



December 17, 2007

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

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

Dear Ms. Morris,

We are submitting comments on the proposed exemption (the "Proposal") from the broker-dealer registration requirements of Section 15(a)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") described in Release No. 34-56779 (the "Notice") and in the letter dated October 11, 2007 from Skadden, Arps, Slate, Meagher & Flom LLP on behalf of the National Association of Realtors ("NAR") requesting the exemption (the "NAR Letter").

OMNI Brokerage, Inc. ("OMNI") is a FINRA-member registered broker-dealer whose business is primarily focused on the offer and sale of TIC Securities (as defined in the NAR Letter). Since 2001, OMNI has reviewed over 1,100 TIC Security offerings from over 80 different sponsors of TIC Securities. During such period, OMNI has offered and sold over \$1.35 Billion of equity in TIC Securities, through over 3,700 transactions to over 1,600 investors located in 41 states. OMNI and its affiliates have also surveyed many other participants in the TIC Securities industry, and believe that OMNI has transacted over 10.8% of the total TIC Securities transactions over the past six years.

OMNI has been actively involved in organizing TIC Securities industry meetings and organizations to facilitate improvements in the industry and foster improved sales practices and disclosures. We recognize the absence of federal and state regulation applicable to sponsors of Regulation D offerings made to accredited investors only, as well as the substantial leverage possessed by those sponsors in their dealings with

10542 S. JORDAN GATEWAY #330, SALT LAKE CITY, UT 84095 (801) 553-1031
OMNI Brokerage Inc
Member NASD/SIPC



broker-dealers. OMNI was an instrumental party in the organization of the Tenant-in-Common Association ("TICA") and remains an active participant in the leadership of TICA. An officer of OMNI (i) has been a member of the TICA Executive Committee since its inception, (ii) has been a member of the TICA board of directors since its inception, (iii) has been a member of the TICA Ethics and Standards Committee since its inception, (iv) served on the committee which authored TICA Alert 06-01, "*A Guide to Certain Best Practices*," and (v) is Co-Chair of the TICA Due Diligence and Compliance Committee. OMNI, and a registered representative of OMNI have also been recently awarded the 2007 TICA "A Champion of Excellence" award in the broker-dealer and registered representative categories, respectively. We note the foregoing to advise the reader that our comments are drawn from substantial experience in all aspects of the due diligence, marketing and sale of TIC Securities.

We appreciate the SEC considering comments from parties which will be impacted by the Proposal, if it is approved, and have confidence that the comment period will assist the SEC to gain valuable insight into the TIC Securities industry through reviewing and considering comments from different perspectives.

While we welcome the opportunity to work with qualified real estate brokers, we believe that significant issues exist under the Proposal, as submitted, that must be resolved prior to any approval of the contemplated exemption from broker-dealer registration under the Exchange Act.

1. The Proposal Will Limit Essential Broker-Dealer Supervision and Control of TIC Security Transactions.

Significant investor protection in the sale of TIC Securities is provided through the thorough scrutiny to which every offered TIC Security property is given by independent broker-dealers. The Proposal permits real estate brokers to make representations and present specific TIC Security properties to investors without broker-dealer supervision and important due diligence investigations. Therefore, the proposed timing of the involvement of real estate brokers will make it impossible for a broker-dealer to properly supervise and control the offer and sale of TIC Securities.

- a. The Proposal Allows the Real Estate Broker to Conduct Substantial Activities Without Broker-Dealer Supervision. Under the Proposal, prior to involvement of a broker-dealer, real estate brokers would be allowed to (i) solicit business relating to TIC Securities by including references to these services in a buyer's agent agreement, (ii) provide information, including marketing brochures, regarding TIC Security properties, (iii) give advice regarding real estate and other aspects of TIC Security properties, and (iv) conduct property tours. The Proposal does not require that a broker-dealer become involved until "the client advises that he or she is

considering the purchase of a specific TIC Security property." This standard is too vague and provides substantial leeway for the real estate broker to present, sell and advise as to TIC Security properties prior to involvement of a broker-dealer. The Proposal recognizes the need for the involvement of a broker-dealer in the transaction, but if the broker-dealer is not involved at all times while these activities are occurring, the activities will not be subject to requirements traditionally applicable to securities transactions and will not be supervised by parties familiar with securities law and regulations. For example, the Proposal, as drafted, provides no control over the adequacy or accuracy of the information provided to an investor by a real estate broker, nor are there any recordkeeping requirements relating to those activities. If the Proposal is approved, the conditions set forth in the Notice should be modified to require the real estate broker to introduce the investor to a broker-dealer upon determining that the investor may be interested in considering the purchase of an interest in a TIC Security property, and prior to the disclosure of any information regarding a TIC Security property.

