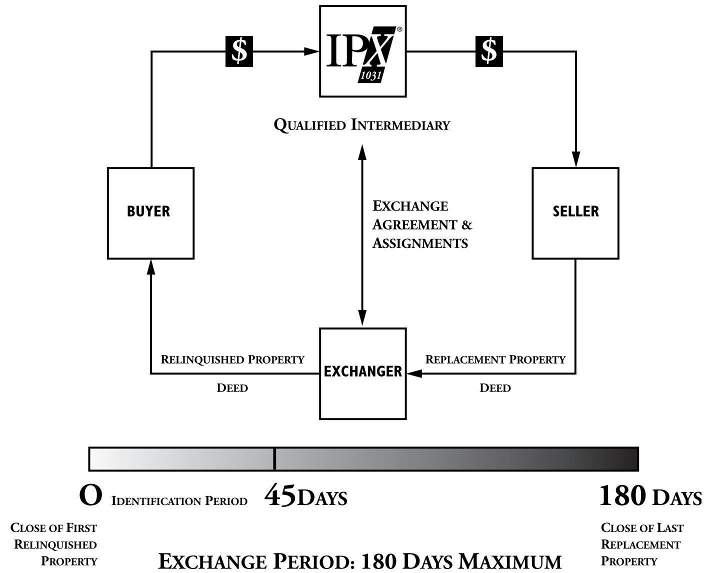
Delayed Exchange Deadlines and Identification Requirements

The most common exchange variation is the delayed exchange format. One of the central requirements in a delayed exchange is that the replacement property is properly identified within the identification period and acquired by the end of the exchange period. The Treasury Department issued Regulations in 1991 that clarified the acceptable methods to properly identify replacement property. See Treas. Regs. §1.1031(k)-1(b) through (e). 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.



There are two key deadlines that the Exchanger must meet to have a valid exchange:

- Exchange Period: The Exchanger must receive the Replacement Property within the earlier of 180 days after the date on which the Exchanger transferred the first Relinquished Property, of 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.
- Identification Period: 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.
- The time periods for the 45-day Identification Period and the 180-day Exchange Period are very strict and cannot be extended even if the 45th day or 180th day falls on a Saturday, Sunday or legal holiday.

Replacement Property must be properly identified within the Identification Period by at least one of the following methods:

- Completing the purchase of the Replacement Property within the Identification Period; or
- Identified in a written document ("Identification Notice") signed by the Exchanger and hand delivered, mailed, telecopied, or otherwise sent by midnight of the 45th day, which is the end of the Identification Period.

The written Identification Notice should be made to:

- The person obligated to transfer the Replacement Property to the Exchanger, even if that person is a disqualified party. Examples of persons obligated to transfer the Replacement Property to the Exchanger are the seller of the Replacement Property or the Exchanger's Qualified Intermediary; or
- To any other person involved in the exchange other than the Exchanger or a disqualified party. Examples of persons who are involved in the exchange and who are not considered disqualified parties are an escrow, settlement or title officer or a person who is providing the Exchanger with services solely relating to the exchange of property.

The Identification Notice must contain an unambiguous description of the Replacement Property and must be signed by the Exchanger. A fully executed purchase and sale agreement specifying the Replacement Property may satisfy these requirements. Otherwise, in the case of real property, the Identification Notice must include the legal description, a street address or a distinguishable name. In addition, when the Exchanger intends to improve the Replacement Property during the Exchange Period the Exchanger must include an adequate description of the underlying land and a description in as much detail as is practicable at the time of the identification of the proposed construction or improvements. When identifying Replacement Property in a real property exchange, any personal property included in the purchase that has a value of less than 15% of the total value of the Replacement Property is considered incidental and does not need to be separately identified. An identification of Replacement Property may be revoked prior to the end of the Identification Period. The revocation must be done in a writing signed by the Exchanger and made to the same person to whom the original identification notice was sent.

Exchangers have the flexibility of identifying more than one property as Replacement Property for their exchange. The options for identification are:

- Three Property Rule: The Exchanger may identify as potential Replacement Property any three properties, without regard to their fair market value.
- 200% Rule: The Exchanger may identify as potential Replacement Property any number of properties provided the aggregate fair market value of all of the identified properties does not exceed 200% of the aggregate fair market value as of the date of the transfer of all of the Relinquished Properties.
- 95% Exception: If the Exchanger identifies more potential Replacement Properties than allowed under either the Three Property or the 200% Rules, the Exchanger must receive Replacement Property by the end of the Exchange Period that has a fair market value of at least 95% of the aggregate fair market value of all of the identified Replacement Properties. The fair market value of property is determined as of the earlier of the date the property is received by the Exchanger or the last day of the Exchange Period and without regard to any liabilities secured by the property.