

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-2111

(202) 371-7000  
Fax: (202) 393-5760  
<http://www.skadden.com>

DIRECT DIAL  
202-371-7216  
DIRECT FAX  
202-661-8286  
EMAIL ADDRESS  
SUZANNE.ROTHWELL@SKADDEN.COM

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June 26, 2006

Catherine McGuire, Chief Counsel  
Division of Market Regulation  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

RE: Welton Street Investments, LLC  
Request for No-Action under Section 15(a)  
of the Securities Exchange Act of 1934

Dear Ms. McGuire:

We are special counsel for Welton Street Investments, LLC ("WSI"). WSI is a broker/dealer registered with the Securities and Exchange Commission ("SEC") under Section 15(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and is a member of the National Association of Securities Dealers, Inc. (the "NASD"). We respectfully request your assurance that the staff of the Division of Market Regulation will not recommend that the SEC take enforcement action under Section 15(a) of the Exchange Act against real estate brokerage firms, with which certain associated persons of WSI are also licensed, if the real estate brokerage firms do not register with the SEC as a broker or dealer under Section 15(b) of the Exchange Act in the circumstances set forth below.

## BACKGROUND

WSI sells undivided tenant-in-common interests in real property together with other arrangements that are deemed to be securities ("TIC Securities") on behalf of affiliated and unaffiliated sponsors in private placements exempt from registration under Section 5 of the Securities Act of 1933 (the "Securities Act"). TIC Securities are generally offered by property owners to individuals seeking to complete tax-deferred exchange transactions pursuant to Section 1031 of the Internal Revenue Code of 1986, as amended (the "IRC")<sup>1</sup> as well as to individuals who are seeking to own undivided fractional interests in real property.

Because TIC Securities are securities under Section 3(a)(10) of the Exchange Act,<sup>2</sup> the federal securities laws require that any sales commission be paid only to a broker/dealer registered under Section 15(b) of the Exchange Act. However, based on our survey of state real estate license laws and discussions with state real estate regulators, we believe that at least 42 states view the sale of TIC Securities as involving the sale of an interest in real property. State laws<sup>3</sup> generally require that any person that receives compensation in connection with the sale of real property for another person must be licensed as a real estate agent or a real estate broker.<sup>4</sup>

In order to meet both the state real estate licensing and federal broker/dealer registration requirements with respect to the sale of TIC Securities, WSI proposed to the NASD that it would register numbers of licensed real estate agents and real estate brokers ("real estate agents") with real estate brokerage firms ("real estate firms") as associated persons of WSI for the purpose of selling TIC Securities (the "WSI dual-registered persons"). By letter dated August 3, 2005, the NASD approved the proposal of WSI to expand its business by employing associated persons who are

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<sup>1</sup> In March 2002, the Internal Revenue Service (the "IRS") issued guidelines on how tenant-in-common interests in real property can qualify as replacement property for purposes of an IRC Section 1031 exchange. Included in the guidelines is the condition that there must be no more than 35 co-owners of a property. *See*, IRS Revenue Procedure 2002-22 (March 19, 2002).

<sup>2</sup> This submission does not address the sale of tenant-in-common interests in real property that are not considered to be a security under Section 2(a)(1) of the Securities Act or Section 3(a)(10) of the Exchange Act.

<sup>3</sup> *See, e.g.*, Oregon Revised Statutes, Chapter 696.020(1) and Colorado Real Estate License Law, Title 12, Article 61, C.R.S., as amended, Part I, §§ 12-61-101(2) and 12-61-102.

<sup>4</sup> A "licensed real estate agent" is generally a natural person who may be required to associate with a licensed real estate broker, which may be an entity or a natural person. Whether the real estate licensing laws of the state where the property, the purchaser, or the seller is located is applicable to a person receiving compensation in connection with the sale of the property (whether or not licensed as a real estate agent) will depend upon individual state law and the activities of the person.

dual-registered and are supervised from the main office of WSI.<sup>5</sup> WSI has, thus far, registered a limited number of WSI dual-registered persons. WSI pays all commissions for the sale of TIC Securities directly to each WSI dual-registered person, *i.e.*, not to the real estate firm with which the person is licensed. Each WSI dual-registered person retains all commissions received from WSI for the sale of TIC Securities.

