

December 17, 2007

VIA E-MAIL (rule-comments@sec.gov)

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

RE: File No. S7-26-07

Dear Ms. Morris:

Our company is an issuer of tenant-in common real estate securities (“TICs”) and, therefore, is acutely aware of the issues surrounding involvement of real estate brokers in TIC securities transactions, as proposed by NAR (the “Proposed Exemption”) in the above-captioned file.

Involvement of real estate brokers in TIC transactions would increase awareness of TICs as a suitable option among persons engaged in Section 1031 exchange. Since most TICs are sold in reliance upon the exemption in Rule 506, involvement of real estate brokers also could assist registered representatives in developing a substantial relationship with prospective TIC investors earlier, thereby increasing the number of suitable offerings available to each prospective TIC investor.¹

Although we welcome the possibility of compensating real estate brokers for services provided to TIC investors, we have some concerns about the Proposed Exemption, as described below.

Credentialing

We are concerned that the Proposed Exemption contains no requirement that real estate brokers serving as buyers’ brokers in TIC transactions (hereinafter referred to as “TIC Buyers’ Brokers”) have any particular knowledge of TICs or the securities laws governing their sale. We believe that it is critical that TIC Buyers’ Brokers be required to receive specialized training about TICs and the securities laws associated with TIC offerings. This specialized training will help to assure that investors are receiving advice from a TIC Buyers’ Broker who is familiar not only

¹ See generally Elizabeth Ayres Whitman, *A “TIC”ing Time Bomb – Rule 506 Meets Section 1031*, 12 Fordham J. Corp. & Fin. L. 121, 161 (2007).

with commercial real estate but also about issues peculiar to TICs, including Rev. Proc. 2002-22 and TIC structures.

Requiring training regarding securities fraud, the general advertising and general solicitation rules, and other securities laws relevant to TIC offerings² is critical as a safeguard against a TIC Buyer's Broker from inadvertently violating those laws and potentially causing harm not only to the investor but also to the sponsor, broker-dealer, and registered representative. Therefore, we propose that a TIC Buyers' Broker be required to obtain at least eight hours of continuing education on TICs, including applicable securities laws (as described below), at least once every two years. To provide some level of quality control, such continuing education should be required to be approved for continuing education credits by the real estate licensing agency in the state in which the TIC Buyers' Broker is licensed, and proof of compliance should be required to be presented to the broker-dealer along with the Buyer's Agent Agreement.

We support establishment of a quantitative threshold to describe when a Commercial Real Estate Professional is "predominantly engaged" in the sale of real estate other than TIC securities and propose that the threshold be set at seventy-five percent (75%). We also propose that quantitative factors in the definition of "substantial experience in commercial real estate" be adjusted for inflation along with any adjustments to the financial thresholds utilized in the definition of "accredited investor" for purposes of Rule 506 (but no less frequently than every five years).

Securities Law Compliance

We assume that as buyers' agents, the general solicitation and general advertising rules (which are only applicable to issuers and persons acting on behalf of an issuer) would not be applicable. However, we are concerned that the Proposed Exemption does not expressly state that TIC Buyers' Brokers would be exempt from the general solicitation and general advertising prohibition in Rule 506 offerings, under which TIC securities generally are offered. As a protection to sponsors, broker-dealers, and registered representatives from claims that a TIC Buyers' Broker's activities resulted in loss of the Rule 506 exemption, we suggest that the SEC's final exemptive relief clarify that TIC Buyers' Brokers are acting only on behalf of the TIC investors and are, therefore, not required to comply with the general solicitation and general advertising prohibitions. Nevertheless, we believe that the continuing education course described above include basic instruction in Rule 506 requirements so that TIC Buyers' Brokers have at least a basic understanding of the constraints within which the TIC industry must operate.

We are concerned about the absence of any requirement that TIC Buyers' Brokers obtain training in securities fraud. Unlike the general solicitation and general advertising prohibition, the antifraud provisions in Rule 10b-5 potentially would be applicable to TIC Buyers' Brokers. Due to the difference in disclosure philosophy between securities and real estate transactions (i.e. disclosure of all material information versus *caveat emptor* or "buyer beware"), without proper training, TIC Buyers' Brokers may not appreciate the need for disclosure in a TIC transaction. There is SEC precedent for requiring real estate brokers involved real estate securities

² See *Securities Law Compliance, infra*.

transactions to undergo training in securities fraud,³ and we urge that any SEC exemption impose a similar requirement for TIC Buyers' Brokers to obtain approved continuing education, as described above.

