

SNYDER

KEARNEY_{LLC}

December 17, 2007

Via Online Submission

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: National Association of Realtors Application for Exemptive Relief Under Sections 15 and 36 of the Exchange Act (File No. S7-26-07)

Dear Secretary Morris:

We appreciate the opportunity to comment on the proposed exemption (the "Proposed Exemption") from the broker-dealer registration requirements of Section 15(a)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and certain other requirements of the Exchange Act and the rules and regulations thereunder, that would permit certain real estate agents, brokers, and firms to receive compensation in connection with the sale of TIC Securities, as described in Release No. 34-56779 (the "Notice") and in that certain letter dated October 11, 2007 from Skadden, Arps, Slate, Meagher & Flom LLP on behalf of the National Association of Realtors ("NAR") requesting the exemption (the "NAR Letter"). While not all aspects of the NAR Letter are described in the Notice, we have assumed that, if granted, the Proposed Exemption would grant the requested relief subject to the terms and conditions described in the NAR Letter.

Snyder Kearney LLC is a law firm that provides due diligence services to broker-dealers in connection with the offer and sale of alternative and non-conventional investments, including offerings of TIC Securities. Since 2001, we have represented more than 100 broker-dealers in connection with more than 350 offerings of TIC Securities sponsored by numerous issuers ("TIC Sponsors"). In addition, one of our partners currently serves as chair of the Due Diligence and Compliance Committee of the Tenant in Common Association, and has worked with non-conventional real estate investment securities since the 1980s, including tenure as the due diligence officer of a registered broker-dealer. Another partner previously served as Branch Chief in the Securities and Exchange Commission's (the "Commission") Division of Corporation Finance for a branch responsible for filings made by real estate and other issuers. Accordingly, we

have substantial experience in connection with the offer and sale of real-estate-related securities, including TIC Securities.

While it may be appropriate for Commercial Real Estate Professionals (as defined in the NAR Letter) to receive advisory compensation in connection with investments in TIC Securities subject to conditions that adequately protect investors, we believe that the Proposed Exemption fails to establish those conditions and therefore should not be adopted in its present form. As more fully discussed below, (i) many investors in TIC Securities offerings are older and unsophisticated and, thus, require the full protection of the federal securities laws; (ii) most TIC Securities offerings are conducted pursuant to an exemption from registration under the Securities Act of 1933, as amended, that involves minimal regulatory oversight; (iii) the involvement of independent broker-dealers in TIC Securities offerings is critical to investor protection and likely will be reduced by the Proposed Exemption; (iv) the Proposed Exemption likely would result in a substantial part of the TIC Securities sales process being conducted and controlled by real estate salespersons who are not subject to securities regulatory oversight; (v) the Proposed Exemption is unnecessary since real estate advice is already available to investors under current regulatory policies; and (vi) the Proposed Exemption would represent a substantial departure from those policies.

1. Market overview.

- TIC Securities transactions involve primarily older, and often senior investors who may be unsophisticated. Market conditions, together with the issuance of Internal Revenue Service Revenue Procedure 2002-22¹ ("Rev. Proc. 2002-22"), have led to a recent surge in the popularity of TIC Securities. According to data compiled by one of our firm's clients, OMNI Brokerage, Inc. ("OMNI") and its affiliates, the TIC Securities market grew from less than \$200 million of equity offered and sold in 2001 to approximately \$3.7 billion of equity offered and sold in 2006. In the more than 3,700 transactions effected by OMNI from 2002 through the second quarter of 2007, which represented in excess of 10% of the estimated total TIC Securities equity sold during that period, OMNI calculated an average individual investor age in excess of 60 years, including a significant number of seniors over age 65. While TIC Securities investors typically are "accredited" investors for purposes of Regulation D, there is no requirement that they be sophisticated. Further, a substantial motivation of many of these older and senior purchasers is to convert a large portion of their net worth represented by appreciated real estate into a passive income-producing retirement asset, with deferral of capital gains tax on the relinquished real estate. While the typical TIC Security investor may invest a large portion of his or her assets, he or she does

¹ Rev. Proc. 2002-22, 2002-14 I.R.B. 733.

not have a sufficient investment size to acquire a commercial property individually. The TIC Security allows a pool of investors to share in a common commercial property investment, similar to real estate limited partnerships and other real estate securities.

