



December 10, 2008

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:

I am writing to share my comments and thoughts relative to the SEC/NAR proposal referenced above, whereby a real estate broker without securities licensing could earn a fee in a Tenant In Common securities transaction. I am currently a Registered Representative and licensed with Omni Brokerage of Salt Lake City, Utah. I am also a 21 year veteran of the commercial real estate industry having worked primarily in Asset Management of large institutional quality properties (office buildings, shopping centers and industrial properties) on the West Coast.

There are a number of points that I would like to make relative to the proposal made by the SEC. While I am in favor of the ability to compensate commercial real estate brokers who have investors that might consider a Tenant In Common for their 1031 Exchange, I firmly believe that more rigorous guidelines should be put in place to insure that the investors in these transactions receive the appropriate amount of guidance, due diligence and most importantly disclosure.

### **Sales Process**

In my opinion, this is the key issue in the proposal. As a registered representative I am held to a very high standard-one imposed by Regulation D-in the way I market Tenant In Common investments to prospective clients. This standard is imperative to the protection of the investor as it helps insure that investors are suitable for Tenant In Common investments and that they are presented properties with full disclosure and awareness of the risks inherent to these kinds of real estate transactions.

If the generally accepted sales process utilized by real estate brokers is allowed in the Tenant In Common securities arena, investors can and will be shown a property before a registered representative becomes involved. At that point, the registered representative can become simply a facility for execution of the transaction. This is very dangerous because the appropriate disclosure did not take place before the investor makes a decision to purchase.

After that decision to purchase has been made, the real estate broker will simply look for the registered representative who can facilitate the transaction with the least amount of due diligence at the property and investor levels. In this scenario, the investor protections established by Regulation D are diluted if not completely eradicated in the sales process.

### **Due diligence**

Tenant In Common properties are highly specialized investment products. Not only do I utilize my real estate experience to evaluate the assets, I am also dependent on the due diligence supplied by my broker dealer as well as various third party reports. Real estate brokers rarely have the resources supplied as a result of the SEC and FINRA's oversight of our industry. In fact, it's FINRA's own notice to members that we follow in order to insure that independent analysis of the sponsors and the Tenant In Common properties they supply is available for review in support of the investor.

### **Qualifications of the Advisor or Broker**

Given the amount of experience I have had in the commercial real estate industry, I am convinced that the qualifications of an advisor in a Tenant In Common transaction are enhanced if that advisor has at least some exposure to commercial real estate investments. In this sense, the involvement of a commercial real estate broker can be helpful. However, given the specialized nature of the Tenant In Common industry and the significant complexity associated with a large office, retail or industrial properties, the typical commercial real estate broker may provide little value to the investor without the aid and assistance and an experienced Tenant In Common specialist. Additionally, an advisor must have some experience or understanding of how a 1031 Exchange works (most Tenant In Common investors do so under IRS Guidelines for a 1031 Exchange).

The SEC/NAR proposal should take this fact seriously as it considers the metrics established for an unlicensed commercial real estate professional's involvement in a Tenant In Common transaction. Many commercial brokers have little if no idea how to review a 10 year pro forma for a commercial office building, particularly one that might be located on an opposite coast. Because of Securities licensing procedures, a registered representative can be licensed to work anywhere in the country and often has resources available in various markets that a typical commercial real estate broker does not have.

With a complex investment product, a national landscape of available properties and a numerous tax implications related to Tenant In Common transactions, I would ask that the SEC do it's best to define the experience and background a commercial real estate broker will have before they can earn an advisory fee in a Tenant In Common transaction. Again, the investor is served best in this circumstance as they will only be exposed to brokers whose obvious incentive is only to assist them in acquiring the most suitable property or properties into which to invest.

## **Suitability**

In my opinion, suitability is the key component of protection for the investor that is at risk if the SEC/NAR proposal were to be ratified in its current form. As an advisor and registered representative, I regularly tell clients not to invest in properties, to improve liquidity in their portfolio, pay taxes, not sell their current solo ownership property, etc. I am bound by FINRA and Regulation D to insure that the investment is suitable for the investor. Commercial real estate brokers who can engage in the sales process without the immediate involvement of a registered representative will not consider the many factors a registered representative and TIC specialist must consider before assisting the client in making an investment. For example, I have numerous clients whose 1031 Exchange might have a value of \$1,000,000. A commercial real estate broker would normally put that into one concentrated investment. I routinely diversify an investment of that magnitude into two or three Tenant In Common properties. If that commercial broker is not working with a registered representative closely through the entire sales process, these key considerations will be lost and the investor will be not be served.

## **Advisory Fee Compensation and Allocation of Liability**

If you have not already seen some of the feed back from the real estate brokerage community on this proposal, you are missing another unfortunate aspect of the incentive NAR and commercial brokers relative to compensation in these transactions. I have seen significant e-mail traffic from brokers who are simply calculating the commissions they could earn if allowed to earn a fee in Tenant In Common securities transactions. One commercial real estate broker went as far as calculate the fees that are currently not being earned in the entire state of Colorado! Interestingly enough, successful real estate brokers have little interest in this proposal because they are already earning a good living in their areas of specialization and not simply looking to garner a fee in a business where they have little experience or knowledge. With this in mind, I firmly believe that the SEC should set some sort of metric towards the level of compensation a commercial real estate broker can earn in a Tenant In Common transaction. If the fee is arbitrary, and there is no control on the sales process, then why would anyone approach this business as a registered representative? In fact, I would personally have to think carefully as to whether I would maintain a securities license if the license simply became a facility to execute a transaction rather than truly support the investor throughout the process.

This also brings up the issue of liability in Tenant In Common securities transactions. The SEC and NAR must address this issue. If a registered representative earns a fee that is arbitrary in the transaction and was involved in the selling process, it does not make sense that he or she take on the liability for potential problems that may arise in the investment. In fact, we pay significant money for errors and omissions insurance in this highly specialized industry. If there is no allocation of liability in these transactions, it may be difficult to obtain such insurance.

Chief Counsel, I know you are receiving significant correspondence from NAR and the real estate brokerage community. I hope you will consider that those of us who have been working with investors in the Tenant In Common securities industry, and those of us who have responded to the proposal, are well aware of the process, structure and risks of a Tenant In Common investment. I am in support of an advisory fee for a commercial real estate broker in a Tenant In Common transaction. However, given my 5 years of experience in this industry, I would ask that you take special consideration of the issues raised by registered representatives who are working every day with existing and prospective Tenant In Common investors. If we can structure the involvement of a commercial real estate broker in Tenant In Common transactions such that there is a high level of focus on the investor, and that the selling process is pure in the spirit of Regulation D, we can maintain an industry that ultimately will continue to serve investor interests.

Thank you.

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