor has $250,000 in gain and $250,000 in net proceeds after closing on the sale of his or her relinquished property. Assuming an investor with a $250,000 capital gain incurs a tax liability of approximately $87,500 in combined taxes (depreciation recapture, federal capital gain tax, state capital gain tax, and net investment income tax (aggregating 35%)) when the property is sold, only $162,500 in net equity would remain to reinvest in another property.

- Assuming a 25% down payment and taking on new financing for the replacement property purchase with a 75% loan-to-value ratio, the investor would only be able to purchase a $650,000 replacement property.

- If the same investor chose to accomplish a §1031 Exchange, he or she would be able to reinvest the entire gross equity of $250,000 from the relinquished property into the purchase of a $1,000,000 replacement property, assuming the same down payment and loan-to-value ratios.

Like-Kind Requirement

The like-kind provisions require non-recognition of realized gains and losses when property held for business or for investment use is exchanged solely for property of a like-kind that is also held for such purposes. Certain types of property are not eligible for non-recognition treatment and are thus categorically excluded from the like-kind exchange provisions. A list of the excluded categories of property includes stock-in-trade and property held primarily for resale (inventory), stocks, securities, evidence of indebtedness, partnership interests, certificates of trust, and choses of action.

In the case of real property, the term like-kind refers to the nature or character of the property, rather than its grade or quality. Therefore, no distinction is made between improved and unimproved real estate. For this reason, bare farm land can be exchanged for a downtown office building; a storage facility can be exchanged for a factory, and vice versa. The extremely broad scope of the like-kind rules as applied to real estate was highlighted in *Commissioner v. Crichton*,[1] in which the United States Court of Appeals for the Fifth Circuit held that an exchange of an

[1] 122 F.2d 181 (5th Cir. 1941).

improved city lot for a mineral interest in unimproved agricultural land involved like-kind properties. The like-kind rules have also historically extended beyond traditional fee-simple interests to include leasehold interests in real property and perpetual water rights. As a general matter, like-kind real estate has been recognized by the courts and the Internal Revenue Service ("IRS") to mean essentially any type of real estate recognized under state law (see below).

Generally, speaking, property which does not qualify for a §1031 Exchange includes (i) a personal residence, (ii) land under development for resale, (iii) construction or fix/flips for resale, (iv) property purchased or held for resale, (v) inventory property, (vi) corporation common stock, (vii) partnership interests, (viii) LLC membership interests, (ix) bonds, and (x) notes.

The following types of real estate interests have been deemed by the United States Congress and the IRS to qualify as like-kind to each other for purposes of a §1031 Exchange: (i) fee simple interests in real estate; (ii) fractional (tenancy-in-common) interests; (iii) leasehold interests involving a 30-year plus lease; (iv) easements for conservation; (v) easements for right of way; (vi) water rights; (vii) mineral rights; (viii) oil & gas interests; (ix) transferrable development rights; and (x) mutual irrigation ditch stock.[2]

Gain/Boot Rules

The underlying policy of the like-kind exchange rules is to allow the deferral of income taxes in cases where a taxpayer has maintained a continuous investment in non-excluded property. In other words, a taxpayer should not have to recognize a taxable gain in cases where she has maintained a continuous and ongoing investment in the same type of property and where there has not been a "cashing out," so to speak, of the original investment. To this end, the tax treatment provided under the like-kind exchange rules results in a capital gain deferral, rather than forgiveness, because the replacement property received in the exchange will generally retain the same basis as the property that has been relinquished.

If a taxpayer receives like-kind property and cash or other non- like-kind property, the taxpayer must then recognize a taxable gain that is equal to the lesser of (i) the non- like-kind property received in the §1031 Exchange or (ii) the amount of the taxpayer's realized gain under IRC §1001 ("§1001"). The presence of non- like-kind property received in a §1031 Exchange that otherwise qualifies for like-kind treatment is commonly referred to as "boot." Any gain that should happen to be recognized in the §1031 Exchange generally transfers over to the basis of the replacement property the taxpayer has received. For example, let us assume that Taxpayer A exchanges raw land with a cost basis of $170,000 and a fair market value of $180,000 for a storage facility owned by Taxpayer B with a fair market value of $180,000. Let us also assume that the deal calls for Taxpayer B to transfer an additional $20,000 in non- like-kind business equipment to Taxpayer A. In this case, Taxpayer A's realized gain under §1001 would be $30,000, which is the difference in $200,000 of total consideration received by Taxpayer A in the deal (the combined fair market value of the storage facility and business equipment) and Taxpayer A's cost basis ($170,000) in the land that was given up in the §1031 Exchange. However, the like-kind exchange rules will limit Taxpayer A's recognized taxable gain to only $20,000, which is the amount of the

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[2] https://www.efirstbank1031.com/1ten31Exchanges/01basicRules.html.

non- like-kind consideration that Taxpayer A received. The result is that Taxpayer A ends up with real estate with a fair market value of $180,000 and a cost basis of $170,000, thereby resulting in an inherent deferred gain of $10,000 that will be taxed when the property is sold in the future. To calculate Taxpayer A's cost basis in the replacement property, we start with the $170,000 of cost basis that A had in the relinquished property, we then subtract the $20,000 of non- like-kind property received by Taxpayer A in the deal, but we also add in the $20,000 of taxable gain recognized by Taxpayer A. The $10,000 of inherent gain in the replacement property arises because Taxpayer A is allowed to defer $10,000 of his total realized gain in the transaction. Although Taxpayer A's total realized gain was $30,000 in the deal, his recognized gain (i.e., the gain he will be taxed on) is $20,000.

