March 17, 2008

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

RE: National Association of Realtors Application for SEC Exemptive Relief ("NAR Application")
Release No. 34-56779; File No. S7-26-07

Dear Ms. Morris:

Many of the comment letters to the U.S. Securities and Exchange Commission ("Commission") in support of the NAR Application are conditional. In other words, if certain contingencies are met, only then would those providing comments support the NAR Application. Regrettably, the potential solutions put forth so far do not work.

Other than realtors, few support the NAR Application as it is written. The comment letters posted to http://www.sec.gov/comments/s7-26-07/s72607.shtml illustrate that no one has yet come up with a proposal that is "appropriate and necessary in the public interest and consistent with the protection of investors" that works within legal precedent and is agreeable to the National Association of Realtors ("NAR"), the Commission, the Financial Industry Regulatory Authority ("FINRA"), the North American Securities Administrators Association ("NASAA"), the Tenant-in-Common Association ("TICA"), registered representatives, and broker-dealers. *See, 15 U.S.C. 78mm(a).* It is also possible that the conditions that some parties advocate may not be available due to lack of precedent, and due to the potential negative affect they may have on other Regulation D activity such as hedge funds, and mergers and acquisitions.

In addition, state real estate licensing laws do not offer any meaningful investor protection beyond those which are provided by the SEC, FINRA and state regulatory bodies regulating the sale of securities. No data was presented, and no record was developed, to support NAR's core argument that accredited private placement 1031 TIC Security investors need the protections offered through realtor services. It is obvious that a commercial realtor who specializes in office leasing in Washington, D.C. does not have viable expertise regarding an apartment building in Austin, Texas, especially when he or she is proposed to offer such advice on a part-time basis.

Furthermore, there does not appear to be any legal precedent to support the NAR Application. According to Commission procedures as outlined in Release No. 34-39624, the Commission states that applicants seeking an exemption "should also cite to and discuss applicable precedent." *See, 17 CFR PART 240.* NAR does not cite any applicable precedent in support of the NAR Application, such as no-action letters, case law, or Commission regulations, even though such guidance is readily available. We believe that no precedent was cited because no precedent supports NAR's position.

No reasonable party believes that the Commission's legal staff at the Division of Corporation Finance, and the Division of Trading and Markets are going to overlook the fact that case law, no-action letters and other regulations *were* cited in the comment letters opposing the NAR Application, but none were cited in the NAR Application. Indeed, some question why the NAR Application was accepted in the first place.

The following points outlined below describe some of the substantive problems with the NAR Application:

DISREGARD OF REGULATION D

NAR has largely ignored that, as a practical matter, there is no way to reconcile the NAR Application with Regulation D, as described in its members' form letter that was posted more than 2,800 times on the Commission's website. FINRA addressed this Regulation D issue in its comment letter, confirming it is fundamentally problematic by stating, "we believe that Regulation D's disclosure requirements and limitations on general solicitation provide important investor protections in connection with TIC Security transactions". (See, Thomas M. Selman, Executive Vice President Corporate Financing/Investment Companies Regulation, Financial Industry Regulatory Authority, January 8, 2008). We concur with FINRA.

Although the NAR Application is only asking for an exemption from broker-dealer registration, breaches of Regulation D are inevitable. NAR has failed to address the securities industry's appropriate concerns regarding Regulation D. Indeed, a workable explanation has not yet been provided as to how any offering specific information can be communicated to a realtor by a sponsor or broker-dealer. It is imprudent for the Commission to consider any application that does not function in the real world in a manner consistent with the stated intention of the request. Such is the case with the NAR Application and the Commission should respond accordingly.

We trust that the Division of Corporation Finance will not fail to address the fact that unregulated realtors and unregulated sponsors would have no choice but to consistently disregard Regulation D in order to function within the incomplete framework set forth in the NAR Application. There is simply no way for the marketplace to reconcile this glaring deficiency with prior guidance from the Commission related to Regulation D and Rule 502(c).

Over seventy years of legal precedent, including a long series of Commission no-action letters (namely, *Damson Oil Corporation,* July 5, 1974; *Alma Securities Corp.,* August 2, 1982; *Gerald F. Gerstenfeld,* December 3, 1985; *Printing Enterprises Management Science, Inc*., April 25, 1983; *Econative Corp.,* February 27, 1978; *Bateman, Eichler, Hill Richards Incorporated,* December 3, 1985; and *ENI Corporation December 3, 1975*) have properly informed us that in order for a broker-dealer to offer an exempt security to an investor pursuant to Regulation D, the broker-dealer and/or its registered representative must first satisfy all of the following requirements:

1. Establish a substantive and pre-existing relationship with the investor;
2. Confirm the investor's accreditation; and
3. Assess suitability.