- The offer and sale of TIC Securities is highly unregulated. TIC Securities are typically offered to accredited investors only pursuant to Rule 506 of Regulation D. Accordingly, no particular offering disclosure is required, the Commission staff does not review the offering documents, and states are pre-empted from merit or disclosure regulation.
- TIC Securities differ from other real estate securities in form only. Tax-advantaged private placement real estate investments are not a new phenomenon. During the 1980s, large numbers of investors invested in tax-oriented real estate limited partnerships in pursuit of tax write-offs. With the demise of these write-offs under the Tax Reform Act of 1986, other tax-advantaged real estate investments gained popularity, including those utilizing low-income housing tax credits and, more recently, TIC Securities offering tax deferral through like-kind exchanges under Section 1031 of the Internal Revenue Code of 1986, as amended ("Section 1031"). While these investments all employ varying structures necessary to accomplish the particular investment goal, one characteristic all of these investments have in common is that the underlying asset is commercial real estate. The structural differences between a TIC Security and a limited partnership are tax driven; to attain the desired tax deferral, the TIC Security cannot be deemed a partnership or a security for federal income tax purposes. So while federal securities laws may treat a TIC Security as a "security," the TIC Security must not be considered a "security" for federal income tax purposes. Apart from a form developed solely for tax purposes, TIC Securities are not unlike any other real estate security.

2. The Proposed Exemption weakens investor protection by reducing the important role of independent broker-dealers.

- The Proposed Exemption will reduce the role of independent broker-dealers. If adopted, the Proposed Exemption likely will alter fundamentally how TIC Securities are sold. It will not merely result in Commercial Real Estate Professionals being able to collect a "real estate advisory fee" in connection with the sale of TIC Securities, it likely will result in Commercial Real Estate Professionals becoming the major, if not the predominant, participants in the offer and sale of these securities, significantly reducing, or even eliminating, the substantial investor protections afforded by participation of independent broker-dealers. These investor protections include the benefits to investors of

independent broker-dealers conducting substantial due diligence and negotiating offering disclosure and transaction terms.

Under the NAR Letter, Commercial Real Estate Professionals will be able to (i) source potential customers for TIC Securities, (ii) conduct a substantial portion of the sales process prior to involvement of a broker-dealer, and (iii) select the broker-dealer that will be involved in the transaction. Thus, it is easy to envision changes in how offerings will be conducted, including:

- The use of sponsor-affiliated broker-dealers, which have inherent conflicts of interest and substantially less incentive than independent broker-dealers to negotiate transaction terms on behalf of investors or conduct meaningful due diligence or suitability determinations;
- Effective control by Commercial Real Estate Professionals over the independent broker-dealer through their initial and expansive role in the offer and sale of TIC Securities and their ability to select broker-dealers;
- Less scrupulous broker-dealers "lending their licenses" to Commercial Real Estate Professionals by processing transactions in exchange for a small portion of the commission, with the lion's share being retained by the Commercial Real Estate Professional; and
- Real estate brokerage firms acquiring or forming broker-dealers with limited licensed personnel to clear transactions "sold" by a large sales force of real estate brokers who do not have securities licenses.

The Proposed Exemption provides significant latitude for Commercial Real Estate Professionals to delay the introduction of the customer to the securities broker-dealer until the very end of the sales process, thus reinforcing their control over the sales process. Further, the level of interaction permitted under the Proposed Exemption makes it likely that an investor's investment decision will be made prior to the involvement of a securities broker-dealer in the transaction. It is doubtful that an investor, after having the level of person-to-person interaction with a Commercial Real Estate Professional permitted by the Proposed Exemption, would find contradictory advice provided by a securities broker-dealer persuasive, particularly in light of the time constraints imposed by Section 1031. Moreover, the Proposed Exemption provides a mechanism to ignore the securities broker-dealer's advice by permitting investors to waive the broker-dealer's suitability determination. The waiver of suitability removes a key safeguard brought to the transaction by the securities broker-dealer.

It is important to recognize that even if the securities broker-dealer were involved earlier in the process, perhaps immediately, the Commercial Real Estate Professional will still have effective control because it is the Commercial Real Estate Professional that chooses the broker-dealer that will close the sale. Given that the Commercial Real Estate Professional has a "salesman's stake" in the transaction (i.e., he or she only receives compensation if the transaction closes), the Commercial Real Estate Professional, or his or her real estate firm, likely will discontinue any referrals to registered broker-dealers that do not approve transactions. Further, in order to obtain TIC Securities business, less scrupulous broker-dealers may accept a low level of compensation insufficient to support a reasonable level of due diligence and other compliance activities.