At this point, it would be prudent to recognize that the presence of mortgage debt on one or both sides of the transaction is common in real estate transactions. In cases where a mortgaged property is sold for cash, the amount realized by the selling taxpayer who is transferring mortgaged real estate will include the amount of the paid off or assumed mortgage. In other words, the amount of mortgage debt that got paid off in the sale of the relinquished property is treated as if the seller of such property had received cash in the deal. In a §1031 Exchange, however, the amount of mortgage boot realized by the seller can be reduced and even eliminated when the amount of debt used to finance the purchase of the replacement property equals or exceeds the loan payoff on the relinquished property. In the last example discussed above, if we assume that the land formerly owned by Taxpayer A had a mortgage of $100,000, then the total amount of consideration received by Taxpayer A in the transaction would include $300,000, consisting of an $180,000 storage facility, $20,000 in non-like-kind business equipment, and $100,000 of debt boot. Thus, the presence of $100,000 in mortgage boot results in a realized gain of $130,000 and a recognized taxable gain of $120,000. However, if we additionally assumed that Taxpayer A borrowed $100,000 on a loan to be secured by a mortgage on the replacement property, then the new loan would have the effect of offsetting the mortgage boot received on the transfer of the encumbered land, thereby again resulting in a realized gain of $30,000 and a recognized taxable gain of $20,000.

Although mortgage boot on relinquished property can be offset by a mortgage secured by the replacement property, the new mortgage does not operate to offset boot gain on the receipt of cash or other non- like-kind property. For example, if we were to assume that Taxpayer A borrowed $110,000 for paying off the old mortgage and providing for some needed repairs to the storage facility, Taxpayer A would still be required to recognize $20,000 in gain on the transaction. In other words, debt incurred on the replacement property can be used only to offset debt boot incurred in the sale of the relinquished property and cannot be used to offset boot received in the form of cash or other non-like-kind property.

Exchange Requirement & Deferred Transactions

§1031 requires that the replacement property be acquired through an exchange of properties, rather than a sale and subsequent purchase. Simply put, a taxpayer who is a seller of real estate cannot directly or constructively receive cash in a transaction and then use the cash to purchase a replacement property. In a direct-swap transaction, the §1031 Exchange requirements are met because the deal simply involves a trading of properties. However, it is difficult in most cases to match potential parties for a direct swap exchange. In many cases, potential purchasers, who are interested in buying rather than exchanging property, will not necessarily possess the kind of property reasonably suited to meet the seller's business or investment needs. For this reason, most like-kind real estate exchanges are conducted as deferred transactions.

Qualified Intermediaries

From a transactional perspective, the qualified intermediary ("QI") acts as an assigned-in seller and buyer. The taxpayer seeking like-kind treatment under §1031 (sometimes also referred to as the "exchanger") will initially enter into the sale and purchase transactions with the respective buyer and seller and assign these contracts to the QI. The QI will then complete the transactions with the buyer of the relinquished property and seller of the replacement property. Once the purchase of the replacement property is completed, the QI then generally transfers title of such property to the taxpayer/exchanger. In addition to serving as an assigned-in buyer/seller, the QI often performs other administrative tasks for the exchanger, including preparation and coordination of exchange-related documents; receipt and safe-keeping of sale proceeds; and the handling of title-transfer and recording issues relating to the real estate involved in the §1031 Exchange.

One issue that is often overlooked in like-kind exchange planning has to do with whether the intermediary is, in fact, qualified to serve as such. Problems can unexpectedly creep up when the selected intermediary is an agent of the taxpayer or is related to the taxpayer or taxpayer's agent. A comprehensive listing of persons and entities who are disqualified from serving as intermediaries is set forth in Treasury Regulation §1.1031(k)-1(k). Among those who are disqualified from serving as an exchange intermediary are agents of the taxpayer, such as employees, attorneys, investment bankers and brokers, accountants, and real estate agents and brokers. Additionally, certain persons who are related to the taxpayer or taxpayer's agent are also disqualified from serving as a §1031 Exchange intermediary. Such related persons would include certain members of the taxpayer or taxpayer agent's family and certain business entities of which the taxpayer, taxpayer's agent, or their family members own at least a ten percent interest.

If a disqualified intermediary is inadvertently used, it can jeopardize the tax consequences of the entire deal, requiring immediate recognition of income taxes. Unfortunately, this requirement is easy to overlook. For example, it is commonplace for attorneys, accountants, financial advisors, and real estate professionals to hold interests in banks and title insurance companies that perform intermediary services. For this reason, careful due diligence should be undertaken to ensure that the intermediary is qualified to serve as such.

ADDITIONAL NOTE: Pursuant to The Tax Cuts and Jobs Act of 2017 signed into law by President Donald Trump on December 22, 2017 (most of the changes introduced by the bill went into effect on January 1, 2018, and do not affect 2017 taxes), the ability to enter into a §1031 Exchange for any asset other than real estate was eliminated. Consequently, a §1031 Exchange will not apply to the extent an investor is disposing of property that does not qualify as real estate or to the extent that a portion of the property consists of property other than real estate. We note that some have taken the position that the aforementioned change in the §1031 Exchange law is applicable to only direct exchanges of personal property and not to nominal personal property tied to a real estate exchange; however, we note that there is no written authority that allows nominal personal property tied to real estate to be exchanged under the current §1031 Exchange law.

Therefore, it is possible that personal property tied to an otherwise real estate §1031 Exchange (for example, refrigerators, ranges, washers, and dryers found within the units of an apartment property), may not be exchanged under the current §1031 Exchange law and therefore, may be subject to taxation.

3. IRC §1031 Exchange Identification Rules

Same Taxpayer

The tax return and name appearing on the title of the relinquished property must be the tax return and titleholder that acquires the replacement property. Please note that a single member limited liability company ("LLC") is considered a pass through to the member and, consequently, the single member LLC may sell and the member may purchase in his or her individual name.

Property Identification

Post-closing of the relinquished property, a taxpayer has 45 calendar days to identify to either his or her accommodator (or the closing entity) the addresses of the potential replacement properties.

- 3-Property Rule – A taxpayer may identify any three replacement properties regardless of value.
- 200% Rule – A taxpayer can identify four or more replacement properties so long as the aggregate value of the replacement properties does not exceed 200% of the relinquished property.
- 95% Exception Rule – If the value of the replacement properties exceeds 200% of the relinquished property, then the taxpayer must acquire at least 95% of the replacement property.

