December 17, 2007

Ms. Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F. Street, N.W.
Washington, D.C. 20549

RE: National Association of Realtors Application for SEC Exemptive Relief [Release No. 34-56779; File No. S7-26-07]

Dear Ms. Morris:

I write in response to the Commission's invitation to submit comments or other information related to the requested exemption by The National Association of Realtors (NAR), on behalf of its members. I appreciate the opportunity to submit comments regarding the above-referenced release and the October 11, 2007 request letter from Skadden, Arps, Slate, Meagher & Flom LLP, written on behalf of NAR.

The premise behind the application of NAR for exemptive relief under sections 15 and 36 of the Securities Exchange Act of 1934, as amended (the "Exchange Act") appears to be that the licensed realtors are not being paid to effect transactions in securities, but instead to provide advice to investors about real estate, and therefore they should not be required to be licensed as representatives of a broker-dealer to engage in this activity. We believe this premise is fundamentally flawed. Investors are solicited to trade real estate for a passive interest in a partnership or similar entity in the TIC transaction. These clearly are securities transactions. They cannot be separated into unrelated transactions. The investor is being solicited to purchase securities, in exchange for a contribution of cash derived from real estate.

If real estate professionals are paid transaction based compensation in these transactions, they ought first to be registered as representatives of a broker-dealer. This is both appropriate and necessary in order to assure investor protection through the application of Commission and FINRA broker-dealer rules, representative qualification and licensing, suitability obligations, and supervisory requirements to the customer relationships and transactions. The dual nature of the transaction provides no basis for an exemption. I, and many others, have become securities licensed for this purpose, and such licensure is readily available to NAR's members who want to be involved in TIC securities transactions.

In other contexts, most prominently insurance securities such as variable life insurance, the Commission has always required the relevant persons to be qualified as registered representatives (in addition to holding insurance licenses) in order to be involved in the transactions and be compensated. The same is true in the case of bank employees involved in referrals of bank customers to securities firms. The Commission has a lengthy record of requiring bank employees to be licensed to be engaged in a substantive way (or compensated on a transactional basis) in order to be involved in those customer's securities transactions.[1] No record has been created through the

[1] The NAR application contains a lengthy recitation of state regulation of real estate agents. However, the idea that this form of regulation is remotely comparable to securities licensure is simply incorrect and

current exemptive application that would support a different result for TIC securities transactions for real estate agents. Without a factual record and basis to support the proposed exemption and showing that it is necessary or appropriate in the public interest and demonstrating that investor protection requirements will be adequately satisfied by alternate means, and distinguishing a wealth of Commission precedent in the other direction supporting the licensure requirement in this context, the proposed exemption fails to meet the standards for approval under Section 36 of the Exchange Act (because there has been no showing that the exemption is necessary or appropriate in the public interest, or that it is consistent with the protection of investors), or the Administrative Procedure Act, 5 U.S.C. § 706 (because the exemption is arbitrary and capricious and an abuse of discretion).

To the extent that the premise for the exemption is that the role of the real estate agent is merely to provide advice to the customer, and not to effect the securities transaction, that premise is equally flawed. Payment of compensation, whether directly or indirectly to a customer for advice regarding securities transactions or investments, requires licensure as an investment adviser or as an investment adviser agent, unless an exemption applies. Fundamentally, the transaction is about an investment in securities. The investor is not purchasing real estate; they are using cash derived from real estate as consideration to purchase TIC securities. Thus, to the extent the real estate professional is being compensated for providing advice (rather than for effecting a transaction), that advice in inextricably bound up in advice about investing in securities. Although there is an exemption from investment adviser registration for broker-dealers (provided they do not receive "special compensation" for provision of investment advice), that exemption is quite narrow and cannot be extended by exemptive order. *Financial Planners Association v. Securities and Exchange Commission*, 482 F.3d 481 (D.C. Cir. 2007). Moreover, if the real estate professional is not licensed as a broker-dealer or representative of a broker-dealer, the broker-dealer exemption from investment adviser registration would be entirely inapplicable.

We believe that it would be arbitrary and capricious, an abuse of discretion, and contrary to law, within the meaning of the Administrative Procedure Act, for the Commission to grant an exemption under Section 15 and 36 of the Exchange Act in a context in which the non-securities licensed real estate professionals who would be compensated to provide "advice" concerning the real estate/securities investments and transactions, within that exemption would be in violation of the Advisers Act and state investment adviser registration requirements through the use of the exemption. The Commission cannot sidestep the obvious investment adviser licensing issue in issuing this exemption. *Cf. Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 418 (1965) (federal agency must consider applicable states laws in its administrative actions); Iowa *Independent Bankers Association v. Board of Governors*, 511 F.2d 1288, 1292 n. 4 (D.C. Cir. 1975) (consideration of public benefits in acting upon application requires

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unsupported by the record. A much stronger case can be made that insurance agent licensing, bank regulation, or accountant licensing provides an alternative investor protection system, and yet the Commission has repeatedly rejected such arguments for many years in the context of requiring securities licensure of professionals from those industries. Moreover, there is ample evidence in the news that real estate agent licensing does not provide strong protections to customers, based on the involvement of many licensed real estate agents over the past five years in placing their clients in houses they could not afford and arranging mortgages that they could not pay, leading to the current crisis in the sub-prime mortgage markets.

federal agency to consider other applicable state and federal laws directly implicated by the order and the constitutionality of those laws).

The proper course for NAR, or any other party, who sells advice to a securities investors is to register as an investment adviser pursuant to the Investment Advisers Act of 1940 ("the Advisers Act"), and applicable state law. As you know, the Advisers Act defines an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the **advisability of investing in**, purchasing, or selling securities." The 1971 Woodmoor Corporation no-action letter provided guidance …"the components of the investment contract are not separable", hence, providing advice regarding any component, is providing advice about investing in securities.

If, **after** such an investment adviser is properly registered, he or she were to enter into an agreement (which is mandated in some states) with an investor to receive transaction-based compensation that is derived primarily from advisory services, only **then** would be timely and appropriate for that registered investment adviser to apply to the SEC for exemptive relief under the Exchange Act pursuant to NASD (now FINRA) Notice to Members ('NTM") 05-18. Granting that exemption as a class by order, rather than through the normal rulemaking process, or upon individual exemptive applications, and in the absence of any effort to address the intertwined Investment Adviser Act issue, is entirely inappropriate, not consistent with the public interest or investor protection considerations in the Exchange Act, and in conflict with the processes dictated, and standards for agency action, under the APA.

In effect, the NAR application seeks to impose a transaction-based advisory fee methodology on an unknown future class of investors, to the benefit of an unknown class of licensed real estate brokers, who as far as one can surmise from the record, are presently unregistered investment advisers. However, each state has its own requirements regulating the appropriate relationship between an investment adviser and a potential investor; it would be arbitrary and capricious for the SEC to submit to NAR's attempt to mandate a transaction-based compensation methodology. Mandating compensation methodology in the free market is not the role of the federal government. Advisory services are generally not paid for on a transaction-based compensation basis. SEC precedent supports this, in the 1984 Markham Investments no-action letter, the SEC allowed a purchaser's representative to receive compensation for advising a client as to a real estate investment, but the compensation was not transaction-based. It was paid regardless of whether the investment was actually made.

Because NAR and the real estate licensees it may represent are requesting an inappropriate exemption, I urge that it be denied as inappropriate and not in the public interest, nor is it consistent with the protection of investors.

I appreciate your consideration of my comments. Please feel free to contact me with any questions at 858-454-3700.

Sincerely,

David H. Freedman, CCIM
Series 22 and 63 Registered Securities Representative