- The role of the independent broker-dealer is essential to the protection of investors. The role that independent broker-dealers play in the TIC Securities marketplace cannot be minimized. Issuers, and their affiliated broker-dealers, have significant monetary incentive that may lead some to be overly optimistic in how they market their offerings, to accept or undervalue the risk of liability relating to aggressive disclosure, or to otherwise act in their own interest in structuring or pricing a transaction to the detriment of investors.² Given the void of federal or state regulation with respect to these offerings under Rule 506 of Regulation D, the independent broker-dealer may be the only participant in the offering process that acts to protect the investing public.

In order to protect themselves from liability under federal anti-fraud laws (including liability under the "shingle theory") and state securities laws, and to comply with the requirements of the Financial Industry Regulatory Authority ("FINRA"), as set forth in its Notice to Members 05-18 ("NTM 05-18"), independent broker-dealers conduct meaningful due diligence to independently verify factual representations of management contained in the TIC Security offering document, and act to ensure that material facts are accurately disclosed. In the course of carefully investigating many TIC Security offerings, these independent broker-dealers have developed expertise in the nuances of TIC Securities, such as the potential for unlimited personal liability under loan documents, tax risks associated with the requirements of a like-kind exchange, control and liquidity provisions under tenant-in-common agreements, and, of course, real estate matters. It is unlikely that a Commercial Real Estate

² See *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968); *Feit v. Leaseco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971) with respect to issuers. The Commission too has noted concern with the "issues of lack of arm's length bargaining and the conflicts of interest in 'self-underwritings'" (Offering of Securities to the Public, Exchange Act Release No. 34-9555, 1972 WL 125455 at 1 (April 12, 1972)). See also, FINRA Rule 2720 and FINRA Notice to Members 97-68.

Professional will have the necessary expertise to perform these important functions absent special training.

In addition to attempting to negotiate improved disclosure on a transaction-by-transaction basis, independent broker-dealers have been working together to establish standards for disclosure and other important matters. One avenue they have pursued is the "Guide to Certain TIC Best Practices" relating to, among other things, the offer and sale of TIC Securities adopted by the Tenant-in-Common Association, an organization whose members consist of sponsors, broker-dealers and other industry participants. Broker-dealers and compliance-oriented TIC Sponsors have been the driving force with respect to many of these best practices, particularly those relating to improved disclosure. In fact, it was the proposed industry best practices developed at a series of meetings of independent broker dealers beginning in 2003 that was the predecessor to the Guide to Certain TIC Best Practices adopted in 2005. Absent the efforts and market clout of the independent broker-dealers, it is our belief that meaningful best practices would never have been adopted, and, if their role is reduced, disclosure standards will deteriorate.

3. The Proposed Exemption does not serve the policy objectives of broker-dealer registration and departs from precedent.

- The Proposed Exemption departs from established precedent. The Proposed Exemption will allow Commercial Real Estate Professionals to engage in the solicitation, and induce the sale, of TIC Securities while at the same time having a "salesman's stake" in closing the transaction absent the protections afforded by the requirements of the Exchange Act and FINRA applicable to registered broker-dealers. It is the receipt of transaction-based compensation by the Commercial Real Estate Professional that can "induce high pressure sales tactics and other problems of investor protection which require application of broker-dealer regulation" ³

While the Commission and its staff have in limited circumstances allowed compensation to be received by persons not registered as broker-dealers, in each of these cases there were mitigating factors not present in the Proposed Exemption, such as dual licensure,⁴ lack of solicitation efforts⁵ or lack of

³ Persons Not Deemed To Be Brokers, Exchange Act Release No. 34-22172, 1985 WL 634795 at 4 (June 27, 1985).

⁴ See First of America Brokerage Service, SEC No-Action Letter (September 28, 1995).

⁵ See Paul Anka, SEC No-Action Letter (July 24, 1991).

transaction-based compensation.⁶ It is noteworthy that the NAR Letter does not cite any legal authority or precedent in support of its request, presumably because no such authority or precedent exists.

- Commercial Real Estate Professionals will be involved in solicitation efforts to induce sales of TIC Securities. The NAR Letter's characterization of the Commercial Real Estate Professional's compensation as an "advisory fee" is a thinly veiled attempt to obscure what it really is - commission sharing in connection with the sale of a security. The solicitation efforts of the Commercial Real Estate Professional to induce the sale are undeniable in light of the broad definition of solicitation recognized by the Commission to include "any affirmative effort . . . to induce transactional business."⁷ The NAR Letter indicates that Commercial Real Estate Professionals will engage in numerous activities to induce a sale, including: (i) locating and identifying potential TIC Securities, (ii) conducting tours of TIC Security properties, (iii) advising the potential investor regarding the comparative characteristics of alternative properties, (iv) evaluating and advising the potential investor regarding operative agreements, financial projections and leases, and (v) providing tax advice. While a Commercial Real Estate Professional may not be "advertising" its TIC Security services, it likely will be communicating its abilities to customers: "Once the client's existing commercial or residential property is sold, the client will often expect that the Commercial Real Estate Professional will continue to assist the client to complete the purchase of a replacement commercial property."⁸ Further, it is likely the availability of Commercial Real Estate Professionals to assist investors with TIC Security transactions will become widely known through publications or other communications in the real estate industry. In addition, the real estate Buyer's Agent Agreement may include language indicating that potential investors "may consider an interest in real property in the form of a tenants-in-common interest . . ." and the Commercial Real Estate Professionals may "provide information . . . on certain TIC Interests that are deemed to be securities . . ."⁹ This offering of services coupled with significant client contacts is a solicitation designed to induce a sale.