Replacement

To meet the exchange period deadline, a taxpayer must complete the acquisition transaction of the replacement property on or before the earlier of (i) midnight on the 180th calendar day after the close of the relinquished property sale transaction, or (ii) the due date of the taxpayer's federal income tax return for the year in which the relinquished property was sold. If a taxpayer's federal income tax returns for the year in which he or she sold the relinquished property are due before the 180-day exchange period deadline, then the taxpayer's exchange period deadline is the date in which his or her tax returns are due. Instead of a 180-day exchange period, the taxpayer will have the total number of days that exist between the close of the sale transaction on the relinquished property and the due date of the taxpayer's federal tax returns.[3]

[3] https://www.1031crowdfunding.com/education-center/blog/42-will-the-year-end-cut-your-180-days-short.

Trading Up

The net market value and equity of the relinquished property must be less than or equal to the replacement property to defer 100% of the tax obligation. Debt and equity in the replacement property must be equal to or greater than the debt and equity in the relinquished property. It is important to note that additional equity in the replacement property offsets debt; however, additional debt does not offset equity.

Hold Time

Although there is no required specified hold time, the IRS looks to determine whether the relinquished property was acquired immediately before the §1031 Exchange. Was the property purchased for investment or productive use? Generally speaking, the shorter the hold period, the greater the need to support a taxpayer's intent to acquire the property for investment purposes. In Private Letter Ruling 8429039 (1984), the IRS stated that a holding period of two years would be a sufficient period of time for a property to be considered held for investment. Though private letter rulings do not constitute binding precedent, some believe that two years is an adequate holding period, assuming that the investor not only held the property for two years, but that he or she intended to do so for investment purposes.

ADDITIONAL NOTE: DO NOT TOUCH THE CASH!!! The IRS requires that proceeds be held by a QI during the §1031 Exchange process. Any receipt of the tax-deferred like-kind exchange funds by a taxpayer during the exchange period will disqualify the entire tax-deferred exchange. This applies to both actual receipt (physical possession) and constructive receipt (direct access). For instance, having the funds in a personal bank account, even if one does not make a withdrawal, would disqualify the entire §1031 Exchange.

4. Types of §1031 Exchanges

Delayed Exchange

The most common type of §1031 Exchange, a "Delayed Exchange" involves a mechanism in which a taxpayer sells his or her property before purchasing a replacement. A QI functions as the signatory and principal in the contracts of sale and procurement instead of the individual (usually by assignment). Upon the QI's receipt of the equity from the sale of a relinquished property, as stated above, the taxpayer has 45 days to formally identify the replacement property. Within 180 calendar days following the closing of the relinquished property (or extension of the taxpayer's tax return), the property must be purchased.

Simultaneous Exchange

A Simultaneous Exchange features a direct swapping of properties between two individuals. The two parties literally exchange the deeds and other necessary documents of their assets, simultaneously transferring ownership to each other. It involves no monetary exchange and is infrequently utilized given the difficulty involved in properly executing the transaction.

Improvement Exchange

An "Improvement Exchange" is similar to a Delayed Exchange except that in an Improvement Exchange, the taxpayer provides upgrades to the replacement property to raise its value before the §1031 Exchange based on the requirement under §1031 that the replacement property must be of equal or greater value, equity and debt, as the relinquished property. A benefit of an Improvement Exchange is that the replacement property does not necessarily have to be fully completed within the 180-day exchange period. A certificate of occupancy is not required. A taxpayer must meet three basic requirements in order to defer all of his or her gain in the Improvement Exchange. The taxpayer must: (i) spend the entire exchange equity on completed improvements or down payment by the 180th day; (ii) receive substantially the same property he or she identified by the 45th day; and (iii) the replacement property must be of equal or greater value when deeded back to the taxpayer. The final value of the replacement property is the combination of the original purchase price plus the capital improvements made to the replacement property. The improvements need to be in place prior to the taxpayer taking title to the replacement property if the taxpayer is seeking full tax deferral.[4]

Reverse Exchange

It is not a requirement that the selling of a taxpayer's property must be done before the purchase of a replacement property. Under a "Reverse Exchange," the taxpayer is given the option to acquire the replacement property first. A Reverse Exchange is considered the most complex and must follow stringent guidelines.

5. Syndicated §1031 Exchange Structures

History[5]

Riding the real estate boom leading up to 2007, securitized replacement property programs rose from a small, niche market to peak at nearly $4 billion in transactions in 2006. Then came the bust and a near-halt to all commercial securitized §1031 Exchange real estate transactions.

Most of the pre-recession fractional-ownership §1031 Exchange programs were structured as tenants-in-common ("TIC"). The credit crisis that hit in 2007, and the deep recession that followed, exposed some deficiencies of the TIC structure, including that a TIC program could have as many as 35 owners, each owner had to be separately underwritten by the lender, each had to form a special purpose entity to hold his or her fractional ownership, and major decisions, such as lease renewals, refinancing and selling of the property required unanimous approval of the TICs. In bad times, it could be cumbersome, expensive and a risk to the investment. Post-recession, the Delaware Statutory Trust ("DST") structure addressed many of the deficiencies of the TIC structure and, as a result, has universally become the entity of choice for fractional-ownership §1031 Exchange programs.

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[4] https://apiexchange.com/improvement-exchanges-build-or-improve.

[5] Excerpts of this subsection were taken from https://www.1031corp.com/1031-exchange-resources/1031-exchange-articles/abcs-of-the-dst.

The DST structure for exchanges was just in its early stages prior to the recession. IRS guidance had come out in 2004 with the issuance of Revenue Ruling 2004-86 (discussed in further detail below).[6] Only a few major sponsors had begun offering the DST structure; however, post-recession, almost all sponsors in the securitized §1031 Exchange marketplace use the DST structure.

According to Mountain Dell Consulting, a market research firm focused on the securitized §1031 Exchange marketplace, the industry saw more than $1.9 billion of securitized §1031 Exchanges in 2017, well off the peak of 2006 ($3.65 billion), but a significant resurgence from the depths of the recession. We note that almost all the equity raised through sponsors in the §1031 Exchange marketplace came through the DST structure, although a few securitized TIC-structured offerings have still been marketed in each of the past several years.

The TIC Structure

In general, a TIC interest allows an investor to acquire an undivided interest in a property instead of buying an interest in an entity that owns the property. Provided that the proper steps are followed (as discussed above) acquiring a TIC interest in a replacement property allows the individual to complete a §1031 Exchange.