- b. Investor Protection Requires that an Independent Broker-Dealer Perform Due Diligence and Approve for Sale an Interest in a TIC Security Property, Before it is Presented to Investors by a Real Estate Broker. Real estate brokers should not present a TIC Security property to any investor until the TIC Security property has been approved for sale by an independent broker-dealer. Through careful, objective due diligence, independent registered broker-dealers perform a critical function in an effort to ensure that TIC Security properties are not presented with significant flaws, such as (i) overly-aggressive projections, (ii) excessive fees and expenses, (iii) inappropriate disclosure of material facts, (iv) financial engineering of cash flow, and (v) inadequate capital reserves. This function is performed to maintain the quality and integrity of TIC Security properties offered in the TIC Securities marketplace. The Proposal permits real estate brokers to present specific TIC Securities properties to investors prior to an independent registered broker-dealer conducting due diligence, and approving the sale of a TIC Security property. Presentation of a TIC Security property to an investor by a real estate broker, based solely on information from the sponsor eliminates the critical checks-and-balances provided by independent broker-dealers. If the Proposal is approved, it should be modified to require that real estate brokers may present only TIC Security offerings that have been approved for sale by an independent broker-dealer.
- c. The Ability to Choose the Broker-Dealer Gives the Real Estate Broker Control. Even if the real estate broker brings a registered broker-dealer

into the transaction at an earlier stage, the real estate broker will be exercising substantial control through its ability to choose the broker-dealer to be introduced to the real estate broker's investor. Given that the real estate broker will be motivated for the transaction to close, and he or she receives a commission, we are concerned that real estate brokers will use firms that, unlike OMNI and other compliance-oriented broker-dealers, would "rubber-stamp" TIC Security offerings in an effort to obtain referrals. Further, given the lack of limits on sharing of compensation, real estate brokers likely will seek to give the broker-dealer only a small share of the total commission. We are concerned that a low level of compensation for the broker-dealer would be insufficient to support the substantial costs of robust supervisory, compliance and due diligence functions which protect investors, and that, once again, other firms that have lower-quality functions would serve the broker-dealer function in an increasing share of the TIC Securities business to the detriment of investors.

- d. Real Estate Brokers may Eliminate the Role of the Independent Broker-Dealer by Working Directly with the Sponsor. While many sponsors maintain affiliated broker-dealers, most of these affiliated broker-dealers are primarily engaged in wholesaling activities and work with independent broker-dealers in the sale of the sponsor's TIC Securities to investors. By allowing the sales efforts of the independent broker-dealer to be replaced by those of the real estate broker, the Proposal would allow the sponsor-affiliated broker-dealers to eliminate the need to work with independent broker-dealers and work directly with the real estate broker sales force. Because of obvious conflicts of interest, sponsor-affiliated broker-dealers would be less inclined to perform meaningful due diligence and other compliance-related activities than the independent broker-dealers. This risk may be even further increased if both the real estate broker and the securities broker-dealer are affiliated with the sponsor, such that the sponsor controls all aspects of the offer of TIC Securities by its commission-based sales force. Since the conditions set forth in the Notice do not require a real estate broker to perform independent securities due diligence on TIC Securities properties, investor protection requires that the SEC allows a real estate broker to only offer TIC Securities approved for sale by an independent broker-dealer.
- e. The Elimination of the Involvement of Independent Broker-Dealers will have an Adverse Affect on the TIC Securities Market. Independent broker-dealers such as OMNI play an important role in the protection of investors. Many TIC Securities investors are older and often not experienced or knowledgeable in real estate investments. As required by

