

January 17, 2008

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

RE: National Association of Realtors (“NAR”) Application for SEC Exemptive Relief S7-26-07 (“NAR Application”)

Dear Ms. Morris:

I am writing to respond specifically to the letter written on behalf of NAR by Suzanne Rothwell dated January 8, 2008, and also to offer comments on other issues raised by the NAR Application.

I have been a licensed commercial real estate salesperson and broker for 23 years, a CCIM for 14 years and a Series 22 and 63 registered securities representative for three years. I am also a tenant-in-common property investor. In the past 13 years, our dual-licensed firm, Freedman Consulting, has closed more than \$1B in exchange transactions between freestanding net-leased properties and TIC Securities.

Investment Advisers are Compensated for Providing Advice

The footnote on page 2 of the January, 8, 2008 NAR comment letter states:

We do not believe that the services provided by a Commercial Real Estate Professional to a client in connection with a TIC Security transaction come within the definition of ‘investment adviser’ in Section 202(a)(11) of the Investment Adviser’s Act of 1940 (the “Act”) and that such services, in any event, come within the exemption provided by Section 202(a)(11)(C) of the Act.

As the Commission is aware, Section 202(a)(11) of the Act defines an “investment adviser” as any person who “engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. . . .” The realtors’ primary function, as proposed in the NAR Application, is to advise on the real estate underlying TIC Securities. From even the most cursory reading of the NAR Application, it is clear that realtors are to be compensated for providing advice about real estate which is inextricably bound to the value of TIC Securities. Investors will undoubtedly use the realtors’ advice to determine whether it is advisable for them to purchase a particular TIC Security. The provision of this advice falls squarely within the definition of an “investment adviser” set forth in the Act. As the Commission stated in the Woodmoor no-action letter, “the components of an investment contract are not separable.” (See The Woodmoor Corporation, SEC No-Action Letter, (February 3, 1972)). NAR’s position is simply incorrect. The plain language of the Act, coupled with subsequent guidance from the Commission, clearly contradicts NAR’s position.

NAR’s second position, that realtors providing investment advisory services come within the exemption from the definition of “investment adviser” under Section 202(a)(11)(C) of the Act, is similarly unfounded. Section 202(a)(11)(C) exempts a person who should otherwise register as an investment adviser from registration because such a person’s performance of advisory services is “solely incidental to the conduct of his business as a broker or dealer....” NAR misstates the principle and erroneously contends that the realtors’ incidental securities-related function under the NAR Application is to advise others as to the advisability of purchasing a particular TIC Security. This is not the case, as the investment advice provided by realtors, as contemplated in the NAR Application, is for the realtors’ *primary* role to be the provision of advisory services. Under the NAR Application, the advisory function performed by realtors would, therefore, not be “solely incidental” to the conduct of the realtors’ business as brokers or dealers from which they seek to be exempt from registration under the Securities Exchange Act of 1934 (the “Exchange Act”). The investment advisory function performed by realtors is the realtors’ primary function and the broker-dealer function is only necessary because the NAR is requesting transaction-based compensation for its members. Furthermore, the exemption asserted by NAR is quite narrow and cannot be extended by exemptive order.

As recently as March 30, 2007 The District of Columbia United States Circuit Court said that 202(a)(11)(F) could not be used to broaden that tailored and precise exemption for broker-dealers in 202(a)(11)(C). See, *Financial Planners Association v. Securities and Exchange Commission*, 482 F.3d 481 (D.C. Cir. 2007).

The Commission cannot sidestep the obvious investment adviser registration obligation in considering the proposed exemption. See, *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); and *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 federal agency to consider other applicable state and federal laws directly implicated by the order and the constitutionality of those laws). It does not make sense to issue an exemption for a class of realtors from broker-dealer registration, at the federal level, that then requires each individual investment adviser to register at the state level.

Investment Advisers Must First Register with Home State

However, the **first** order of business for the realtor is to register at the state level to receive compensation for the provision of investment advice. This has been confirmed by licensing officials in the Commonwealth of Pennsylvania and the States of Washington, Montana, Oregon and Texas. As most states follow the Uniform Securities Act, most other states will likely have similar registration requirements. If, **after** a realtor has registered as an investment adviser in his or her home state, and the realtor then executes an agreement with an investor who desires their services, **only then** may they have standing to apply for broker-dealer exemption if their agreement calls for transaction-based compensation. This is appropriate, as the specific investor will be in control of the compensation paid for the advice that is provided.

Trade Associations and the Commission Should Not Set Compensation in the Free Market by Exemptive Order

It is inconsistent with the Commission's mission to protect investors, to allow a special interest trade association to attempt to impose a compensation methodology on a class of unknown future investors, to the benefit of a class of realtors. However, if it were appropriate, it should also apply to the American Institute of Certified Public Accountants, the American Bar Association, the Appraisal Institute and to any trade association whose substantially experienced professionally-designated members could provide advice on TIC Securities and other Regulation D Securities. These trade associations, entitled to an exemption from broker-dealer registration under the Exchange Act, could also include the Greens Keepers and Golf Professionals Association advising on a golf course underlying a TIC Security, the Harbormasters Association advising on a marina underlying a TIC Security, the Senior Housing Managers Association advising on a senior housing property underlying a TIC Security, and the Hotel Managers Association advising on a hotel underlying a TIC Security. If it is good for one special interest trade association, it has to be good for all special interest trade associations.