While the Notice indicates that the Commercial Real Estate Professional will be allowed to discuss the "real estate characteristics" of a property and ignores the other broader services described in the NAR Letter, it is difficult to imagine how

⁶ See Markham Investments, SEC No-Action Letter (January 15, 1984).

⁷ Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 34-27017, 1989 WL 1097092 at 6 (July 11, 1989).

⁸ NAR Letter at 10.

⁹ *Id.* at 17.

the “real estate characteristics” can be separated from the characteristics of the transaction that cause it to be a security under the federal securities laws. These characteristics – which include the sponsor’s negotiation of the acquisition of the property, the debt financing on the property, tax aspects, and the property management and other agreements involved in the transaction – are so intertwined with the “real estate characteristics” of the property as to render meaningless a discussion of the property without addressing them.¹⁰

- Protections of broker-dealer registration are necessary for Commercial Real Estate Professionals. Unlike non-securities real estate transactions, the securities laws clearly recognize the need for additional protections where there is a common investment with the expectation of profits from the efforts of others. There are many of these important protections that will not be afforded to investors under the Proposed Exemption due to the substantial control of, and participation in, the sales process by Commercial Real Estate Professionals:
 - The Proposed Exemption may reduce investor recourse by potentially limiting remedies under the Exchange Act. While Section 10(b) of the Exchange Act would apply to a Commercial Real Estate Professional notwithstanding that it is not registered as a broker-dealer, the standard of care applicable to a real estate broker may be lower than that applicable to a registered broker-dealer under the “shingle theory” of liability.
 - Commercial Real Estate Professionals will not be subject to the panoply of requirements imposed by FINRA on its members designed to protect investors in connection with the offer and sale of securities. Certain examples of important requirements include:
 - Disclosure requirements, such that disclosures to investors must not be misleading and must present a balanced treatment of risks and potential benefits. On the contrary, Commercial Real Estate Professionals are accustomed to a sales process that involves some degree of puffery, without a need to balance disclosure;
 - Limits on receipt of gifts by a person associated with a registered broker-dealer. Under the Proposed Exemption there would be no uniform restriction. It is not hard to imagine an aggressive TIC Sponsor providing a real estate firm or its professionals with gifts to induce future business;
 - Recordkeeping and approval requirements for sales literature that not only provide evidence of these communications with the public, but also deter improper communications, since it is known such communications will be of record. Under the Proposed Exemption,

¹⁰ See The Woodmoor Corporation, SEC No-Action Letter (February 3, 1972) (components of an investment contract are not separable).

there will be no uniform review or recordkeeping requirements with respect to communications by the Commercial Real Estate Professional;

- A requirement to “train registered persons about the characteristics, risks and rewards of each product before they allow registered persons to sell that product to investors.” To the contrary, generally, once a Commercial Real Estate Professional has obtained the requisite state license, it is our understanding that no particular training as to the characteristics, risks and rewards of a particular real estate product typically is required; and
- A requirement to maintain a supervisory system including control policies and procedures. The chief executive officer of each registered broker-dealer must annually certify that the firm “has in place processes to establish, maintain, review, test, and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable NASD rules, MSRB rules and federal securities laws and regulations”¹¹ In contrast, Maryland law, for example, merely provides that real estate brokers are required to exercise reasonable and adequate supervision of real estate salespersons without any further affirmative requirements.¹²
- The Proposed Exemption does not provide for independent regulatory supervision that includes routine examinations and inspections aimed to ensure compliance with applicable standards. To the contrary, under the Proposed Exemption, no regulatory body will verify that (i) those claiming to be qualified as Commercial Real Estate Professionals are in fact so qualified or (ii) that communications to prospective investors are not misleading and are fairly balanced.
- The Proposed Exemption, by eliminating the disqualifications of Section 3(a)(39)(E) of the Exchange Act, appears to allow Commercial Real Estate Professionals to associate with, share commissions with, or be controlled by, persons that would be disqualified from registering as a broker-dealer under the Exchange Act. Thus, it appears that a real estate brokerage firm controlled or influenced by, or that employs, criminals or other disqualified persons can engage in the solicitation of TIC Securities transactions through its qualified Commercial Real Estate Professionals.