Since WSI dual-registered persons also engage in the sale of non-securities real properties and may also engage in other real property management activities through a real estate firm with which the person is licensed as a real estate agent, such WSI dual-registered persons have an independent contractor agreement with the real estate firm, as more fully described below, which sets forth the obligations of both parties and terms governing the financial relationship of the parties. Currently, WSI only permits a WSI dual-registered person to have a contract with a real estate firm that includes a financial arrangement pursuant to which the WSI dual-registered person is obligated to pay a periodic fee to the firm that is calculated as a percentage of the person's commissions and other income from the person's non-securities activities (the "Real Estate Percentage Fee").<sup>6</sup> The percentage used to calculate the Real Estate Percentage Fee does not vary directly or indirectly with whether the real estate agent is or is not dual-registered with any broker/dealer, including WSI, or based on his or her transactions in TIC Securities.

We believe that the payment of the Real Estate Percentage Fee by a WSI dual-registered person to an unregistered real estate firm does not subject the real estate firm to registration as a broker/dealer under Section 15(b) of the Exchange Act because each WSI dual-registered person retains all commissions received from WSI for the sale of TIC Securities and is not subject to any formal or informal agreement requiring him or her to pay any part of such securities commissions to the real estate firm. Such an arrangement does not give the real estate firm a "financial stake in the revenues generated by the registered representative's securities transactions . . . ." <sup>7</sup>

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<sup>5</sup> WSI may, in the future, request that the NASD approve the creation of one or more Offices of Supervisory Jurisdiction. Upon approval by the NASD and the creation of any Offices of Supervisory Jurisdiction that are registered with the NASD, any supervisory responsibilities of the main office of WSI discussed in this letter would also be assumed by the relevant Office of Supervisory Jurisdiction.

<sup>6</sup> WSI imposes other limitations on the activities of WSI dual-registered persons, which are described *infra* in the section on "The Proposed Arrangement."

<sup>7</sup> *1<sup>st</sup> Global, Inc.*, SEC No-Action Letter (May 7, 2001).

## THE PROPOSED ARRANGEMENT

WSI is proposing to employ associated persons who will be dual-registered and who will have a financial arrangement for a "desk fee," subject to the limitations discussed below, with the real estate firm with which the person is licensed without the arrangement subjecting the real estate firm to registration as a broker/dealer under Section 15(b) of the Exchange Act (the "Desk Fee Arrangement"). Desk fee arrangements are used by numbers of real estate firms either alone or in conjunction with a real estate percentage fee. WSI proposes to significantly expand its activities by entering into agreements with additional real estate agents in different states that are licensed with different locally operated real estate firms to become registered as associated persons with WSI to sell TIC Securities. Such agreements, already in use by WSI for existing WSI dual-registered persons described above, provide that the WSI dual-registered persons are engaged as associated persons of WSI as independent contractors that are responsible for the payment of their own taxes, social security and health/retirement benefits.<sup>8</sup> As set forth above, WSI will continue to pay any securities commission earned by a WSI dual-registered person from the sale of TIC Securities directly to the WSI dual-registered person and not to the real estate firm with which the person is licensed.

In order to ensure appropriate separation between each WSI dual-registered person's securities and non-securities real estate activities, WSI currently requires and will require that a WSI dual-registered person must:

1. operate an office for his or her securities business on behalf of WSI at a location other than that of the real estate firm, generally from the person's home, where the WSI dual-registered person is required to maintain a copy of the books and records required by SEC Rules 17a-3 and 17a-4 related to the person's securities business (with the original or a copy, as applicable, maintained at the main office of WSI);
2. conduct his or her securities business related to the sale of TIC Securities on behalf of WSI away from the premises of the real estate firm where the person is licensed, except for activities such as arranging appointments, receiving documents, and photocopying;
3. not post any signage, advertise or make any public representation that the real estate firm or the office of the real estate firm where the person is

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<sup>8</sup> We understand that a broker/dealer's responsibilities under the federal securities laws to supervise its associated persons' securities activities are not affected by whether the broker/dealer treats its associated persons as "employees" or as "independent contractors" for other purposes. See, e.g., *In the Matter of William V. Giordano*, Securities Exchange Act Release No. 36742 (January 19, 1996) and *Interactive Financial Solutions, Inc.*, SEC No-Action Letter (December 15, 1992).

licensed conducts a securities business, is a broker/dealer, is associated with WSI, or that TIC Securities are available;

4. use a separate business card for the sale of TIC Securities that indicates the person's association with WSI, with a different telephone number and address from that of the real estate firm with which the WSI dual-registered person is licensed, which card is subject to the review and approval of WSI; and
5. not provide directly or indirectly any payment, compensation, or other economic incentive to any unregistered real estate agent, employee, or other person associated with a real estate firm (collectively, "unregistered persons") or to the real estate firm, to facilitate or effect a sale of securities.