FINRA rules, we devote substantial efforts to training and supervising our registered representatives in the many aspects of a TIC Security, including investor suitability, tax aspects, real estate matters, TIC Securities structures, and sponsor evaluation. Our staff devotes substantial time to conducting due diligence on TIC Security properties and often retains the services of third-party experts, such as attorneys and accountants, to assist us in evaluation of TIC Security properties. As a result of our due diligence we, and other independent broker-dealers, often require sponsors to improve offering disclosure and terms. The fact that sponsors know independent broker-dealers will scrutinize their offerings provides incentive for them to make appropriate disclosure and set reasonable offering terms. We are concerned that the Proposal will (i) allow real estate brokers that are not subject to the proper securities training, supervision and other compliance requirements to solicit and control TIC Security transactions, and (ii) eliminate the important role of independent broker-dealers, such as OMNI, in policing the activities of sponsors, who are significantly motivated to close their offerings to obtain the substantial front-end fees. Absent participation of independent broker-dealers such as ours, disclosure in TIC Security offerings will suffer and terms may be less favorable to investors, as some sponsors, and their affiliated broker-dealers, may lack the objectivity to appropriately police their own offerings.

- f. Investors Who Inspect a TIC Security Property Are "Considering the Purchase" of that TIC Security Property. As stated above, the conditions set forth in the Notice would permit real estate brokers to "arrange" an inspection of a TIC Security property prior to introducing the investor to a broker-dealer, although the real estate broker must introduce the investor to a broker-dealer upon learning that the investor is "considering the purchase of a specific TIC Security property." In our experience, an investor who spends the time and energy to inspect a TIC Security property is, in fact, "considering" purchasing an interest in that TIC Security property. It has been estimated that investors purchase more than 80% of all TIC Security properties they inspect. We, therefore, believe it is imperative that the broker-dealer be involved with the investor prior to the investor inspecting a TIC Security property, to ensure that potential concerns raised during the independent broker-dealer due diligence are appropriately considered before the investor makes the decision to purchase an interest in the TIC Security property. The SEC should, therefore, not permit TIC Security property inspections until the investor has been introduced to a broker-dealer.

2. The Suitability Waiver Contained in the Proposal May Adversely Impact All TIC Securities Investors.

- a. The Suitability Waiver is Not in Investors' Best Interests and Does Not Protect Investors. The SEC should not allow an investor to waive suitability. A hallmark of the investor protection provided through securities regulations has been the requirement that the registered representative "have reasonable grounds" for believing that the recommended investment is suitable for the investor. To permit an investor to simply waive this important restriction at the urging of a real estate broker significantly undermines the SEC's mission to protect investors. TIC Security investors are often older and a large portion of their investment portfolio may be in real estate. A TIC Security property may not always be a suitable investment, in the best interest of the investor. Furthermore, since TIC Securities are private offerings not registered with the SEC, they are considered by some to be a higher risk investment than securities which have been registered with the SEC. The SEC should not endorse the Proposal, or any other suggestion that would permit investors to invest a substantial amount of money and, possibly, a significant portion of their net worth into an unregistered, illiquid TIC Security property that may be wholly unsuitable for the investor. Suitability cannot be waived with TIC Securities and, at the same time, protect investors.
- b. The Suitability Waiver May Also Adversely Effect Co-Tenants of the Investor Who has Waived Suitability. In many respects, TIC Securities are different than other types of securities. If an investor purchases a registered security such as a stock, for example, one could argue that the investor may waive suitability exclusively to the investor's detriment, and not to the detriment of other shareholders. With respect to TIC Securities, however, up to 34 of the investor's co-tenants rely upon the ability of all co-tenants to make prudent decisions and, if necessary, make financial contributions for unexpected capital calls for property repairs, tenant improvements or other expenses. If an investor for whom an interest in a TIC Security property is an unsuitable investment does not possess the ability to meet these obligations to their co-tenants, the success of the investor's co-tenants' investment may also be adversely impacted. Allowing investors to waive suitability may also have a chilling effect on investors' interest in the TIC Securities industry and discourage those with substantial real estate experience and financial means from purchasing TIC Securities because they do not wish to assume the additional risk of investing with co-tenants which are not all similarly situated. Investors purchasing TIC Securities deserve reasonable

assurances that the strangers with whom they are investing in a specific TIC Security property will not compromise the success of their investment.