¹¹ FINRA Rule 3013.

¹² MD. Code §17-320.

5. The Proposed Exemption will create undue risk of violation of Regulation D's prohibition on general solicitation.

TIC Securities are typically offered under Rule 506 of Regulation D, conditions of which prohibit general solicitation. Securities broker-dealers are well aware of this requirement and typically have supervisory procedures designed to prevent a general solicitation. Securities broker-dealers typically are trained in this aspect of a TIC Securities offering, because failure to observe this requirement can have significant negative ramifications for both the TIC Sponsor and the broker-dealer. For example, such a failure can cause a violation of Section 5 of the Securities Act, as well as a violation of state securities laws due to the loss of pre-emption of state law, if Regulation D is not available.

Unlike associated persons of a registered broker-dealer, Commercial Real Estate Professionals generally are not trained in the requirements of Regulation D and are accustomed to activities that are entirely appropriate in connection with the sale of real estate that would constitute advertising and general solicitation in a securities offering. There will be no structured regulatory scheme or oversight to ensure that Commercial Real Estate Professionals do not unwittingly advertise or conduct a general solicitation in connection with the sale of a TIC Security. While the Proposed Exemption does include some measures that appear intended to limit activities that would clearly result in general solicitation (such as the prohibition against Commercial Real Estate Professionals advertising the availability of TIC Securities), it is not reasonable to expect the vast population of Commercial Real Estate Professionals, who do not have relevant training or supervision by securities professionals, to be able to adhere to the requirements of Rule 506.

Furthermore, in light of the substantial additional risk presented by the possible loss of the exemption from registration provided by Rule 506, more compliance-oriented broker-dealers might consider discontinuing their participation in TIC Securities transactions involving Commercial Real Estate Professionals, further eroding the overall level of investor protection present in the TIC Securities market.

6. The Proposed Exemption may result in a lower duty of care to investors.

A high standard of care is placed upon registered broker-dealers and their associated persons by the federal securities laws. The Proposed Exemption does not require that Commercial Real Estate Professionals maintain any fiduciary duty to purchasers of TIC Securities. Although Commercial Real Estate Professionals may owe a fiduciary duty to their clients under state agency laws, brokers' contracts often limit their liability with provisions including (i) an "as is" clause, (ii) a non-reliance clause, (iii) a release or

waiver clause, or (iv) a merger or integration clause.¹³ Further, some states appear to allow buyer's agents to contractually waive any fiduciary duty in a commercial real estate transaction.¹⁴ Moreover, buyer's agent agreements often disclaim any duty by the agent to conduct an independent inspection of any property, or any verification of the accuracy or completeness of statements made by a seller. All of these provisions share the same objective – to shift risk to real estate purchasers.¹⁵

Further, while many jurisdictions have modified the doctrine of *caveat emptor* in connection with residential real estate sales, the doctrine remains in force in some states in connection with commercial real estate transactions.¹⁶ Thus, state laws enacted to provide protections to real estate purchasers may not protect purchasers of TIC Securities.¹⁷

The Proposed Exemption does not require any specific terms to be included in the Buyer's Agent Agreement, nor does it require the Commercial Real Estate Professional to be subject to the standards applicable to registered broker-dealers and their associated persons. Thus, it is likely that prudent Commercial Real Estate Professionals will attempt to limit their duties to investors, and therefore their potential liability, through the Buyer's Agent Agreement. The potential combination of (i) Commercial Real Estate Professionals contractually limiting or eliminating their fiduciary duties and (ii) the investor waiving a securities broker-dealer's suitability determination creates a scenario where very little investor protection is present, and the investor's only recourse may be an action for intentional fraud committed by the Commercial Real Estate Professional.¹⁸

7. The Proposed Exemption's suitability waiver is inappropriate for TIC Securities.

We believe it is inappropriate in the context of the offer and sale of a TIC Security to allow for the waiver of a suitability determination by a registered broker-dealer. The suitability determination protects investors, who are not necessarily sophisticated, from aggressive commission-based sales efforts and from their own poor judgment. Given the likelihood that the investment in a TIC Security will represent a large portion of the investor's net worth and the fact that many TIC Security investors are older or senior

¹³ Craig W. Dallon, *Theories of Real Estate Broker Liability and the Effect of the "As Is" Clause*, 54 Fla. L. Rev. 395, 436 (2002).

