

December 10, 2007

Office of the Chief Counsel  
Attn: Nancy M. Morris  
Division of Market Regulation  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-6628

Re: File No. S7-26-07

To Whom It May Concern:

The NAR exemption request has two major components, investor protection and the ability for real estate brokers to receive compensation. As a dual licensed real estate salesperson and registered representative, I believe that there are several serious deficiencies in the SEC Release No. 34-56779, as written. Keeping in mind that the vast majority of real estate brokers and registered reps are honest, hardworking individuals who work in the best interests of their clients – we must be mindful that regulations of all types are written to prevent unscrupulous advisors (of all kinds) from taking advantage of investors.

If the exemption is granted, the following issues must be addressed, and procedures implemented to assure compliance.

**1) Selecting the appropriate replacement property for investors:** Under current FINRA (Financial Industry Regulatory Authority – formerly known as NASD) rules, before a registered representative is permitted to review a potential TIC offering, the affiliated broker/dealer is required to perform extensive due diligence to insure that all of the material facts of the transaction are appropriately disclosed. In addition, the broker/dealer is required to obtain and evaluate third party due diligence reports. Once this is completed, the broker/dealer is required to sign a selling agreement with the sponsor/promoter.

Under the proposed exemption, real estate brokers are permitted to engage in the sale of a security by presenting TIC offerings to their clients – but there are no requirements that independent due diligence be performed by the real estate broker. If the real estate broker is really adding value, then they must be required to do independent due diligence and have a selling agreement in place prior to the investor seeing the offering material.

**2) Time constraints:** An investor, who is attempting to complete a 1031 Exchange, must identify a property within 45 days of closing on their relinquished property. The vast majority of investors will either decide to reinvest in a single property or choose to purchase a smaller share in several Tenant In Common offerings. The advantage of the TIC offerings is that the investor is buying a smaller piece of a substantially higher quality product, and in buying several, attempting to diversify their risk. Everyone can agree that a commercial real estate broker is the correct choice when the investor is buying a single replacement property, since all aspects of the transaction must be evaluated – which takes considerable time, effort and knowledge of the local market.

The TIC replacement property is a significantly larger investment with many moving parts. The requirements placed upon the broker/dealer to perform due diligence is appropriate considering the size and scope of the overall investment. The real estate community does not appreciate the cost, effort and detail that is involved in this process. It is impractical to expect that an individual commercial real estate broker would be able to evaluate all of the various TIC offerings, and do the appropriate due diligence on each, in order to make a recommendation to the investor within the 45 day identification window. If the investor decides that purchasing a TIC offering is more appropriate, the registered rep who represents a wide range of broker/dealer approved opportunities is the logical advisor to the investor.

Once an investor decides to proceed with a TIC purchase, the commercial real estate broker should introduce the client to a registered rep and be able to receive compensation. The commercial real estate broker should only offer additional advice at the client's request to evaluate the various opportunities being offered.

**3) Timing of the sales process:** It is extremely important that the registered rep be brought into the sales process as early as possible, and certainly before any specific property is presented to an investor. Many investors do not meet the accreditation standards, and if they are too far along in the identification process, their options will be limited and they may lose the opportunity to complete a 1031 Exchange using traditional real estate.

**4) Investor suitability:** As registered reps, it is our responsibility to not only make sure that the potential client is accredited, but that the investment is suitable and consistent with the client's investment objectives. The regulations as written do not provide for this safeguard either. The commercial real estate broker is not required to affirm that the client is accredited – and since the broker is not required to perform due diligence and sign a selling agreement with the sponsor, the suitability of the investment is impossible to ascertain.

**5) General solicitation:** The securities community is well aware of the prohibitions against general solicitations, and the SEC and FINRA regulate all registered and associated persons. Real estate brokers would not be subject to the same oversight. In addition, enforcement would be impractical with the increased number of offices that would enter the market to provide services to the potential TIC investor.

The concern is that inappropriate inducement of sales upon owners of real estate with the promise of higher cash flows may occur. We should be cognizant of the fact that there is a potential for real estate brokers to “double-dip” by earning commissions on both sides of the transaction, which may also lead to abuse. One might argue that the only way to prevent this practice would be to allow a real estate broker to receive compensation from only one leg of a transaction. At the very least, commercial real estate brokers must fully disclose their potential compensation to the investor.

**6) Liability sharing:** Any professional who receives compensation from the sale of a TIC offering must accept a share of the liability commiserate with the work performed and compensation received. All parties must be required to maintain Liability Insurance as well as Errors and Omissions Insurance for the life of the investment.

**7) Compensation for the introduction:** Once a commercial real estate professional brings an investor to a registered rep, the advisory fee should reflect the services provided and should not exceed what is customary for a referral of this size. While I am aware that the SEC is hesitant to set a fee, there is precedent for doing so. As a registered rep I receive the same fee, regardless of the sponsor or the offering that I recommend. This way, the investor knows that my recommendation is based upon what I believe to be in his/her best interest, and not because I am influenced by the ability to earn higher fees from a different offering.

Without setting compensation levels, the inexperienced registered reps will offer higher splits. The problem will be that real estate brokers will refer to the registered rep who will give them the highest fee, and not necessarily the more experienced registered rep who would be a better advisor. If there is a set fee structure, real estate brokers will endeavor to seek out the best registered rep, and the investor will be better served.

Of course, there must be prohibitions from deals with real estate brokers where consideration is paid outside of the transaction.