In 2002, the IRS issued Revenue Procedure 2002-22 (“2002-22”), which set forth a list of guidelines that the IRS will use in determining whether to issue a private letter ruling that a TIC structure will be treated as separate interests in real property and not a partnership or other entity for federal income tax purposes. We note that Revenue Procedures are different from Revenue Rulings in that a Revenue Procedure is an official statement of a procedure that affects the rights or duties of taxpayers under the law, while a Revenue Ruling is the conclusion of the IRS on how the law is applied to a specific set of facts. Generally, a Revenue Ruling states the IRS position, whereas a Revenue Procedure provides return filing or other instructions concerning the IRS position. Therefore, the guidelines and conditions set forth in 2002-22 do not establish any particular “law” or “rule” for the treatment of TIC ownership arrangements; they merely set forth the circumstances under which the IRS is prepared to rule favorably when presented with a particular case. Cases that do not meet all the requirements and conditions of 2002-22 may nonetheless qualify as proper TICs for tax purposes under their particular facts and circumstances. It should be noted that all the TIC owners will enter into a TIC agreement wherein the rights and obligations of each TIC owner will be laid out and further, will discuss the 2002-22 guidelines.

Many tax attorneys associated with syndicated TIC offerings will issue a tax opinion that an interest in an arrangement satisfying all (and in certain circumstances, almost all) of the

[6] A Revenue Ruling is “an official interpretation by the IRS that has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, IRS officials, and others concerned.” Revenue Rulings are published “to promote correct and uniform application of the tax laws by IRS employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers.” See 26 C.F.R. sec. 601.601(d)(2)(i)(a), 26 C.F.R. sec. 601.601(d)(2)(iii), and Mitchell Rogovin & Donald L. Korb, “The Four R’s Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within,” 46 Duquesne Law Review 323, 330 (2008).

conditions in 2002-22 should be treated as an interest in the underlying property and therefore, qualify under §1031. The conditions are summarized below:

1. TIC Ownership. Each of the co-owners must hold title to the property (either directly or through a disregarded entity as a tenant in common under local law);

2. Number of Co-Owners. The number of co-owners must be limited to no more than 35 persons (and husband and wife are treated as a single person for this purpose);

3. No Treatment of Co-Owners as an Entity. The co-owners may not file a partnership tax return or otherwise hold themselves out as a partnership or other form of entity;

4. Co-Ownership Agreement. The co-owners may enter into a limited co-ownership agreement that may run with the land. This agreement may provide that a co-owner must offer the interest for sale to the other co-owners or the sponsor at fair market value before exercising any right of partition. In addition, the agreement may provide for majority voting on certain issues (see "Voting" below);

5. Voting. The co-owners must retain their voting rights as described below. Unanimous approval is required for any sale, lease or re-lease of a portion or all of the property, any negotiations or re-negotiations of indebtedness secured by the property, the hiring of any manager, or the negotiation of any management contract (or any extension or renewal of such contract). However, for all other actions, the co-owners may agree to be bound by a vote of more than 50% of the co-owners. A co-owner who has consented to an action in this matter may provide the manager with a power of attorney to execute specific documents with respect to that action. We also note that many TIC agreements contain "deemed consent" provisions wherein a TIC owner's failure to respond to an item requiring a vote within a defined period will be deemed to have consented in favor of the action up for vote. This alleviates some of the problems that can occur when one or more TIC owners are disinterested or unresponsive to repeated requests for vote on specific matters;

6. Restrictions on Alienation. In general, each co-owner must have the right to transfer, partition, and encumber his or her interest in the property without the agreement or approval of any person. However, restrictions that are required by a lender and that are consistent with customary commercial lending practice are not prohibited. Moreover, the co-owners or the sponsor may have a right of first refusal and a co-owner may agree to offer an interest for sale to the other co-owners or the sponsor at fair market value before exercising any right to partition;

7. Sharing Proceeds and Liabilities upon Sale of Property. If the property is sold, any debt secured by the property must be satisfied and the remaining proceeds distributed to the co-owners;

8. Proportionate Sharing of Profits and Losses. Each co-owner must share in all revenue generated by the property and all costs associated with the property in proportion to his or her interests in the property. Neither the other co-owners, the sponsor, nor the manager may advance funds to a co-owner to meet expenses associated with the property, unless the advance is recourse and is not for a period exceeding 31 days;

9. Proportionate Sharing of Debt. The co-owners must share in any indebtedness secured by the property in proportion to their undivided interests in the property;

10. Options. A co-owner may issue an option to purchase his interest, provided the exercised price reflects fair market value of the property determined as of the time the option is exercised. A co-owner may not acquire an option to sell the interest (put option) to the sponsor, the lessee, another co-owner or the lender or any person related to such parties;

11. No Business Activities. The activities of the co-owners must be limited to those customarily performed in connection with the maintenance and repair of rental real estate[7];

12. Management and Brokerage Agreements. The co-owners may enter into management or brokerage agreements, which must be renewable no less frequently than annually. The manager or broker may be a sponsor or co-owner (or a related party), but may not be a lessee. The management agreement may authorize the manager to maintain common bank accounts for the collection and deposit of rents and to offset expenses associated with the property against any revenues before dispersing each co-owner's[1] share of net revenues. In addition, the management agreement may authorize the manager to take certain actions on behalf of the owners (subject to the provisions discussed in "Voting" above). The manager may not be paid a fee based in whole or in part on the income or profits derived from the property and the fees may not exceed the fair market value of the manager's service based upon comparable fees paid to unrelated parties for similar services;

13. Leasing Agreements. All leasing agreements must be bona fide leases for federal tax purposes;

14. Loan Agreements. The lender may not be a related person to any co-owner, the sponsor, the manager, or any lessee of the property; and

15. Payments to Sponsor. The amount of any payment to the sponsor for the acquisition of the co-ownership interest and services must reflect the fair market value of the interest acquired and the services rendered. This means that such payments and fees may not depend, in whole or in part, on the income or profits derived from the property (i.e., no back-end or carried interest is permitted).