¹⁴ *Wurtzel v. Marcus & Millichap Real Estate Inv. Brokerage Co.*, No. B191607, 2007 WL 2430012 (Cal. App. 2 Dist. August 29, 2007).

¹⁵ Dallon, *supra*. at 436.

¹⁶ Richard A. Lord, 17 Williston on Contracts §50:26 (4th Ed) (2007).

¹⁷ Dallon, *supra*. at 411.

¹⁸ *See Id.* at 413-414.

investors that are not necessarily sophisticated, the suitability determination takes on a high level of importance in a TIC Security transaction.

8. The Proposed Exemption will have potential adverse effects.

There are a number of other potential adverse effects of the Proposed Exemption:

- Securities broker-dealers and TIC Sponsors will have no effective means to monitor or ascertain disclosures made by a Commercial Real Estate Professional. A typical TIC Security transaction involves a selling agreement with the selling broker-dealer that prohibits the selling broker-dealer from making any statements or providing any information to the investor other than that contained in the offering document. This allows the TIC Sponsor and the broker-dealer to control the information that is provided to an investor to ensure its accuracy. The Proposed Exemption, however, would allow Commercial Real Estate Professionals to discuss aspects of the offering or otherwise provide investors information prior to the involvement of the broker-dealer and outside of that contained in the offering document.
- Securities broker-dealers will be unable to effectively supervise Commercial Real Estate Professionals. Since the Commercial Real Estate Professional will not be subject to the control and supervision of the securities broker-dealer, it will not be able to prevent or remediate improper actions by a Commercial Real Estate Professional. For example, should a securities broker learn that a Commercial Real Estate Professional intends to make, or has made, false or misleading statements to an investor, the securities broker has no means to prevent the action.
- Commercial Real Estate Professionals will have incentive to limit potential like-kind exchange options for investors to TIC Securities. There may be options other than TIC Securities for a potential like-kind exchange, such as transactions structured as a Delaware Statutory Trust, that a Commercial Real Estate Professional would have incentive not to recommend since those alternative structures are not covered by the Proposed Exemption.
- The Proposed Exemption may allow persons not qualified to provide advice to receive compensation. According to footnote 42 of the NAR Letter, “[g]enerally, the Real Estate Advisory Fee will be paid to the Real Estate Firm with which a Commercial Real Estate Professional is licensed, which will distribute all or a previously agreed-upon percentage of the Fee to the Commercial Real Estate Professional that signed the agreement and to any other Commercial Real Estate Professional or real estate firm that was added to the agreement with the

consent of the client.” This language suggests that any real estate firm may be added, even if it is not related to the Commercial Real Estate Professional providing the advice, or otherwise qualified to receive the compensation. As written, this would appear to allow residential real estate brokerage firms to receive compensation in connection with sales of TIC Securities.

- The Proposed Exemption may be used by firms to sell TIC Securities, even if like-kind exchange treatment is not intended. The Proposed Exemption does not require that a purchaser of a TIC Security intend like-kind exchange treatment. Thus, relying on the relief granted by the Proposed Exemption, issuers of real estate securities can structure their offerings using tenant-in-common ownership instead of other forms of ownership to avail themselves of the unregistered Commercial Real Estate Professional sales force.
- Requirement that a Commercial Real Estate Professional be predominately engaged in non-TIC Security business is prime for abuse. Although the NAR Letter requires that the Commercial Real Estate Professional be predominately engaged in the sale of real estate other than TIC Securities, this requirement is ambiguous. First, the word “predominately” generally means having numerical superiority. Each like-kind exchange typically involves the sale of a relinquished property not deemed a TIC Security and then the purchase of a TIC Security. If a real estate broker were engaged only in these transactions, 50% of the broker’s business would be other than TIC Securities, such that an occasional non like-kind exchange commercial transaction would then enable the broker to satisfy the predominance requirement. In other situations where an exemption from broker-dealer registration has been granted, the Commission has required only one transaction in any 12-month period, a standard that seems to provide greater certainty and a more appropriate level of protection than the standard set forth in the Proposed Exemption.¹⁹

9. The Proposed Exemption is unnecessary.

We believe the Proposed Exemption is unnecessary for the following reasons:

- Real estate brokers can already provide fee-based investment advice. We believe that real estate professionals can receive non-transaction based compensation for advisory services in TIC Securities transactions absent registration as a broker-dealer. NAR asserts that “unless the Commercial Real Estate Professional can be compensated for providing additional real estate services as a ‘buyer’s agent’ to the client with respect to the purchase of a TIC

¹⁹ 17 C.F.R. § 240.3a4-1(a)(4)(ii)(C).