- c. Investors Considering Waiving Suitability Should be Required to Receive Independent Advice. A waiver of suitability should not be allowed. However, if a suitability waiver is allowed in connection with the Proposal, the suitability waiver should require the investor to receive independent advice. We are concerned that if a broker-dealer notifies an investor that an interest in a TIC Security property is not a suitable investment for the investor, the investor will merely seek assurances from its real estate broker who initially recommended the TIC Security property, sign the suitability waiver, and purchase the unsuitable investment. Because the real estate broker (i) initially recommended the TIC Security property and (ii) will receive a real estate advisory fee only upon the investor's purchase of an interest in the TIC Security property, we believe that the investor should be required to receive written independent advice from a disinterested party prior to waiving suitability.
- d. If Investors are Permitted to Waive Suitability, Broker-Dealers and Other Parties Should be Released From Liability. If an investor is permitted to waive suitability against the advice of a broker-dealer, the waiver should be required to include a release of liability from the investor in favor of the broker-dealer and the managing broker-dealer. The liability should remain exclusively with the real estate broker who is advising the investor to purchase an interest in the unsuitable TIC Security property. If the SEC and the NAR are uncomfortable permitting the liability to remain exclusively with the real estate broker who recommended the unsuitable TIC Security property, perhaps the suitability waiver should be reconsidered. It is simply inequitable for a broker-dealer or registered representative to have any direct or regulatory liability if a suitability waiver is approved.

3. Real Estate Brokers Should Only be Permitted to Engage in the Sale of TIC Securities if Certain Criteria are Met.

- a. Standard to Determine if Real Estate Broker is Predominantly Engaged Should be Set at 85%. In our opinion, no less than 85% of a real estate broker's (i) sales commissions, and (ii) transactions during the 12 months immediately preceding the real estate broker's presentation of a specific TIC Security property to an investor must be derived from the sale of *commercial* real estate which is not a TIC Security property. A stated goal of the Proposal is to compensate real estate brokers who occasionally provide commercial real estate advice related to TIC Securities. It,

therefore, seems appropriate to require that real estate brokers (a) spend the clear majority of their time advising investors on commercial real estate, rather than residential real estate, and (b) do not derive more than 15% of their sales commissions from the sale of TIC Securities or non-commercial real estate. Any real estate broker who derives more than 15% of sales commissions from the sales of TIC Securities should obtain appropriate securities registrations and become an "associated person" of a securities broker-dealer.

- b. Qualified Real Estate Brokers Should be Limited to those Holding a CCIM or SIOR Designation. The Proposal requirement that a real estate broker has "substantial experience" is too vague to provide any meaningful protection to investors. The real estate industry has established its own standards which indicate substantial experience in commercial real estate. Real estate brokers seeking to participate in the sale of TIC Securities should, therefore, possess either the (i) Certified Commercial Investment Member ("CCIM") designation or the (ii) Society of Industrial and Office REALTORS® ("SIOR") designation. Consistent with the investor protection considerations behind the Proposal and the SEC's mission to protect investors, the CCIM and SIOR designations each possess an educational requirement evidencing knowledge and an understanding of commercial real estate principles, and substantial transactional experience. By using real estate industry standards which designate real estate brokers with substantial experience, the SEC will ensure, so far as possible, that all real estate brokers advising investors on TIC Security properties in connection with the Proposal are qualified to do so.
- c. Investors Benefit From Requiring Real Estate Brokers to Hold Clear, Identifiable Designations. Investors seeking qualified advice regarding commercial real estate should be able to readily ascertain whether or not they are engaging a qualified real estate brokers which possesses the educational and transactional experience required to provide meaningful commercial real estate advice. An individual investor should not be required to determine whether or not a commercial real estate professional meets the complicated requirements set forth in the Proposal. The CCIM or SIOR designation are awarded after an evaluation of a commercial real estate broker's experience provides an investor independent verification that the commercial real estate broker possesses the required substantial experience to provide meaningful commercial real estate advice. If the SEC approves the Proposal, investors are entitled to readily know that real estate brokers permitted to participate in the sale of TIC Securities are qualified to provide meaningful real estate advice regarding TIC Securities.

- d. Real Estate Brokers Should not be Permitted to Sell TIC Securities by Virtue of the ALC Designation. The Accredited Land Consultant ("ALC") designation is insufficient commercial real estate experience to allow real estate brokers to sell TIC Securities. The requirements to receive an ALC designation, which are (i) three years of experience as a real estate licensee, and (ii) either \$5,000,000 in land transactions or a minimum of 25 separate land transactions, of which no more than 80% involve residential lot sales, provide no assurance of any practical experience in the types of commercial real estate offered as TIC Securities. The ALC provides no reasonable assurance that the real estate licensee has the substantial experience required to provide meaningful advice to an investor purchasing an interest in a TIC Security property. Therefore, the ALC designation, by itself, should not be considered sufficient commercial real estate experience for a real estate broker to engage in the sale of TIC Securities.