In a TIC syndicated offering, the sponsor either acquires property directly or through a controlled entity and then sells TIC interests to investors, or the sponsor contracts to acquire property and assigns the right to acquire the property to TIC investors who simultaneously close into the property. Once the TIC investors acquire the property, it is generally held in one of the following three arrangements:

(i) A lease with a single tenant. The lease likely would be a triple-net lease and require minimal, if any, management by the owners.

(ii) Multiple tenants subject to a single master lease. Under this type of arrangement, the master lessee, who generally is an affiliate of the sponsor, would sublease the property to the

[7] See Revenue Ruling 75-374, 1975-2 CB 261.

tenants. The master tenant in turn is required to pay a specified return to the TIC investors, as landlord under the master lease. We note that it is possible that the master tenant will be capitalized by sponsor-provided capital or with a portion of the equity raised in the specific offering in order to supplement property-level cash flows in the event the property under performs; however, we deemphasize the level of upfront master tenant capitalization and instead, would recommend an in-depth underwriting of the offering-specific property to determine the likelihood that the property can perform at the level necessary to pay the TIC investors the return specified in the master lease. This underwriting needs to be performed as part of the initial investment due diligence process.

(iii) Several leases entered into with several tenants but managed by a property or asset manager other than the owners. We note that the property/asset manager is many times affiliated with the sponsor.

Each of these types of arrangements frees the owners from the property's management function. The particular type of arrangement used may determine the type of taxpayer who would be interested in acquiring a TIC interest.

The DST Structure

The DST is a separate legal entity created as a trust under Delaware's statutory law. Under Revenue Ruling 2004-86 (the "2004 Ruling"), the IRS classifies the DST as a trust rather than a business for purposes of §1031 Exchange qualification. In general, an organization constitutes a trust for tax purposes if it is an arrangement whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries. An arrangement will be treated as a trust for tax purposes if the purpose of the arrangement is to vest in trustees the responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of that responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit[8]. This distinction allows the DST to hold a property on behalf of multiple investors, with each investor's beneficial interest in the DST qualifying as a like-kind §1031 Exchange property. The DST is the title holder of the property and fractional investors will purchase beneficial interests in the DST. Traditionally, the DST structure has been only utilized for limited types of properties such as single-tenant, triple-net leases or, as the use of DSTs is beginning to expand, multi-tenant properties under a long-term master lease.

A signatory trustee is the individual or entity appointed to manage the DST. The sponsor of the DST offering, or an affiliate of the sponsor, typically serves as the signatory trustee. A DST is often structured with three trustees. In addition to the signatory trustee, an independent trustee typically serves for the benefit of the lender or the beneficiaries in the event the signatory trustee should fail or not act in the best interest of the lender or the DST, and a Delaware trustee maintains a physical Delaware address to prevent the DST from winding up if the signatory trustee should be unable to continue serving the DST. The signatory trustee is permitted to also act as the Delaware trustee provided it meets the legal requirements of a Delaware trustee.

[8] Treasury Regulation Sections 301.7701-1(a)(1), (b), and 4(a).

While the 2004 Ruling confirmed that beneficial interests in a DST may qualify as replacement property in a §1031 Exchange, it also makes clear that such qualification is subject to the following limitations:

1. No future contributions may be made to the DST by existing or new investors once the offering is closed;

2. The trustee may not modify or renegotiate the terms of the existing loan, nor can it borrow new funds from any other party (except where a property tenant is bankrupt or insolvent);

3. The trustee may not enter into new leases or renegotiate the current lease(s) (except where a property tenant is bankrupt or insolvent);

4. The trustee may not sell the real estate and reinvest or use the proceeds to purchase new real estate;

5. The trustee may only make capital expenditures with respect to the property for normal repair and maintenance, minor non-structural improvements, and those required by law;

6. The trustee must distribute all cash, other than necessary reserves, on a current basis as defined by the terms of the DST agreement (i.e., monthly, quarterly, etc.); and

7. Any cash held by the trustee between distribution dates may only be invested in short-term debt obligations which will reach maturity prior to the next distribution date.

These seven restrictions are commonly referred to as the "seven deadly sins," as they severely restrict the power of the trustee. Investors in the DST may be at risk of losing their §1031 tax deferral should any one of these requirements not be followed.

Please note that, according to most DST agreements, the trustee may elect to temporarily convert the DST into a limited partnership ("LP") or LLC should the trustee determine that the DST is in danger of losing the property due to the trustee's inability to take substantive action. Once converted, the LP/LLC will be treated as a partnership for tax purposes, meaning that the investors would not be able to perform a tax-free exchange if the LLC sold the property. We note that the tax law is unsettled as to whether or not the LLC may be re-converted into a DST (or whether a traditional "drop and swap" structure[9] could be utilized) once the problems giving rise to the initial conversion are resolved.

Many DST offerings involve the acquisition of more than one property. In this case, the sponsor will many times form sub-trusts (or operating trusts) to hold title to each property while the trust (or parent trust) holds all beneficial interests in the operating trusts. Investors acquire beneficial interests solely in the parent trust. This "double-stack" structure effectively eliminates the possibility that a "kick out" will taint the entire DST structure in the event that one of more

[9] In general, a drop and swap structure is when a LLC or LP is dissolved prior to the sale of the relinquished property. Members or partners are then distributed individual ownership interests in the relinquished property ("the drop"). The individual owners subsequently deed the relinquished property to the buyer. The individual owners may then be able to exchange their respective ownership interests into replacement property (the "swap"), subject to various requirements, including that the relinquished property was held for investment purposes.

properties held by the trust are imperiled due to unexpected circumstances. Under this double-stack structure, only the troubled operating trust(s) would be contributed to a LP/LLC (as discussed above) while the trust would continue to retain the other properties held in the remaining operating trusts, therein preserving a future §1031 Exchange with respect to equity invested in the remaining operating trusts.

In relation to TIC-structured offerings, the DST offers certain benefits and drawbacks. The benefits of the DST to its investors center on ease of investment and exchange. The DST investor is not required to create its own LLC as he or she will simply own a beneficial interest in the DST (which itself is a bankruptcy remote, special purpose entity). This adequately shields the investor from potential liability with respect to the property without the added complexity, cost and time commitment of forming an individual LLC for each investor.

