

January 8, 2008

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

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

Dear Ms. Morris:

FINRA appreciates the opportunity to submit comments to the Securities and Exchange Commission regarding a Notice of Application of the National Association of Realtors for Exemptive Relief Under Sections 15 and 36 of the Exchange Act and a Request for Comment (“Notice”).¹ The Notice requests comment on an exemption that would permit an unregistered Commercial Real Estate Professional (“CREP”) and an unregistered real estate brokerage firm to receive a real estate advisory fee in connection with the sale of an undivided tenant-in-common interest in real property that is offered and sold in a manner that causes it to be deemed a security under the federal securities laws (“TIC Security”). In response to the Notice, FINRA offers the following comments.

1. Sales Occurring Without a Registered Broker-Dealer

The Notice states:

Absent an exemption, a licensed real estate agent or real estate broker who receives compensation for the sale of a TIC Security would be required to be registered as a broker with the Commission or to be a registered associated person of a registered broker-dealer. Similarly, a real estate brokerage firm that receives compensation for the sale of a TIC Security would be required to register as a broker-dealer.

¹ The comments provided in this letter are solely those of the staff of FINRA; they have not been reviewed or endorsed by the Board of Governors of FINRA. For ease of reference, this letter may use “we” and “FINRA” interchangeably, but these terms refer only to the FINRA staff.

We are aware of certain firms that are selling TIC Securities without using a registered broker-dealer to execute the transactions, often in reliance upon legal opinions of dubious quality. We have met with representatives of the TIC industry to express our concerns about this activity. We hope that the SEC's exemptive order will clarify the status of these illegitimate selling activities under the federal securities laws.

2. Obligations of the Selling Broker-Dealer

The Notice provides that before a TIC Security transaction qualifying for the exemption is effected, the selling broker-dealer would have to perform a suitability analysis in accordance with the rules of the selling broker-dealer's applicable self-regulatory organization "as if the selling broker-dealer had recommended the TIC Security transaction." If the broker-dealer determines that the transaction is not suitable under the applicable SRO rules, the broker-dealer could nevertheless effect the transaction if it obtains the customer's written consent.

A. Transactions that the Broker-Dealer Recommends

The exemption, if granted, should not conflict with existing FINRA rules. It is a violation of NASD Rule 2310 (Suitability) for a broker-dealer or its associated person to recommend the purchase, sale or exchange of any security unless the broker-dealer or associated person has reasonable grounds for believing that the recommendation is suitable for the customer. The Commission and FINRA have repeatedly emphasized that a "recommendation is not suitable merely because the customer acquiesces in the recommendation" or "affirmatively seeks" to engage in the activity in question.² Rather, a recommendation is suitable only if there is a reasonable basis to believe that it is "consistent with the customer's financial situation and needs."³ Thus, under Rule 2310, a customer's written consent is not a defense to an unsuitable recommendation and any exemption should make clear that a member or associated person may not recommend a TIC Security that is not suitable for the customer.⁴ This point of clarification is

² See, e.g., *Dane S. Faber*, Exchange Act Release No. 49216, 2004 SEC LEXIS 277, at *24 (Feb. 10, 2004); *Jack H. Stein*, Exchange Act Release No. 47335, 2003 SEC LEXIS 338, at *8 (Feb. 10, 2003) ("Even in cases in which a customer affirmatively seeks to engage in highly speculative or otherwise aggressive trading, a representative is under a duty to refrain from making recommendations that are incompatible with the customer's financial profile."); *Dep't of Enforcement v. Bendetsen*, Complaint No. C01020025, 2004 NASD Discip. LEXIS 13, at *12 (NAC Aug. 9, 2004) ("[A] broker's recommendations must serve his client's best interests and the test for whether a broker's recommendation is suitable is not whether the client acquiesced in them, but whether the broker's recommendations were consistent with the client's financial situation and needs.").

³ *Bendetsen*, *supra* note 2.

⁴ FINRA provided guidance in *Notice to Members 05-18* (March 2005) on members' suitability and due diligence obligations in connection with recommending TIC Securities. In *Notice to Members 01-23* (April 2001), FINRA also provided guidance for determining whether a particular communication could be deemed a "recommendation" that triggers application of the suitability rule.

particularly important in the private placement context, where transactions typically are recommended.

B. Transactions that the Broker-Dealer does not Recommend

The requirement in the federal securities laws that a suitability analysis be performed for any recommended security transaction provides a fundamental protection to investors. Unfortunately, a CREP is not subject to this suitability requirement, and the CREP's investors are not afforded this important protection.

The exemptive order seems to impose a requirement to address this regulatory gap: In the case of a TIC Security transaction in which the broker-dealer has not made a recommendation, the exemptive order would nevertheless require that the broker-dealer perform a suitability analysis in respect of the CREP's recommendation. The broker-dealer could only execute a transaction that it finds unsuitable if the customer provides written affirmation indicating a desire to proceed with the purchase. The exemptive order thus goes beyond the federal securities law in one respect, by imposing a suitability analysis upon broker-dealers with respect to unsolicited transactions in TIC Securities.

We would not object to such a requirement. The exemptive order would not impose any suitability requirement upon a CREP who recommends a TIC Security. Without the proposed requirement for a broker-dealer suitability analysis, investors in TIC Securities that have been recommended by a CREP would be deprived of a fundamental protection of the federal securities laws. In our view, it is better that the broker-dealer perform a suitability analysis, even though it has not recommended the TIC Security, than to deprive investors of this important protection.

3. Compliance with Regulation D

We recommend that the exemption require that the transaction comply with Rule 506 under Regulation D. Rule 506 provides important investor protections by requiring each purchaser who is not an accredited investor, either alone or with his purchaser representative, to have the knowledge and experience in financial and business matters such that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within that description. In addition, we believe that Regulation D's disclosure requirements and limitations on general solicitation provide important investor protections in connection with TIC Security transactions.

Nancy Morris
January 8, 2008
Page 4 of 4

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Thank you for your consideration of these comments. Please contact Joseph E. Price, Vice President, Corporate Financing Department, at (240) 386-4642, or Gary L. Goldsholle, Vice President and Associate General Counsel, Office of General Counsel, at (202) 728-8104.

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas Selman". The signature is written in black ink and is positioned below the word "Sincerely,".