### ***The Real Estate Firm***

Consistent with the practice in the real estate industry, unless a WSI dual-registered real estate agent is the sole owner and also an agent of a real estate firm,<sup>9</sup> each WSI dual-registered person will typically have a formal independent contractor agreement (the "contract") with the real estate firm with which the agent is licensed that obligates the agent to provide real estate services to the firm as an independent contractor. Each licensed real estate agent is responsible for providing real estate services to customers and maintaining all applicable state real estate licensing requirements. A real estate firm typically operates as an umbrella organization providing (among other things) brand name recognition and goodwill, firm advertising, office space, office equipment, supplies, office management, and clerical and other office support (including, among other things, bookkeeping, information systems, and recordkeeping services) to the business of each real estate agent. In addition, a real estate firm is responsible for maintaining its real estate brokerage license in all states where it does business and for providing continuing education and training to licensed real estate agents in order that they may comply with state real estate licensing requirements.

### ***The Desk Fee Arrangement***

As mentioned previously, the contract of a licensed real estate agent with the real estate firm with which the person is licensed typically includes terms

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<sup>9</sup> We believe that a WSI dual-registered person who is the sole owner of a real estate firm and also licensed as a real estate agent of the firm (the "sole owner/WSI dual-registered person") is unlikely to have a contractual arrangement with the firm as is the case with any other licensed real estate agent. In such case, we do not believe that broker/dealer registration of the real estate firm is required solely as a result of the receipt by the sole owner/WSI dual-registered person in his or her individual capacity of a commission from WSI for the sale of TIC Securities, so long as the sole owner/WSI dual-registered person does not forward any securities transaction commissions received from WSI to the real estate firm. *1<sup>st</sup> Global, Inc.*, SEC No-Action Letter (May 7, 2001).

governing the financial relationship of the parties. Each contract is individually negotiated between the real estate firm and each licensed real estate agent. Thus, a real estate firm is likely to have different financial arrangements with different licensed real estate agents, including any WSI dual-registered person. We are requesting assurance from the staff of the Division of Market Regulation that a WSI dual-registered person may enter into a contract with such person's real estate firm that obligates the person to pay the real estate firm the following Desk Fee Arrangement as an alternative or in addition to the Real Estate Percentage Fee Arrangement discussed above without the real estate firm registering as a broker/dealer under Section 15(b) of the Exchange Act.

A desk fee arrangement is structured to require that a real estate agent pay the real estate firm a flat periodic fee that is not affected by the amount of income generated by such person in the time period covered by the contract or whether such agent's income is generated from the sale of non-securities real property or securities real property (such as TIC Securities), or from property management and other types of real property-related services. Real estate firms use desk fee arrangements for the purpose of providing the real estate firms with constant and consistent fees from their licensed real estate agents and reimbursing the real estate firm for its services to the agent, its overhead and other expenses that occur regardless of whether the agent is engaged in sales of real property or other activities. We propose that the Desk Fee Arrangement entered into by a WSI dual-registered person must meet following three conditions.

1. The Desk Fee Arrangement must not contain a "look-back escalator" that may increase the fee depending on the volume of transactions, commissions or income of the WSI dual-registered person in the prior month or a number of prior months, *provided, however, that* this condition would not prohibit the WSI dual-registered person from also being obligated to pay a Real Estate Percentage Fee, as described above.
2. The Desk Fee for WSI dual-registered persons must be the same dollar amount as other similarly-situated commercial real estate agents that are licensed with the real estate firm and are not also WSI dual-registered persons or registered as an associated person of another broker/dealer.
3. For a real estate firm that is compensated by means of a Desk Fee Arrangement in addition to a Real Estate Percentage Fee Arrangement, the existence of and percentage used to calculate the Real Estate Percentage Fee for WSI dual-registered persons must be the same as for other similarly-situated commercial real estate agents that are licensed with the real estate firm and are not also WSI dual-registered persons or registered as an associated person of another broker/dealer.

The purpose of the first condition is to prevent the fee paid under the Desk Fee Arrangement from becoming a fluctuating fee that would indirectly reflect the securities activities of the dual-registered person. However, a fee paid under a Desk Fee Arrangement may be combined with a Real Estate Percentage Fee, since any Real Estate Percentage Fee is based only on a percentage of income from non-securities activities. Similarly, the purpose of the second and third conditions is to ensure that the securities activities of the WSI dual-registered person do not affect the amount of the fee paid under the Desk Fee Arrangement or the Real Estate Percentage Fee that is charged by the real estate firm.