Further, the lender only must qualify the DST as a borrower instead of qualifying each individual investor in a TIC offering. This means that each investor need not gather and provide his or her detailed financial and tax information for the lender. Since the DST is the sole borrower, each investor's potential personal liability is greatly reduced and, with less complexity in the lending process, lenders may be able to offer more favorable loan terms and rates than for a comparable TIC offering. In addition, we note that an environmental indemnity obligation for principals as required in most TIC transactions is not required for DST transactions.

Because the number of interests is not limited to 35 as with a TIC offering, a DST offering may allow a smaller minimum investment from each investor, thereby opening the door for more potential investors. Finally, while investors in a DST are not entitled to vote on management of the DST, the threat of a holdout or a rogue investor is eliminated. This stability of management may also have the effect of reducing lender concerns as the lender can anticipate that the trustee will continue operating or managing the property throughout the holding period.

Utilization of a Master Lease in the DST structure[10]

As discussed above, federal tax law requires that the DST signatory trustee be prohibited from taking certain actions with respect to leasing, financing and capital-raising for the property. Also, the beneficiaries have no control over the operations of the property. Therefore, either a master lease or a long-term triple-net lease is required.

In the case of a master lease, the master tenant (generally an affiliate of and controlled by the sponsor) will sublet the property to residential or commercial tenants. The master tenant also handles maintenance and repairs, and contracts with a management agent (also often an affiliate of the sponsor). In general, the master tenant is empowered to do everything that an owner of the property would be empowered to do. Such a master tenant/master lease arrangement satisfies the requirements of the federal tax law, can be seen as very attractive to institutional lenders, and

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[10] Note that it is possible to utilize a master lease in a TIC structure, but it is not required given the TIC owners' ability to enter into new leases through a property management contract. If a master lease were to be utilized in a TIC-structured offering (for example, to smooth out property-level cash flow), the master lease should be characterized as a true lease for federal income tax purposes, and not a partnership, management agreement, joint venture, or financing arrangement, under a similar analysis as discussed below.

eliminates the concern raised in TIC transactions as to how to ensure the unanimous consent of the TICs to certain necessary management actions.

The master tenant is likely to be structured as a special purpose entity, adding yet another layer of bankruptcy protection. Because most master tenants are minimally capitalized (a sponsor-guaranteed demand note or through operational cash flow at the property retained by the master tenant), the sponsor will be the entity that owns and controls the master tenant and have the required net worth and liquidity to satisfy lender requirements.

The master lease will generally provide for rent to be paid by the master tenant to the DST in a set amount equal to debt service plus a market rate of return. The master lease structure economically incentivizes the master tenant to maximize the mortgaged property’s net operating income because the master tenant retains all net operating income over and above debt service and rent payments under the master lease, and incentivizes the master tenant to cover short-term operating deficits to protect its desired return and its valuable investor reputation in the industry.

Additionally, most seasoned sponsors create and fund a capital reserve account from the property’s net operating income (over and above typical lender replacement reserves) for unanticipated repairs and uninsured losses, as there is no real ability to negotiate changes in the master lease terms and rent payments with the DST trustee.

Master Lease must be a True Lease

A master lease must be considered a true lease and not as a financing for federal income tax purposes. There is, however, no bright-line test for making this determination. Revenue Procedure 2001-28 sets forth guidelines for obtaining an advance ruling that a lease constitutes a true lease (and not a financing) for federal income tax purposes, as well as the federal income tax case law governing this area.

In recent cases, courts have conducted a two-part analysis to determine whether the purported lease should be respected for federal income tax purposes, including an analysis of whether (i) the purported lease should be disregarded as a "sham" transaction and, if not, (ii) whether the lessor (trust) retained a sufficient amount of the traditional benefits and burdens of ownership of the property. A leasing transaction will be deemed a sham, and thus disregarded, if it was entered into for the sole purpose of obtaining tax benefits and the transaction is devoid of any reasonable opportunity for economic profit (exclusive of tax benefits). A transaction is not a sham if there is either a business purpose or economic substance to the transaction. The business-purpose test has been described as a subjective analysis examining the motivations for entering into a transaction, while the economic substance analysis is described as an objective analysis focusing on whether the transaction has a reasonable opportunity of producing a profit (exclusive of tax benefits). If a transaction is shown not to be a sham, the lessor (trust) must additionally retain sufficient benefits and burdens of ownership to be regarded as the owner for federal income tax purposes. The essence of the courts' benefits and burdens analysis is an examination of whether the purported lessor is subject to the risks of ownership (i.e., downside) and will enjoy the profits and of the property (i.e., upside).

Revenue Procedure 2001-28 sets forth advance ruling guidelines for "true lease" status. These ruling guidelines provide certain criteria that the IRS will require to be satisfied in order to issue a private letter ruling that a lease is a true lease for federal income tax purposes. In the event of an examination by the IRS, the IRS and, ultimately, the courts of applicable jurisdiction, would consider these ruling guidelines, together with existing cases and other rulings, in determining whether a master lease qualifies as a true lease for federal income tax purposes. Many tax experts in the syndicated DST space do not believe that strict compliance with Revenue Procedure 2001-28 is required to conclude that a master lease should be characterized as a true lease for federal income tax purposes. Rather, they believe that satisfying most of the material ruling guidelines should be sufficient for this purpose. In this regard, we note that most, if not all syndicated DST offerings will provide a tax opinion from the sponsor's tax counsel analyzing the material ruling guidelines under Revenue Procedure 2001-28 and concluding whether or not the master lease should be treated as a true lease rather than a financing for federal income tax purposes.

The Master Lease must not be a Deemed Partnership

It also is necessary to consider whether the master lease could be re-characterized as a partnership for federal income tax purposes. If the trust or the beneficial owners (investors) are treated as partners with the master tenant with respect to the ownership of the property, the beneficial owners (investors) would not be treated as directly holding interests in the property for income tax purposes. Case law provides that certain factors are indicative that a purported lease may in fact be a partnership for federal income tax purposes.