4. The Proposal's Requirements for the Buyer's Agent Agreement are Insufficient.

- a. Buyer's Agent Agreement May Not Require Any Fiduciary Duty and May Actually Disclaim Responsibilities. Buyer agent's duties to an investor are established under agency law and are contractual. Under contract law in some states, fiduciary duties can be waived in commercial transactions. Further, many standard buyer's agent agreements disclaim any duty to investigate important matters relating to the real estate. In order to continue to provide adequate investor protection, the SEC should require the buyer's agent agreement to make the real estate broker responsible for fiduciary duties and to undertake substantial obligations to investigate and advise the investor consistent with standards applicable to registered representatives.
- b. Buyer's Agent Agreement Can Require Exclusivity. The Proposal will allow the real estate broker to enter into an exclusive buyer's agent agreement with an investor long before a broker-dealer is involved. This becomes highly anti-competitive as the real estate broker now must be paid regardless of whether an interest in the TIC Security property sold is located in the proper jurisdiction or is otherwise of the type where the real estate broker can give quality advice.
- c. Buyer's Agent Agreement Should Disclose the Mandatory Involvement of Broker-Dealer and Registered Representative. Since the buyer's agent agreement contemplated in the Proposal is (i) between the real estate

broker and the investor and (ii) must set forth the aggregate maximum real estate advisory fee to be paid by the investor, the investor should know that a securities broker-dealer and a registered representative (a) are required to participate in the transaction and (b) expect to receive a portion of the sales commission associated with the TIC Security transactions. If the Proposal is approved, it should require the buyer's agent agreement to fully disclose the required participation of broker-dealers and anticipated commissions to be paid as consideration for their professional expertise rendered in connection with the investor's purchase of a TIC Security property.

5. The Proposal Raises Implications Regarding Compliance with Regulation D.

Most TIC Securities are offered under the Regulation D exemption from registration. The FINRA Notice to Members 05-18 restated standards related to general solicitation in connection with Regulation D offerings. We, along with other registered broker-dealers, have devoted substantial efforts to develop and implement policies and procedures, and to train registered representatives, to avoid engaging in a general solicitation in connection with TIC Security offerings. For example, we make sure that a pre-existing substantive relationship exists with an investor prior to discussion of a particular TIC Security property. Care is taken to obtain and assess information regarding the investor's level of sophistication and financial condition. We are concerned that because of a lack of training and focus on securities regulations, real estate brokers will be discussing information regarding a TIC Security property well before a pre-existing substantive relationship has been established with an investor. We are further concerned that, due to our lack of ability to supervise the activities of a real estate broker, we will have no adequate means to ensure whether the applicable Regulation D requirements have been satisfied. As a result, longstanding protection for investors provided by established securities regulations will suffer. In addition, broker-dealers will be subject to potential liability for loss of an exemption due to actions by real estate brokers broker-dealers do not supervise. If the SEC approves the Proposal, there cannot be any responsibility for a broker-dealer to supervise a real estate broker's compliance with Regulation D, nor any broker-dealer liability for any real estate broker's violation of the rules and regulations promulgated thereunder. Furthermore, no broker-dealer should be held liable for the loss of an exemption caused by any action of a real estate broker.

6. Registered Broker-Dealers Retain Liability, Despite the Inability to Supervise.

Given that the real estate broker will not be an associated person of a broker-dealer, the broker-dealer will have no authority or jurisdiction to supervise activities or records of real estate brokers participating in TIC Security transactions. For example, no surprise examinations can be performed, nor can

broker-dealers monitor investor communications and representations made by real estate brokers. Since, as drafted, the Proposal provides that the real estate broker controls the relationship with the investor through the buyer's agent agreement, a broker-dealer will also have no ability to take any action in the event of improper conduct. Since the broker-dealer cannot supervise the actions of the real estate broker, the broker-dealer, therefore, should not be held liable for the malfeasance of real estate brokers. If the Proposal is adopted, it must include a specific exemption for broker-dealers from liability for the actions of real estate brokers.

Thank you for the opportunity to provide comments related to the Proposal. We appreciate the SEC taking time to consider our comments. If I can be of further assistance, please do not hesitate to contact me at 801-553-1031.

Best regards,

OMNI Brokerage, Inc.

A handwritten signature in cursive script that reads "Gary Beynon".

Gary R. Beynon
President and C.E.O.