### ***General Compliance Representations***

In connection with WSI's arrangements with WSI dual-registered persons, WSI will comply with the applicable requirements of the Exchange Act and the rules thereunder and self-regulatory organization rules, including the requirements to make and keep current certain books and records pursuant to Section 17(a) of the Exchange Act and the rules thereunder. WSI will also exercise exclusive control over, properly supervise, and be responsible for the training of all WSI dual-registered persons, and be responsible for and monitor compliance by all WSI dual-registered persons with all applicable securities laws, rules and regulations and with WSI's compliance manual and procedures with respect to such persons' securities activities.<sup>10</sup>

In addition, WSI will monitor compliance of all WSI dual-registered persons with the special limitations on the activities of WSI dual-registered persons that are set forth above, which are for the purpose of ensuring that there is an identifiable separation between the person's securities and non-securities real estate activities. WSI will require each WSI dual-registered person to provide WSI with an up-to-date copy of any contract, agreement, or other records reflecting his or her Desk Fee Arrangement and/or Real Estate Performance Fee Arrangement with his or her real estate firm, and WSI will preserve those records for a period not less than three years. WSI will provide each WSI dual-registered person with a copy of WSI's compliance manual, the NASD Manual and a copy of this request for no-action and the response received from the staff.

WSI will provide each real estate firm with which a WSI dual-registered person is licensed as a real estate agent with a copy of this request for no-action and the response received from the staff. WSI will inform in writing every

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<sup>10</sup> See, Division of Market Regulation, Staff Legal Bulletin No. 17, *Remote Office Supervision* (March 19, 2004). See, also, NASD Notice to Members 99-45, *NASD Provides Guidance on Supervisory Responsibilities* (June 1999); NASD Notice to Members 98-38, *NASD Reminds Members of Supervisory and Inspection Obligations* (May 1998); NASD Notice to Members 86-65, *Compliance with the NASD Rules of Fair Practice In the Employment and Supervision of Off-Site Personnel* (September 1986).

three years each such real estate firm that, in order to rely on the staff's no-action position, the real estate firm directly or through its unregistered persons may not:

1. engage in securities-related activities, including the offer and sale of TIC Securities, on behalf of WSI or any other broker/dealer;
2. accept or transmit orders or handle customer funds or securities in connection with TIC Securities;
3. receive any payment, compensation, or other economic incentive for the referral of customers to WSI or WSI dual-registered persons in connection with TIC Securities until and unless such referral fees are permitted by the SEC;
4. post any signage, advertise or make any public representation that the real estate firm or the office of the real estate firm where the person is licensed is a location that conducts a securities business, is a broker/dealer, is associated with WSI, or that TIC Securities are available; or
5. advertise the offer of TIC Securities in general or any specific TIC Securities or list any TIC Securities on any multi-listing or other real estate listing service.

## ANALYSIS

Section 15(a) of the Exchange Act provides that it shall be unlawful for any broker or dealer to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security, unless the broker or dealer is registered in accordance with Section 15(b) of the Exchange Act.

Section 3(a)(4) of the Exchange Act defines the term "broker," in relevant part, as "any person engaged in the business of effecting transactions in securities for the account of others."<sup>11</sup>

In determining whether a person comes within the definition of "broker," the staff has, among other things, focused on whether the person is effecting transactions in securities and whether the person is at least partly engaged in the business of securities transactions or receives commissions or other compensation in connection with transactions in securities ("transaction-based compensation").<sup>12</sup>

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<sup>11</sup> Because we do not anticipate that the real estate firms will buy and sell TIC Securities for their own accounts, we are not requesting no-action relief from Section 15(a) of the Exchange Act for activity that would require registration as a dealer.

<sup>12</sup> In *Herbruck, Alder & Co.*, SEC No-Action Letter (May 3, 2002), the SEC Division of Market Regulation staff stated that "The Division previously has noted that the receipt of compensation related to securities transactions is a key factor that may require an entity to register as a broker-dealer." The Division explained that, where such transaction-based compensation is paid "Registration helps to ensure that persons who have a 'salesman's stake' in a securities transaction operate in a manner that is

Further, in the case of dual-employed registered representatives, an important factor in the staff's determination that the unregistered employer is not required to register under Section 15(b) of the Exchange Act is that all personnel who engage in securities activities will be fully subject to the securities laws and applicable rules of self-regulatory organizations and whether a registered broker/dealer will control, properly supervise and be responsible for the securities activities of all dual-employed registered representatives.<sup>13</sup>

We believe that the unregistered real estate firm with which a WSI dual-registered person is licensed will not be "engaged in the business of effecting transactions in securities" as a result of the limitations on the real estate firm's activities, the limitations on the activities of the WSI dual-registered person on the premises of the real estate firm, the limitations that are imposed on the ability of the WSI dual-registered person to pay, directly or indirectly, transaction-based compensation to the real estate firm, and because the securities-related activities of WSI dual-registered persons are fully subject to supervision by WSI.