The test set forth in *Comm'r v. Culbertson, 337 U.S. 733 (1949),* is applicable in determining whether an agreement is treated as a partnership or as a lease. The master lease should specifically state that the trust does not intend to form a financing arrangement, joint venture, or management arrangement with the master tenant. Likewise, the master lease should recite that it is intended to be characterized as a true lease and that the parties shall reflect the master lease as such in all applicable books, records, and reports, including income tax filings. The trust and the master tenant should agree not to pool either their capital or services. Another factor to consider is whether the trust and master tenant will have joint control over the capital and earnings of the venture. The master tenant may have control over cash from the property; however, the master tenant should not be deemed to have an ownership interest in the funds to which the trust is entitled and it should not have the power to spend such funds except pursuant to the specific terms provided under the master lease. The trust and the master tenant should each earn a separate profit. Further, the master tenant should recognize income or loss based on the difference between the rent it receives on subleases and the expenses of leasing and operating the property. The trust usually receives rent from the master tenant, including a fixed base rent payment payable monthly, and a percentage of gross rents earned on an annual basis (with estimated payments being made to the trust on a monthly basis). The master lease should not provide for any rental payments based on net operating income or net cash flow from the operation of the property. Thus, none of these parties should jointly share in profits or losses; rather, each should bear its own separate risk that a profit will be realized. Other factors that must be considered are (i) which entity has control over the management of the property (should be the master tenant, or a third-party management firm contract to do so by the master tenant), (ii) the maintenance of separate books, (iii) the lack of filing of partnership returns, and (iv) whether or not the master tenant shares in the sales proceeds (master tenant should not, any compensation should be payable to the signatory trustee by contract between the signatory trustee and the trust). In summary, the master lease must contain economic substance or be entered into for a business purpose (substance-over-form doctrine). Similar to our true lease discussion above, we note that most, if not all, syndicated DST offerings will provide a tax opinion from the sponsor's tax counsel analyzing the aforementioned factors and concluding whether or not the master lease should be treated as a deemed partnership for federal income tax purposes.

6. Comparison of TIC & DST Structures

TIC	DST
Maximum of 35 investors	Maximum of 1,999 investors
Higher minimum investment	Lower minimum investment
Up to 35 separate real estate closings	Lender only needs to make one loan because the DST owns 100% of the real estate
Each investor is required to be recourse with respect to "bad boy" and some environmental carve-outs	Loan carve-outs apply to sponsors, not investors
All major decisions require unanimous agreement by investors	Sponsors (as signatory trustee) makes decisions on behalf of the investors
Investors can be liable for the actions of co-investors	Investors do not need separate LLCs
Each investor must pay annual LLC fees	No annual LLC fees
Lender underwrites each investor	Lender does not underwrite each investor

7. What is an IRC Section 721 Exchange?

Rather than exchanging property for a property, IRC Section 721 ("§721" or a "§721 Exchange") allows a taxpayer to exchange (tax-defer) the proceeds directly into an umbrella partnership real estate investment trust ("UPREIT") in exchange for operating partnership units ("OP Units"). The ownership of OP Units may offer investors the following benefits: access to a diversified portfolio of institutional-quality real estate; deferral of capital gains; realization of the economic benefits of the real estate investment trust's ("REIT") entire portfolio, including potential capital appreciation and distributions of operating income; convertibility of OP Units into REIT shares (at investor's discretion at time of exit or needing liquidity); management of tax gain through partial conversion and liquidation of OP units over time; full divisibility of OP Units; and upon death, receipt by heirs of a stepped-up basis in OP Units (permanent tax-deferral). We have recently reviewed several DSTs offerings that have a §721 Exchange exit strategy for its DST investors (DST interests exchanged for OP Units of a sponsor-affiliated REIT). It is likely that these investors would lose their ability to continue any future §1031 Exchange once exchanged into the OP Units. These offerings usually also allow a fair market value cash buy-out of an investor's DST interests in lieu of participation in the §721 Exchange for OP Units. Under this scenario, a future §1031 Exchange may be possible.

8. Energy §1031 Exchange Private Placements

While the vast majority of §1031 Exchange private placements involve conventional real estate, a §1031 energy private placement allows investors to acquire direct fractional interests in oil and gas properties through like-kind exchanges. Investors may sell conventional surface real estate and acquire interests in subsurface mineral related assets on a tax-deferred basis. As long as the fundamental like-kind exchange rules are followed with respect to (i) replacement property identification, (ii) sale proceeds held though qualified intermediaries, and (iii) the closing of the replacement property within 180 days of the sale of the relinquished property (all discussed above), the sale gains attributable to the disposition of the relinquished property can be deferred under federal tax law. While working interests in oil and gas leases can qualify for like-kind exchange treatment under §1031 of the federal tax code, a majority of the assets acquired in these programs tend to be mineral interests, royalties, and overriding royalties, as income producing assets are generally favored by participating investors.

While the DST is unquestionably the product structure of choice for surface oriented §1031 real estate products, the TIC structure prevails within the energy private placements that provide like-kind exchange opportunities. This observation is likely driven by the 2004 Ruling, which prevents DSTs from borrowing new debt or from entering into new leases or renegotiating old leases.

In a §1031 energy private placement, the sponsor forms an LLC that acquires the minerals, royalties, and/or overriding royalties from a seller and takes title to the assets. The LLC eventually transfers title to the investors as capital is raised. The subscription documents signed by investors will contain special provisions that prohibit an investor from treating his/her investment as a partnership interest. An affiliate of the sponsor often fulfills the role of asset manager and enters into a management agreement with each investor. The asset manager performs accounting and administration functions on behalf of the investors and is paid an on-going management fee. Such on-going administrative services include (i) execution of leases, development agreements, and division orders, (ii) collecting and accounting for production revenues paid by the oil and gas purchasers to the property holders, (iii) paying expenses relating to the interests, (iv) distributing revenues and accounting information to investors, and (v) preparing tax returns. Thus, while the nature of the investment is passive, investors are afforded the tax advantages associated with real estate as the program assets are titled directly to the investors. Additionally, each investor must be given a right in the management agreement to terminate the asset manager and to assume the asset management duties if he or she so chooses.

