

RE: Release No. 34-56779; File No. S7-26-07)

NOTICE OF APPLICATION OF THE NATIONAL ASSOCIATION OF REALTORS FOR EXEMPTIVE RELIEF UNDER SECTIONS 15 AND 36 OF THE EXCHANGE ACT AND REQUEST FOR COMMENT

This request should be denied. The application leaves one with more questions than solutions. In the first paragraph:

“permit a licensed real estate agent or broker who is predominantly engaged in and has substantial experience in the commercial real estate market and the real estate brokerage firm with which such agent or broker is licensed to receive compensation in the form describe below for the sale of a TIC Security, as defined below.”

Three points I would draw attention to

- a. Substantial experience, in the NAR definition, equals either education or practical experience. Experience should remain defined as living through an event or training and personal participation. The NAR definition allows for those who have never sold anything and yet have designations behind their names to participate. This should be unacceptable to the SEC.
- b. The second half of their definition refers to substantial experience in the real estate brokerage firm. What does that mean? Paperwork, secretarial, years of working in one firm, or years with a large franchise and moving from one firm to the other.
- c. The last point I would like to make on this is that “predominantly engaged” in commercial real estate market and brokerage firm would seem that the agent is earning the vast majority of his employment income from commissions which would require a Real Estate License. If this is the case then at what point would his involvement in SEC transactions show him to be “in the business”. Predominantly would mean that it is more than 51% but would allude to a much, much higher percentage.

In the NAR definition of substantial experience, (practical experience), NAR feels that five commercial real estate transactions with an aggregate value of at least \$3 million in the prior 5 years or 10 transactions with an aggregate value of at least \$10 million in the prior 10 years including 3 transactions in the prior 3 years is sufficient. By NAR's own estimate, approximately 800 RE Participants would request exemption. By their own assumption these 800 would deliver an agent agreement 6.63 times a year. This totals over 19 every 3 years. If the SEC were to grant this exemption I would expect the bar to be much higher than a transaction a year. Keep in mind, the 6.63 times a year are transactions that would require a 1031 transaction. These "predominantly engaged agents probably do more than 6.63 transaction a year. If they did only 6.63 and received compensation from TIC would they then be "in the business" and require a series 22 license?

NAR states that a signed buyer's agent agreement would have to be involved. This sounds like protection for the Real Estate Agent but the form has to be delivered to the Lead Placement Agent at CLOSING. In other words, agents can be changed, added, renegotiated up until closing. Since most of these transactions are to complete a 1031 tax deferred exchange and time is of the essence the last thing a TIC transaction needs are "loose cannons" at the twelfth hour.

Under the General Conditions:

1. NAR states that the replacement property must qualify for purposes of IRC section 1031. Who is to make that determination other than the attorney's opinion found in the PPM. It looks as though NAR is now placing the burden on the Lead Placement Agent and off the sponsor, sponsor's attorney, buyer's agent and buyer's CPA, and buyer's attorney.
2. NAR would like the advisory fee to be paid directly to the Real Estate advisor from the buyer,(that will never, never happen), or by the sponsor. If this is an advisory fee and the Selling Broker-Dealer is apparently doing the **vast** majority of the work then the fee should be paid out by the Selling Broker Dealer, or directly from the buyer,(that will never, never happen), with proper documentation signed by buyer acknowledging the payment by buyer,(that will never, never happen).

I see where the Selling Broker-Dealer must perform a suitability analysis of the TIC Security. This opens up the possibility of the Real Estate Advisor coaching would be buyers on how to respond. This I believe is a real possibility and threat to the TIC industry. The sub-prime loan fiasco happened because licensed agents and mortgage brokers subverted the suitability guidelines and have put the entire real estate industry and market in a very expensive disaster. This could easily filter into this business. There are no safeguards, no mandatory errors and omissions, no consequences for Real Estate Agent "missteps.

I believe that allowing this exemption would open the door for agents who sell a small investment property, (rental home, duplex, etc..) could then allow an agent in their office who has some experience in commercial to take the buyer and then shop him out to a SEC licensed agent. No suitability, no knowledge of the buyer only an opportunity to make a commission. In other words, commission first buyer suitability second. Sounds a lot like sub-prime all over again!

Another question that may not be obvious. How does one verify the transactions that qualify the Realtor? Real Estate agents maintain records for 3 years. Are we to take their word for it that they have done transactions over 3 years prior? Can they provide proof from their E & O for over 3 years from their renewal applications? If not, no exemption! Maybe they should request an exemption per transaction if they did meet the experience acid test. Per transaction should mean they are the **listing agent** at the time of request. This would mean that they have some personal knowledge of the client other than a referred "hot one". They could put in their request during the listing period with proper documentation so that the SEC could verify and grant exemption either during the listing or escrow process. To keep from being inundated with bogus requests an application fee to cover the verification process could be charged. Once again, may I remind NAR that they are requesting an exemption for approximately "800" experience agents. Their ability to prove their knowledge and experience should not be a problem but should be their burden! If the property that is to be exchanged closes escrow prior to the granting of the exemption then no exemption! This would prevent unscrupulous agents and buyers from shopping themselves or their clients for a "piece of the commission".

I do not want to sound negative when it comes to Real Estate agents but I am a Broker and I believe that Real Estate industry has enough areas to work on to make it safer for the average consumer that the TIC area does not need their problem agents spilling over.

Once again, may I remind you, where is the punishment for an agent to lie at the time of request. Will he be denied the honor of wearing his "Realtor" pin for a six month period? Will NAR push for the different State Departments of Real Estate to punish or suspend or expel an agent who falsifies his request to the SEC.

I have only read through this once and these were the glaring problems. I have not even touched upon the advertising that is going on today. There are agents alluding to TICs at this time and agents who have called me looking for referral fees. They have never mentioned suitability, just how much can they get.

Under request for comment, one bullet asks, “Are there education and experience designation from groups other than those affiliated with NAR that would be appropriate to name specifically as evidencing “substantial experience in commercial real estate”? The answer is yes. SEC !

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