**8) Define who is a commercial real estate professional:** Commercial real estate brokers must be current in their licenses, disclose any disciplinary actions on their record, and have a professional designation from an accredited program provided by a NAR affiliated institute, or some hybrid certificate from a new FINRA approved designation program. Allowing for anything less than a professionally earned designation will invite abuse. The “self affirming” declaration that one has the educational equivalent or transactional experience to be considered a commercial expert, should be unacceptable. Having earned a professional designation is verifiable and the only clear indication of the knowledge that is required to participate in a transaction.

In addition, there must be a requirement that the real estate broker only offer advisory services with regard to the property types that fall within their area of expertise. A CCIM who specializes in leasing warehouse space in Cincinnati should not represent to the client that they can add value by advising on a multi-family property in Arizona.

**9) Buyers agency agreement is inconsistent with investor protection:** Many investors seek advice from several registered reps before selecting the professional that they want to work with. An exclusive agreement that allows the real estate broker to control the process, limits the investor’s options. Furthermore, the investor should have input regarding how commissions are split so that the party adding the most value is appropriately compensated for their efforts.

**10) Dual registration:** Any person who wishes to present TIC offerings to investors should be dual registered. Registered representatives should hold a real estate salespersons license, and commercial real estate brokers should obtain at least a Series 22 & 63 registration from FINRA. This way, FINRA has regulatory authority and oversight over all parties involved in a transaction. At the end of the day, we’re talking about an investment in **securitized real estate** and someone should have a working knowledge in both disciplines (or at least submit to FINRA jurisdiction for enforcement) before they make investor recommendations.

**11) FINRA Rule 3060:** Registered persons are not permitted to give or receive gifts that exceed \$100 in any calendar year – to avoid unfair inducement and conflicts of interest. This applies to registered reps, affiliates and their agents. What limits on non-cash compensation will be placed on the real estate brokers, and who will be in charge of monitoring and enforcing compliance with the rules?

**12) Captive representatives of a sponsor:** Sponsors must be prohibited from having an in-house captive registered rep who only recommends that particular sponsor's products. Registered reps should be independent and potential investors should be presented with a minimum of three TIC opportunities that are being offered by different sponsors. Without this regulation, investors will not be educated enough to make an intelligent decision. It is important to provide for appropriate investor due diligence and this can only be accomplished if the investor evaluates several programs offered by different sponsors.

**13) Product information:** Sponsors (both securitized and non-securitized) should be prohibited from discussing their offerings or providing sales materials and/or a PPM to any real estate broker until the affiliated broker has performed the appropriate due diligence and has a signed selling agreement in place.

**14) TIC vs. traditional real estate:** The real estate community may not understand the difference between traditional real estate and a securitized interest in a Direct Participation Program (DPP) that uses real estate as the underlying asset. Traditional real estate is transaction based – once the sale is complete, the broker's involvement ends. In a DPP, the responsibility for monitoring the performance of the property and assisting the client to understand the ongoing financials and fluctuations in the market doesn't end until the interest is sold. The registered rep earns a fee not only for evaluating and recommending a particular offering – but for providing service to the client during the life of the investment.

**15) Investor recourse:** When an investment goes bad, the investor will seek some sort of redress. Will the investor be forced to go to arbitration against the broker/dealer and registered rep, and then seek restitution from the real estate broker in a civil proceeding? How will forcing the investor into separate legal arenas be in their best interests?

**16) Advice outside of the PPM:** Investors are required to attest to the fact that their investment decision was made solely on the basis of the information contained in the PPM. Since the investor is not permitted to rely on additional information, what value can the real estate broker add that isn't already being provided?

### **CONCLUSION:**

The issues that have been identified must be resolved if the Exemption Request is to be granted. I have attempted to be objective in offering suggestions – but this all has to do with the process rather than substance.

I believe that the SEC should take the Nancy Regan approach, and "Just say No!" This entire discussion has been disingenuous. NAR members want to receive a referral fee for recommending a TIC offering to a potential investor. They knew that the term

“referral fee” would never pass the SEC smell test, so they call it an “advisory fee.” Let’s all just be honest about what we’re talking about.

The argument that a real estate professional can add value is true – but guess what – we already do! The vast majority of registered reps are dual licensed and hold real estate sales and brokers licenses. We’ve chosen to specialize in a niche market. We have become educated in Internal Revenue Service codes, securities regulations, investment strategies, real estate investments and more. We review financials, calculate the loads, dissect the assumptions, review the market data, read third-party reports, and most importantly, we know which sponsors to avoid. We are compliant, professional and the best advisor to an investor on these very unique products. Does the real estate community also understand that a TIC offering could be in oil & gas, hotels, senior housing facilities, golf courses, marinas, and more? What value can the average real estate broker offer when advising on those very specialized investments?

A TIC offering is not just real estate – it is a securitized interest in a DPP that uses real estate as the underlying asset. If the exemption is passed, will a real estate broker be able to advise an investor who wants to invest in a REIT and receive compensation for their time? After all, the underlying asset in a REIT is real estate. Where does it end? Should a doctor receive compensation for evaluating a bio-tech stock offering? Allowing an unregistered person to engage in the process of offering a security is wrong. Saying that the investor needs another advisor in order to be protected assumes that the investor is not receiving expert advice already – and this is simply untrue.

The SEC and FINRA have been very careful to regulate the TIC industry to prevent investor abuse, and the reoccurrence of the Limited Partnership debacle of the 1980’s. The checks and balances that were instituted make the selling of securitized real estate much more difficult – but all in the name of investor protection.

The SEC must not allow political pressure to alter its fundamental mission. Allowing unregistered sales representatives to engage in the sale of a security will not be in the investor’s best interests. The “Law of Unforeseen Consequences” is in play, and this exemption may very well have an adverse affect on investors and the securities industry in general.

Thank you for the opportunity to provide comments.

Respectfully submitted,

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