9. The Importance of Due Diligence in §1031 Exchange Private Placements

We start with the premise that just like every due diligence provider isn't the same, no two §1031 Exchange private placements are the same. To perform an adequate level of due diligence requires completing an exhaustive review of the private placement memorandum, its exhibits and all supplements to the private placement memorandum from a legal and tax standpoint, as well as a review of a plethora of third party reports and property-level documents in order to properly analyze and opine as to the viability of the property from a performance perspective within the constraints of the offering's structure. The sponsor will charge the investors various fees for syndicating the §1031 Exchange private placements including upfront acquisition/loan placement fees, operational management fees, and disposition fees. Further, the clear majority of syndicated §1031 Exchange private placements are sold through Financial Industry Regulatory Authority ("FINRA")-registered broker-dealers that charge commissions and expenses which are added to the investors' acquisition cost for the property. Therefore, a property's performance must be underwritten with the acknowledgement that these fees and expenses funded from investor proceeds must be recouped at disposition of the property.

Although not an all-encompassing list, reports and documents that should be reviewed in all §1031 Exchange private placements include the following: Phase I Environmental Assessment; ALTA/NSPS Survey; Property Condition Assessment; Title Commitment; Purchase Agreement; Loan Terms or Commitment (w/supporting documents); Appraisal; Rent Roll and Abstracts of ≥15% Space Leases; Executive Summary of the Offering/Property; Two Years Historical Operating Financials; Master Lease (if applicable); Trust Agreement(s) (if applicable); Entity Documents (Articles of Incorporation/Organization, Bylaws/Operating Agreement); Call Agreement (if applicable); Power of Attorney (if applicable); Escrow Agreement; Legal and Tax Opinions; Form D, Broker-Dealer Selling Agreement; Insurance Certificate/Declarations Page; Aerials/Photos; Major Tenant Leases (15% or greater rentable space); Property Management Agreement; Asset Management Agreement (if applicable); Pro Forma Financials/Projections/Assumptions; Argus (in native application) or Excel Spreadsheet of Underwriting; Major Tenant Financials (15% or greater rentable space); Zoning Letter or Report; and an ADA Compliance Report.

Finally, it is of upmost importance to independently underwrite the property or properties involved in a §1031 Exchange private placement. When analyzing a property, primary sources of information include: Rent Roll/Tenant Leases; Historical Operating Expenses; Market Reports/Market Information; Capital Markets Report; Market Operating Expense Information; Sales/Lease Comparables; and Loan Documents/Loan Summaries. As further confirmation of value, due diligence materials may include an appraisal, as well as other sources of information to support the long-term viability of the offering include: Property Condition Report; Demographic Information; General Economic Information; and Tenant Interviews/Estoppel Certificates. The utilization of third party information providers is also key to understanding historical, current, and future macro and micro economic trends/predictions specific to the property and its asset class. Providers that we have utilized in the past, among others, include: CBRE/Torto-Wheaton; Newmark Knight Frank; Colliers; Colliers PKF – for Multifamily; CoStar; Korpacz Investor Survey; Integra Realty Resources; Real Capital Analytics; The Boulder Group; REIS; Smith Travel Research; Moody's Economy.com; and National Investment Center for Seniors Housing.

From the primary and secondary sources of information, one can begin to understand the economics associated with a property or properties offered in the private placement. A properly-structured §1031 Exchange private placement will include sponsored-provided basic return metrics such as a cash-on-cash return and internal rate of return calculations, as well as a disposition analysis. Real estate underwriting is often built on the concept that investors will want to receive a return on each dollar invested into the offering as well as a return of capital. A residual value calculation following a stated hold period will often edify investors as to the possibility of a return of their original capital. While difficult to calculate given the innumerable variables impacting the future underwriting as well as capital market conditions, we find it valuable to independently demonstrate the likelihood investors will receive a return of their capital upon the ultimate disposition of the property. Additionally, while a master lease structure may "guarantee" a stated annual return, the master tenant is often not sufficiently capitalized to pay such a return should the underlying property not generate sufficient cash flows. Therefore, we often see sponsors utilize property reserves collected from offering proceeds (investor equity) to supplement the annual cash flows to investors, which often signals an underperforming property.

Finally, please bear in mind that FINRA requires that its members analyze each offering (including each syndicated §1031 Exchange offering) on its individual merits, including structure, financing, pro forma analysis and other areas of inquiry as outlined by FINRA Notices to Members ("NTM") 2003-71 and 2005-18, and Regulatory Notice 2010-22, and by personnel with the qualifications set forth in NTM 2005-48. We note that FINRA member firms may retain counsel or other experts to assist them in undertaking and fulfilling their reasonable investigation obligation, which includes understanding the sponsor's basis for its property-level projections and determining whether any projected yields can reasonably be supported by property-level operations. In this regard, many FINRA members utilize independent, third-party law firms with specific underwriting capabilities to support them in fulfilling these investigation obligations as well as in determining the suitability of an investment prior to recommending the security to investors.

10. Summary

In conclusion, §1031 allows an investor to sell a property, to reinvest the proceeds in a replacement property, and to defer capital gain taxes; however, the process is not easy or simple. To properly complete a successful §1031 Exchange requires various timing, identification and structural requirements. While the DST has several benefits, its potential scope of utilization is potentially narrower than that of the TIC structure. Traditionally, the DST structure has been only utilized for limited types of properties such as a single-tenant, triple-net leases or, as the use of DSTs is beginning to expand, multi-tenant properties under a long-term master lease. The TIC structure, on the other hand, allows the investor a larger variety of property types from which to select. TIC structures also provide investors with the benefit of having a deeded title for their prorated property ownership, the ability to vote on management decisions and generally fewer investors per property. The utilization of TIC and DST structures in syndicated §1031 Exchange offerings provides individual investors with a multitude of investment opportunities over various asset classes. Notwithstanding the multitude of investment opportunities, without proper due diligence of the offering's structure, related fees and expenses, property-level documentation, and independent property underwriting, an investor may be exchanging into an asset not worth the benefits of the immediate tax-deferral.