Under the Desk Fee Arrangement proposed by WSI, the payment of the periodic Desk Fee proposed herein, including when the Desk Fee is combined with a Real Estate Percentage Fee Arrangement, by a WSI dual-registered person to an unregistered real estate firm should not be considered to be transaction-based compensation by the Division of Market Regulation because the real estate firm will not have a "financial stake in the revenues generated by the registered representative's securities transactions . . . ." <sup>14</sup> The amount of the fee paid under the Desk Fee Arrangement and the percentage used to calculate the Real Estate Percentage Fee are not affected by a WSI dual-registered person's receipt of commissions from WSI for the sale of TIC Securities.<sup>15</sup> Moreover, the fee paid under the Desk Fee Arrangement will be payable by the WSI dual-registered person to the real estate firm regardless of

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consistent with customer protection standards governing broker-dealers and their associated persons." See, also, *1<sup>st</sup> Global, Inc.*, SEC No-Action Letter (May 7, 2001).

<sup>13</sup> In *First of America Brokerage, Inc.*, SEC No-Action Letter (October 5, 1995), the SEC Division of Market Regulation staff stated that "This staff position is based, in part, on First of America's representations that it will control, properly supervise, and be responsible for all activities in connection with the sale of Insurance Securities."

<sup>14</sup> See, discussion under the third scenario in *1st Global, Inc.*, SEC No-Action Letter (May 7, 2001), citing *Birchtree Financial Services, Inc.*, SEC No-Action Letters (September 22, 1998) (and related letters) and *Freytag, LaForce, Teofan and Falik*, SEC No-Action Letter (January 22, 1988).

<sup>15</sup> See, *1st Global, Inc.*, SEC No-Action Letter (May 7, 2001), where the SEC Division of Market Regulation staff concluded that "The Division will not recommend enforcement action to the Commission under Section 15(a) if 1<sup>st</sup> Global Capital Corp. pays commissions directly to a CPA registered representative, so long as the CPA registered representative is not subject to any formal or informal agreement or arrangement directing him to turn over securities commissions, or other income received as a result of securities activities, to an unregistered CPA firm or other unregistered entity."

the amount of income generated by the such person or whether such person's income is generated from sales of non-securities real property or securities real property (such as TIC Securities), from the sale of other securities that are not also considered real property under state laws, or from property management and other types of real property-related services.

Further, all WSI dual-registered persons will be deemed to be associated persons of WSI within the meaning of Section 3(a)(18) of the Exchange Act and WSI has represented that WSI will exercise exclusive control over, properly supervise, and be responsible for the training of all WSI dual-registered persons, and be responsible for and monitor compliance by all WSI dual-registered persons with all applicable securities laws, rules and regulations and with WSI's compliance manual and procedures with respect to such persons' securities activities.

The receipt by an unregistered real estate firm of a fee paid under a Desk Fee Arrangement, whether or not combined with a Real Estate Percentage Fee from a WSI dual-registered person should not, therefore, lead to a conclusion that the unregistered real estate firm is "engaged in the business of effecting transactions in securities" as required by the definition of "broker" in Section 3(a)(4) of the Exchange Act.

## **CONCLUSION**

On the basis of the foregoing, we respectfully request your assurance that the staff of the Division of Market Regulation will not recommend that the SEC take enforcement action under Section 15(a) of the Exchange Act against the unregistered real estate firms that WSI dual-registered persons are licensed with if a WSI dual-registered person enters into a periodic Desk Fee Arrangement (the fee paid under which may be combined with a Real Estate Percentage Fee Arrangement) with the unregistered real estate firm with which the person is licensed as a real estate agent, as described above.

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Catherine McGuire, Chief Counsel  
June 26, 2006  
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If you require any additional information or clarification regarding this submission, please do not hesitate to contact me in the Washington, D.C. Office of Skadden, Arps, Slate, Meagher & Flom LLP at (202) 371-7216. On behalf of our client, WSI, we thank you for your consideration of this matter.

Very truly yours,

A handwritten signature in black ink that reads "Suzanne Rothwell". The signature is written in a cursive, flowing style.

Suzanne E. Rothwell

cc: Mark D. Quam, President  
Welton Street Investments, LLC

Phyllis G. Korff  
Skadden, Arps, Slate, Meagher & Flom LLP

Brian A. Bussey  
Securities and Exchange Commission

Michael Hershafft  
Securities and Exchange Commission