Communication with the investor must occur directly with the broker-dealer or registered representative in order for all three of these steps to occur. This was confirmed by the National Association of Securities Dealers (now FINRA) in the concluding sentence of its *Notice to Members 05-18* (March 2005) wherein it stated, "[m]oreover, in addition to meeting these conditions, the other requirements under Regulation D also must be met, including establishing an adequate, substantive and pre-existing relationship with the investor and completing a suitability analysis prior to offering TICs to an investor."(Footnote 18 See, e.g., Bateman Eichler, Hill Richards, Inc., supra note 16). Without violating Regulation D, it is not possible for a realtor or a sponsor to provide any specific information prior to a registered representative and/or its broker-dealer satisfying all three of these requirements. A realtor acting as a buyer's agent will not be an agent of the issuer and their relationship with an investor cannot tack on, or otherwise transfer, to a sponsor or a broker-dealer. Therefore, a realtor cannot show any property underlying a TIC Security or communicate any meaningful information regarding the same to a potential investor without violating Regulation D. The NAR Application does not make sense in this regard and it would be impossible to implement. Regulation D should not be ignored.

REALTORS ARE OBLIGATED TO REGISTER AS INVESTMENT ADVISERS

NAR failed to address the obligation of realtors to register as investment advisers at the state level in the NAR Application. The Commission's release says, "NAR states that the requested exemption would allow a potential purchaser of a TIC Security to benefit from the real estate expertise of a Commercial Real Estate Professional, while receiving necessary protections afforded by federal and state securities laws and regulations." (See, SEC Release No. 34-56779, Notice of Application of the National Association of Realtors for Exemptive Relief under Sections 15 and 36 of the Exchange Act and Request for Comment, November 9, 2007). The federal and state securities laws referred to by NAR presumably include the Investment Advisers Act of 1940, as well as other state securities laws and regulations. Many states require individuals performing the activities described in the NAR Application to register as investment advisers. Realtors who do not register cannot offer advice relating to a TIC Security or the real property underlying a TIC Security, because the provision of this advice would deem them to be investment advisers. It does not make sense to exempt realtors from broker-dealer registration at the federal level, when they are required to register as investment advisers at the state level. The law is clear on this issue and, again, it should not be ignored.

REALTORS AS FINDERS, SALESPEOPLE OR ADVISERS

As currently contemplated by the NAR Application, realtors are proposed to simultaneously be functioning as finders, salespeople and advisers with a "salesperson's stake" in closing the transaction. The specific functions to be performed by realtors are not separated and clearly identified in the NAR Application. This is problematic due to conflicts with case law and no-action letter precedent relating to these three activities, which have been treated differently by the Commission and others.

Finders - One set of rules, regulations and no-action letters apply to finders and referral sources. The concept is to refer the investor and have no further activity. (Conceptually applicable no-action letters include *Paul Anka, Victoria Bancroft, Landmark Securities, and Crossland Investors.*)

Salespeople - Another set of rules, regulations and no-action letters apply to broker-dealers who receive transaction-based compensation and have a salesperson's stake in the

consummation of the transaction. These parties are required to register with, and be regulated by, FINRA as broker-dealers and/or registered representatives.

Investment Advisers - A third set of rules, regulations and no-action letters apply to investment advisers. These parties must register at the state level, and they usually sell advice for a set fee that is not based on the consummation of a transaction.

CONCLUSION

The NAR Application is irreconcilable because of (a) its disregard of Regulation D, (b) the obligation of realtors to register as investment advisers, (c) the finder and sales roles of the realtor, and (d) the unregulated behavior of realtors who, through the NAR Application, are requesting to induce sales of securities, advise on purchases of securities, and receive transaction-based compensation.

While we understand that realtors would like to be compensated for selling securities, and that sponsors would like to broaden their distribution channels, we do not believe that the NAR Application has met the Commission's standard of being "appropriate and necessary in the public interest," as it is fundamentally inconsistent with over seventy years of Commission precedent. We also believe that anyone who wants to be involved in the sale of securities must comply with the letter, and spirit, of all of the securities laws which *are* in the public interest and consistent with the protection of investors. Strict compliance with securities laws supports market integrity and maintains public trust.

* * *

We appreciate your consideration and we hope that these comments will be helpful to the Commission and its staff. We would be pleased to discuss with the Commission and its staff any aspect of this letter. Questions may be directed to Michael Leventhal (215-345-6578), Kathy Heshelow (727-319-6303), Bill Swayne (206-726-1633), Aubrey Morrow (858-597-1980), Ken Monroe (757-952-1836) or David Freedman (858-454-3700).

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