

9 December 2007

From: Todd A. Phillips¹
On behalf of: Upland Real Estate Group, Inc.²
3800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

To: Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-6628

**RE: FILE NUMBER S7-26-07; RESPONSE TO NOTICE OF
APPLICATION FOR EXEMPTIVE RELIEF BY THE NATIONAL
ASSOCIATION OF REALTORS**

Dear Ms. Morris,

I am writing this letter in response to release number 34-56779; File number S7-26-07, published on November 9, 2007 on behalf of my clients, Upland Real Estate Group, Inc. and Upland Private Equity Partners, LLC. The principals of Upland have been actively involved in the sale of investment grade commercial real estate for more than 20 years and the company is regarded as one of the national leaders in the sale of single-tenant net lease properties. As such the company has been following the issues raised in the SEC notice of application for exemption ("Proposed Exemption") quite closely. The Proposed Exemption raises several material issues that affect the protection of investors and the public interest.

As stated in both the Proposed Exemption and the Exemption Request from the National Association of Realtors ("NAR"), any exemption must be (1) appropriate in the public interest and (2) consistent with the protection of investors. Involving a real estate professional in the sale of a security consisting primarily of real estate and secondarily of the various agreements necessary to operate and own investment grade commercial real estate, all of which are squarely within the expertise of properly qualified real estate professionals, is both appropriate in the public interest and consistent with the protection of investors.

¹ Todd A. Phillips is a licensed attorney in the State of Minnesota. Mr. Phillips is also a licensed real estate broker and a former CPA. Mr. Phillips is legal counsel to Upland Real Estate Group, Inc., a licensed real estate brokerage firm and a partner in Upland Private Equity Partners, LLC, a real estate investment company.

² Upland Real Estate Group, Inc. is a full service commercial real estate brokerage company. Not only is the company a national leader in the sale of single-tenant net leased properties, it also represents landlord, tenants, buyers and sellers of all commercial property types.

Other comments to the Proposed Exemption have stated that TIC Securities sales belong solely to the sacrosanct licensure of securities broker dealers who are well versed in the ways of investor protection and the reading and understanding of private placement memorandums.³ Unfortunately, statements such as this appear to be the result of this issue taking place as a ‘turf battle’, resulting in comments aimed at the protection of sales revenue and not consistent with the protection of investors and not appropriate in the public interest. My client feels there are legitimate issues to be addressed before an exemption is issued.

First, the Proposed Exemption properly requires substantial experience, but fails to allow for compensation of less qualified real estate professionals. Second, the Proposed Exemption must be narrow when restricting advertising. Third, the Proposed Exemption should not restrict properly qualified brokers from participating in more than a de minimis number of TIC Securities transactions. Finally, the Proposed Exemption should not get into the business of determining whether a TIC Security qualifies under IRC Sec. 1031 rules.

The Exemption should require real estate professionals have substantial experience, but should allow those without requisite experience the ability to co-broker with a adequately experienced real estate professional.

According to the NAR, there are at least 1.3 million licensed real estate professionals in the United States.⁴ Many of those, however, work primarily in residential real estate and thus are not experienced in commercial real estate. The business of real estate, however, often requires that real estate professionals work together on transactions in order to best serve the client. Thus, the practice of co-brokering has become commonplace. Without a change to this rule, if a real estate professional represents a client in the acquisition of investment real estate, but is primarily in the business of residential real estate, in the case the buyer were considering TIC Securities, that client would be without the services of a trusted professional. A non-

³ In researching this response, I read through a handful of private placement memorandums from previously sold TIC Securities. From my own experience in commercial real estate investment, I looked for the data analysis in which I would require a complete understanding before investing. The following items were not included in any of the private placement memorandums that I reviewed: (1) analysis of tenant(s) creditworthiness, (2) tenant net rent amounts per square foot and lease terms, (3) comparable market rents and operating expenditures per square foot, (4) analysis of future capital expenditures including structural repairs and replacements, future tenant improvements, and future leasing commissions, (5) detail of pertinent debt obligations such as carve-out guarantees, reserve account maintenance, and duties and obligations imposed by the lender with respect the property and the tenants, (6) comparable sales prices and market capitalization rates, (7) replacement cost estimates, and (8) quality and coverage of property insurance. Furthermore, there are investment analytics that are qualitative in nature and are not necessarily printable in a PPM, which are readily accessible to a well qualified real estate professional such as a historical understanding of the property, an inside understanding of tenants that have either rented in or looking at the building or location, and a understanding of the reputation and skill of the property management company and leasing team.