Regulation D and General Solicitation

Nowhere in the 24 page NAR Application does NAR address how the realtor or the realtor's investor is to learn about the real estate underlying a Regulation D TIC Security. However, we were informed via 2,758 NAR form letters posted on the Commission's website how realtors believe that they will obtain this information. The form letter says:

I am able to contact the sponsor and find out how the fractional interests are being brokered.
If the property is a TIC security I can ask a broker dealer representing the sponsor for basic summary real estate information on the property for my client to review.

The problem with the position taken in the realtors' form letter is that this activity is inconsistent with all of the Commission's prior guidance and legal precedent regarding this issue. Registered security representatives are unable to provide any basic summary real estate information on any property underlying a TIC security, to investors, without a private placement memorandum first being provided. In fact, no information can be provided to any investor until after a substantive pre-existing relationship exists and suitability has been determined by a broker-dealer or its registered securities representative, because it violates the rules against general solicitation. No broker-dealer or registered security representative is able

to offer, advertise or market an offering outside of the offering's private placement memorandum. There is absolutely no provision whatsoever for offering limited information on a Regulation D security to a potential investor except via the private placement memorandum.

It would be inconsistent with the Commission's mission to consider any application for exemption that is silent on general solicitation, and one whose proponents either do not understand the prohibition or intend to violate the same. It is critical to note that no record has been established in the first place to prove that investors even need these proposed advisory services.

Clear Intention and Substance over Form

The NASD notified the TIC Securities industry in its Notice to Members 05-18 that a realtor cannot be compensated to act or function as a salesperson for any specific TIC Security offering. The Commission has also issued prior guidance in the form no-action letters (Victoria Bancroft, Landmark Securities, Crossland Investors and Paul Anka, etc.) stating that unregistered persons cannot be compensated to act or function as a referrer or finder with any ongoing role or function in a securities offering. Nonetheless, both the "salesperson" and "finder" functions are imbedded within the proposed realtor roles in the NAR Application. These imbedded and overlapping roles violate the intent of the regulations and the spirit of the Commission's consideration of the NAR Application. Both should have been extracted so that rule makers maintain their intellectual honesty, and the TIC Securities Industry and the investing public benefit from much-needed clarity in this exemption application process. Realtors could perform a narrow advisory role, but cannot covertly act as veiled salespeople and finders at the expense of meaningful bright-line regulations. The NAR Application specifically states and highlights that the realtor will be acting and functioning as an advisor. As previously stated, the role of an advisor is appropriate only if the investor desires to hire a realtor, the realtor is also a registered investment advisor, and a broker-dealer has first presented a private placement memorandum to the investor.

What Can the Commission Do Instead to Protect Investors?

One constructive action that the Commission can take is to require any promoter wishing to offer a so-called non-securitized TIC property, across state lines to persons unknown to each other, to first obtain a no-action letter. The Financial Industry Regulatory Authority ("FINRA") raised this issue in its recent comment letter saying, "[w]e are aware of firms that are selling TIC Securities without using a registered broker-dealer to execute transactions, often in reliance upon legal opinions of dubious quality." It should be noted that some promoters do not even bother obtaining a legal opinion. If some of these structures are legitimate, then the Commission ought to inform the marketplace so that everyone can offer such a product outside of securities laws and regulations.

Requiring promoters to obtain a no-action letter would clear up the ancillary regulatory problem regularly faced by dual-licensed registered security representatives who could be "selling away" by offering a so-called non-securitized TIC property to investors. The threat of regulatory enforcement against dual-licensed registered security representatives only, under NASD Rule 3040, must be removed. The NASD Sanctions Guidelines recommend sanctions up to \$50,000 and a one-year suspension for violations of Rule 3040. It is inconsistent to allow **only** realtors to offer this so called non-securitized TIC property to their investors, and effectively exclude a dual-licensed real estate broker because he or she also happens to be a compliant registered security representative, under threat of sanction.

Advice is Readily Available

In the meantime, if the Commission genuinely believes that the Regulation D investors need additional protection through professional advice, they could require all TIC Securities sponsors to insert a notice inside the front cover of all future private placement memoranda that states:

In the event that you feel that you need specialized advice regarding the real estate underlying this offering, please contact a professional who possesses the specific expertise required to assist you. We suggest that you find a professional who is experienced in the asset type, and the geographical location of the real estate underlying this offering. Websites through which you may find such a professional are as follows:

*<http://www.ccim.com>
<http://www.sior.com>
<http://www.appraisalinstitute.org>
<http://www.seniorshousing.org>*

The list of websites can certainly be targeted and amended depending upon the specific offering and expertise that may be beneficial to investors. This concept offers choice and control of targeted advisory services to investors at the investor's election and does not undermine the existing regulatory framework that generally meets the needs of Regulation D investors in the TIC Securities marketplace.

Based on the lack of legal authority, the obligation to register as an investment adviser, the unaddressed and confused Regulation D general solicitation issues, and the imbedded salesperson/referrer roles, I trust that the NAR Application will be rejected.

I appreciate the opportunity to comment. Feel free to contact me at 858-454-3700 with any questions.

Sincerely,

David H. Freedman, CCIM
Series 22 and 63 Registered Security Representative
OMNI Brokerage, Inc.