Terms of Buyer's Agent Agreement

The Proposed Exemption contemplates that sponsors will be expected to pay the investor's Real Estate Advisory Fee (with possible commensurate reduction in broker/dealer commissions) but that the terms of the Buyer's Agent Agreement likely will be determined by the real estate broker and signed before the TIC offering is presented to the investor. We are concerned that the TIC Buyer's Broker may negotiate a Buyer's Agent Agreement with a prospective investor prior to broker-dealer or sponsor involvement.

In particular, we are concerned that investors may agree to a two percent (2%) Real Estate Advisory Fee based upon the total purchase price. This commission structure would be reasonable in a traditional commercial real estate transaction, but generally would be excessive in a TIC transaction in which a broker-dealer was involved. TIC equity offerings typically represent approximately one-third (1/3) of the total real estate purchase price, with the remaining two-third (2/3) of the purchase price being paid by assumed debt/mortgage. Therefore, a two-percent (2%) Real Estate Advisory fee would amount to approximately six percent (6%) of a TIC equity investment.

Typical broker-dealer compensation in TIC transactions is as much as nine percent (9%) of the TIC equity investment (rather than the total purchase price, which includes assumed debt), with seven percent (7%) being commission. If the sponsor were to pay a six percent (6%) Real Estate Advisory Fee, and the broker-dealer commission were reduced accordingly, then the broker-dealer who presented the TIC offering, conducted the suitability analysis, and coordinated the sale, would have a reduced commission of only one percent (1%). Such a small commission would be unfair given the risk to the broker-dealer and therefore, is not likely to be accepted by the broker-dealer community, rendering any exemption ineffective. If the broker-dealer commission were not commensurately reduced, then total compensation to broker-dealers and real estate professionals combined could amount to an unacceptable level, perhaps as much as fifteen percent (15%) of the TIC equity offering. We believe that increase in total compensation to broker-dealers and real estate professions beyond the ten percent (10%) aggregate level permitted by the SEC in *Gunnar & Associates*⁴ poses an unacceptable burden on TIC investors whose equity investments would be utilized to pay that compensation.

We suggest that the SEC require that the Real Estate Advisory Fee be based upon either a reasonable fixed fee or upon a percentage of cash investment so that the method of computation is comparable to that currently utilized by broker-dealers in the TIC industry. We further suggest that regardless of whether the Buyer's Agent Agreement provides that Real Estate

³ In *Roland University Properties*, SEC No-Action Letter, 1984 SEC No-Act. LEXIS 2461 (Apr. 9, 1984), real estate brokers working along with broker-dealers in the sale of condominiums tied to rent pooling arrangements were required to receive training on the antifraud provisions of the federal securities laws, the use of a prospectus and limitations on advertising and promotion.

⁴ SEC No-Action Letter, 1983 SEC No-Act. LEXIS 2890 (Sept. 19, 1983).

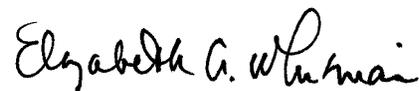
Advisory Fee is to be a fixed fee or be determined as a percentage of cash investment that such fee be limited to one percent (1%) of the cash investment actually made by the investor. Such a limit upon the Real Estate Advisory Fee would provide compensation for TIC Buyers' Brokers for their advice to investors, would limit the adverse impact on broker-dealers. Limiting the Real Estate Advisory Fee in this manner also should prevent any need to increase the aggregate compensation payable (whether to real estate brokers or broker-dealers) out of the offering, so TIC investors would not be adversely impacted.

Finally, we are concerned that the Proposed Exemption provides that the Buyer's Agent Agreement need not be presented to the Lead Placement Agent until closing. We believe that it is critical that the Lead Placement Agent verify the TIC Buyer's Agent's authority and qualifications prior to presenting any TIC offerings to the TIC Buyer's Agent's client. Therefore, we propose that the SEC require that real estate brokers produce evidence of their qualification to serve as TIC Buyers' Brokers (including qualification as a Commercial Real Estate Professional, completion of any required continuing education specific to TICs, and a copy of the Buyer's Agent Agreement) at the time each investor is introduced to the broker-dealer.

Conclusion

We appreciate the opportunity to comment upon the Proposed Exemption that would permit payment of a real estate commission to real estate brokers in TIC transactions. We are generally in favor of involving real estate brokers in TIC transaction. However, we believe that specialized education in TICs and securities laws, as well as limitations on the compensation to TIC Buyers' Brokers, are necessary to protect TIC investors from real estate brokers who might charge a high fee for inadequate advice.

Very truly yours,



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