⁴ The NAR request states that the NAR consists of 1.3 million individual members. The SEC notice contemplates that approximately 800 real estate professionals would rely on the exemption.

qualified real estate professional should be allowed to participate in a TIC Securities transaction if the non-qualified real estate professional co-brokers the transaction (shares fees and responsibilities) with a well qualified real estate professional.

In order to protect the investor, the SEC should require that the well qualified real estate professional certify by signature that he or she (1) has adequate knowledge and experience to understand the property, market and property type for which the investor is buying, (2) has read the pertinent investment documents and prepared their own analysis if necessary and (3) reviewed their investment analysis with the client (collectively “Certification”).⁵

Allowing non-qualified real estate professionals to co-broker with qualified real estate professionals is proper because it is consistent with the way in which the real estate industry operates, it is appropriate in the public interest and it is consistent with the protection of investors.

The Exemption should restrict advertising of TIC Securities, but should be narrow in scope to avoid infringing on real estate professionals general advertising rights.

Generally, real estate professionals engage in a substantial amount of public advertising. It is common business practice for investment real estate sales persons to advertise the availability of properties in a variety of medium, including newspapers, web-sites, mailings, etc. all of which is consistent with the various states’ law regarding the sale of real estate.

Both the NAR request and SEC notice delineate a proper and appropriate rule. The rule should be defined more specifically, however, to narrow the scope to restrict the advertising of TIC Securities and specific TIC Security purchase opportunities. A narrow rule will allow the SEC comfort that real estate professionals are not violating general solicitation rules that would otherwise apply to people licensed by the SEC.⁶ Furthermore, a narrow rule could be drafted that would be both consistent with SEC rules and with the laws of the various states. Finally, as further protection for the investor and the general solicitation rules of the SEC, the real estate professional can be required to certify that he or she has not engaged in any general advertising that would violate the exemption.⁷

It is proper for the Exemption to restrict real estate professionals from selling large volumes of TIC Securities, but only when the real estate professional

⁵ We recommend that the certification or attestation by the real estate professional is broader in scope than indicated in either the NAR’s request or the SEC notice. A broader certification adds more investor protection and can be used to assure compliance with SEC guidance and rules. The certification should also indicate that the real estate professional did not violate the advertising rules of the exemption (and/or has a previous business relationship with their client).

⁶ Most often this will be a moot point because real estate professionals typically have existing relationships their clients long before discussing TIC opportunities.

⁷ See above.

does not have substantial experience. Properly qualified real estate professionals must have the right to be compensated for as many TIC Securities transactions as necessary to serve their clients.

Often times in the practice of real estate, individuals develop a subset of knowledge that differentiates them from the myriad of other professionals in the marketplace. There is no setting where this is more evident than in investment real estate. Understanding investment real estate takes a great deal of market knowledge and experience in addition to education and skills. The nuisances of real estate can greatly affect the current and future value of a property.⁸ Once an individual has obtained this level of specialization, he or she is a rare commodity in local real estate markets. Thus, that person is sought out by clients time over time for their expertise. It is highly conceivable that this person will be asked by clients to evaluate a number of options, including TICs.⁹

As noted throughout this recommendation, there are real estate professionals with adequate and proper experience to advise purchasers of TIC securities and those without. Professionals who have the requisite experience and who attest their experience must not be limited in how many clients or transactions they represent.¹⁰

In order to be fitting, any exemption must be in the best interest of the investor. Limiting real estate professionals contradicts investor protection. Limiting the number of transactions a real estate professional can engage in will cause them to steer clients away from TIC Securities once their quota is met. Alternatively, not limiting properly qualified real estate professionals will buttress investor protection and further ensure that investors make sound decisions with adequate facts, knowledge, and advice.