Security, the Commercial Real Estate Professional is unlikely to be willing to continue to assist the investor."²⁰ There are a large number of knowledgeable real estate experts, such as real estate appraisers or commercial brokers, that would presumably be willing to provide such services for a fixed or hourly fee. This is no different than the services that each investor typically obtains from legal and/or tax counsel in connection with the purchase of a TIC Security. The NAR Letter aims to compensate Commercial Real Estate Professionals as salesmen under the pretext that advisory services are being provided. Apparently, the NAR Letter presumes that lawyers and accountants must be compensated by the hour for legal and tax advice, but the Commercial Real Estate Professional must be compensated based on a percentage of the transaction value.

- Real estate advice by real estate brokers is no more necessary with TIC Securities than other real estate securities. Commercial real estate securities are not a new phenomenon. Single or multiple property limited partnerships, limited liability companies and REITs have been sold by securities broker-dealers for many years. The only difference between a TIC Security and any other single-property security relates to non-real estate attributes: a TIC Security has unique structural aspects designed to achieve tax objectives and satisfy lender requirements.
- Real estate advice by real estate brokers is no more necessary with TIC Securities than other professional advice with respect to many types of securities. It is a false assumption that commercial real estate expertise is more important to an investment in a TIC Security than legal or tax advice. It is also a false assumption that commercial real estate expertise is more important to an investment in a TIC Security than petroleum engineering expertise is with respect to an oil and gas investment. The securities laws are not designed to allow all relevant experts to receive transaction-based compensation particularly where the professional has the ability to induce the sale of the underlying security.
- Securities broker-dealers routinely obtain the necessary expertise with respect to a wide variety of asset and investment types. There are many types of securities offerings with respect to which specific expertise may be necessary to evaluate the investment opportunity, such as oil and gas investments, equipment leasing programs, franchise arrangements and lending arrangements. Broker-dealers routinely hire experts or otherwise develop required expertise within their own staff to evaluate these investments and to train their registered representatives.

²⁰ NAR Letter at 10-11.

With respect to TIC Securities, FINRA has issued its Notice to Members 03-71 relating to Non-Conventional Investments, as further interpreted by Notice to Members 05-18 to apply to TIC Securities, reminding members of their obligation to "know the product."

10. The Proposed Exemption is based on erroneous factual assumptions.

The NAR Letter includes certain inaccurate assertions including the following:

- TIC Securities typically do not involve a direct deed to investors. The NAR Letter incorrectly states that each investor "receives at a real estate closing a deed in the owner's name representing his or her undivided fractional interest in the TIC property."²¹ In a typical TIC Securities transaction, a special purpose limited liability company is formed by the TIC Sponsor for the investor, and the real property is transferred to, and the investor receives a membership interest in, the special purpose entity. In most cases, the special purpose entity is governed by a substantive limited liability company agreement, and has a second non-economic member or manager initially appointed by the TIC Sponsor that has certain rights and powers.
- TIC Securities are not as liquid as other real estate investments. The NAR Letter incorrectly states that "TIC Interests are illiquid in the same manner as other real property."²² This statement fails to recognize that most TIC Securities are much more illiquid than other real estate investments. Because of certain tax considerations and lender requirements unique to TIC Securities, the sale and transfer of a TIC Security or the underlying property is considerably limited, including a typical provision requiring unanimous consent of investors to approve a proposed sale of the underlying property. Further, no secondary market exists for sale of a TIC Security.
- All broker-dealer compensation may not be disclosed on the cover page of a private placement memorandum. According to the NAR Letter, the commissions and fees that will be paid to a participating broker-dealer will be listed on the cover page of the private placement memorandum. In our experience many offering documents do not include this information on the cover page.

²¹ *Id.* at 4.

²² *Id.*

- State statutory frameworks do not imply that states have a policy that protection of TIC Security purchasers is enhanced by Commercial Real Estate Professionals. According to the NAR Letter, NAR believes that the "state statutory and regulatory framework implies that many states have made a policy determination that the protection of a purchaser of real estate, including a TIC Security, is enhanced when the purchaser received real estate services from a Commercial Real Estate Professional."²³ There appears to be no basis for this statement.

11. The substantial experience standards of the Proposed Exemption are ambiguous and inadequate.

The NAR Letter states that only a Commercial Real Estate Professional with substantial experience will be exempt from registration. Footnote 41 of the NAR Letter sets forth alternative ways to establish the requisite experience.