First, a real estate professional who advises an unlimited number of clients in the purchase of TIC Securities would be able to more effectively evaluate TIC investments. TIC's have facets to their operation that are significantly different than the operation of a solely owned real estate asset or those that are owned in a partnership or LLC. The operating conditions, the way asset managers and property managers work together and the covenants in mortgages all create additional considerations in TIC investments. These conditions and difference may or may not be understood or disclosed by a broker/dealer, but the implications of those differences on the real estate asset are squarely within the knowledge and experience of real estate professionals. Thus, a real estate professional more versed in understanding TIC Securities will be able to more effectively evaluate the underlying real estate opportunity.

Additionally, an unfettered real estate professional would be more aware of the quality of TIC sponsors and the availability of product type as well as pricing, which would all benefit the knowledge and understanding of the investor.

⁸ See note 3.

⁹ See NAR request p 11.

¹⁰ As an alternative, a firm or brokerage company could have a requirement for transaction volume, but an individual working within the firm should not be limited.

Furthermore, the investor would benefit from a more knowledgeable real estate professional because that individual would have more experience in evaluating and communicating the real estate analysis with the client and it would provide for more consistent delivery.

An exemption doesn't necessarily have to go without limitations, certainly those without requisite knowledge and experience shouldn't be allowed an unlimited number of TIC Security sales. If the exemption allows for co-brokering as described above, then it would be nearly impossible for those without requisite experience to co-broker because the experienced real estate professional would have limitations.

Under the Proposed Exemption, the broker / dealer will still have to complete a suitability analysis and have a duty to discuss the investment with the buyer. Having the broker / dealer in place will be sufficiently effective in protecting investors from real estate professionals who are not adequately trained in non-real estate investing and managing a portfolio of various investment types.

Finally, limiting the number of transactions a real estate professional can engage in is not only not in the investor interest, it appears to be more of a 'turf battle' between real estate professionals and securities sales professionals, which is not appropriate for the SEC. Some comments from the securities sales persons have indicated that not limiting real estate professionals deal volume would lead to a breakdown of the general advertising rules. This can be simply solved by requiring the real estate professional to certify that he or she has not engaged in any general advertising and / or has a preexisting relationship with his or her client.¹¹

TIC Securities covered under the Exemption should be limited to those evidenced by a deed, but the SEC should avoid the determination of whether it qualifies for 1031 purposes.

Tax law is complicated and to add to that, the IRS has given very little substantial guidance to the TIC industry. Rev. Proc. 2002-22 is merely guidance for sponsors wishing to request a deal-specific ruling, not a safe harbor and not a ruling in itself. To date, only two actual rulings exist and the rulings apply only to specific transactions. This means that only two previously sold TIC transactions can be said to qualify for 1031 purposes for certain. The difference between a TIC interest and a limited partner (or LLC) interest can be simply boiled down to whether or not the investor has deeded title to the property.

The Exemption should merely require that a real estate professional can only be paid on TIC Securities where the investment is evidenced by a deeded undivided fraction interest.

¹¹ The SEC may also consider requiring the real estate professional to consent to the jurisdiction of the SEC.

Requiring the transaction to actually qualify for 1031 purposes will create uncertainty amongst sponsors, broker dears and real estate professionals. Most importantly, if the exemption requires that the TIC Security qualifies for 1031 purposes, then the real estate professional will be required to make that determination. Real estate professionals are not CPA's and should not be put in the position to assume that kind of liability.¹²

My client is in favor of the exemption, and they feel it is a viable solution to for the industry. Without the changes outlined above, however, the exemption will be unworkable and impractical.

Respectfully Submitted,

Todd A. Phillips
The Phillips Law Firm

¹² And most CPA's and attorney's disagree on what qualifies as replacement property and what doesn't.