- First, the requisite experience may be shown through a designation as a CCIM, SIOR or ALC. Unlike professional licensing designations, such as a certified public accountant, attorney-at-law or real estate appraiser, the designations CCIM, SIOR or ALC are not administered by any state or other regulatory authority, but rather are designations created by individual membership organizations. No regulatory authority sets or monitors the requirements for these designations, nor has any independently ascertained the actual benefits to the public afforded by dealing with a person who has attained any of such designations. CCIM, SIOR and ALC are themselves professional affiliates of NAR itself, which means that an affiliate of the party requesting exemptive relief will be able to establish the requisite level of experience and expertise. Further, the ALC designation is related to expertise in land transactions, but the NAR Letter would allow a Commercial Real Estate Professional with an ALC designation to receive "advisory fees" for any commercial real estate transaction.
- Second, the requisite experience may be shown if the Commercial Real Estate Professional has education and transaction experience that is equivalent to those required to obtain those designations. This vague standard apparently would allow the Commercial Real Estate Professional to determine unilaterally that he or she has equivalent experience. Once again, no independent authority will police this determination. It is hard to see how this condition can provide any adequate assurance that the Commercial Real Estate Professional has the expertise to provide meaningful advisory services.

²³ *Id.* at 8.

- Third, the requisite experience may be shown if the Commercial Real Estate Professional has participated in at least a specified number and dollar amount of commercial real estate transactions within specified time periods. There is no requirement as to the level of participation in the transactions, such that the Commercial Real Estate Professional may have merely listed and sold commercial real estate and have no relevant experience in commercial real estate. Further, the definition of commercial real estate is so broad, that it will allow satisfaction of the experience requirement with the possibility that the Commercial Real Estate Professional may not have any experience relevant to a particular TIC Security.
- Finally, the NAR Letter states that “[a] Commercial Real Estate Professional may also meet the “substantial experience” requirement based on a combination of at least two of the following factors: education in commercial real estate; the length of time during which the person engaged in commercial real estate transactions; the dollar value of commercial real estate transactions in which the individual has participated; and the number of commercial real estate transactions in which the individual has participated.” These vague concepts have no substantive meaning; for example, “education in commercial real estate” might be a one-day seminar conducted by NAR or a self-study course designed by a TIC Sponsor.

12. Consideration of the Proposed Exemption may be better served through the formal rulemaking process.

It appears that it may be more appropriate for the Proposed Exemption to be treated as a proposed rule rather than an exemption. Under the Administrative Procedures Act, a “rule” is defined as the “whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy”²⁴ In contrast, an “order” is “the whole or part of a final disposition . . . of an agency in a matter other than rulemaking.”²⁵ Because the Proposed Exemption has a “future effect designed to implement [the Commission’s] policy,” it may be more appropriate for the Proposed Exemption to be considered as a rule. In fact, prior exemptions from broker-dealer registration affecting classes of persons have been granted by rule.²⁶ Among other things, use of the formal rulemaking process would facilitate a better understanding of the Commission’s analysis of the Proposed Exemption, as well as its effect on competition.

²⁴ 5 U.S.C. § 551.

²⁵ *Id.*

²⁶ *See, e.g.* 17 C.F.R. § 240.3a4-1 (persons associated with issuers not deemed to be brokers); 17 C.F.R. § 240.15a-6 (exemption of certain foreign brokers or dealers).

Conclusion

Because TIC Securities offerings are typically conducted pursuant to Rule 506 of Regulation D, no particular offering disclosure is required, the Commission staff does not review the offering documents, and states are pre-empted from merit or disclosure regulation. Many investors in these offerings are older and many are unsophisticated. It is the regulatory requirements applicable to broker-dealers and the involvement of independent broker-dealers that provide important investor protections in connection with the offer and sale of TIC Securities.

It may be appropriate for Commercial Real Estate Professionals to receive compensation for advice provided in connection with investments in TIC Securities. Any such arrangement should be tailored so that investor protection is not diminished, however. The Proposed Exemption likely would result in a substantial part of the sales process being conducted and controlled by persons not subject to the regulatory requirements applicable to broker-dealers, and would minimize or eliminate the role of the independent broker-dealer in many transactions. Accordingly, because the Proposed Exemption is not consistent with the protection of investors, we respectfully urge the Commission not to grant it in its present form.

* * *

We appreciate this opportunity to comment on the proposed order, and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to Todd D. Snyder (410-964-2500, tsnyder@snyderkearney.com) or John F. Kearney (410-964-2500, jkearney@snyderkearney.com).

Very truly yours,

SNYDER KEARNEY LLC