

Confidential Treatment Requested by  
Skadden, Arps, Slate, Meagher & Flom LLP  
on Behalf of National Association of Realtors®

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October 11, 2007

Nancy M. Morris, Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

RE: Tenants-in-Common Interests  
Request for Exemption from Registration Under  
Section 15(a)(1) of the Securities Exchange Act of 1934

Dear Ms. Morris:

We are submitting this letter on behalf of the National Association of Realtors® ("NAR"), which is America's largest association of real estate agents and brokers, representing more than 1.3 million members involved in all aspects of the residential and commercial real estate industries. We respectfully request the Securities and Exchange Commission (the "Commission" or "SEC") to grant an exemption from the broker-dealer registration requirements of Section 15(a)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Exchange Act")<sup>2</sup> and from the reporting and other requirements specifically imposed by the Exchange Act, and the rules and regulations thereunder, on a broker or dealer that is not registered with the Commission (except Sections 15(b)(4) and 15(b)(6) of the Exchange Act), pursuant to Sections 15(a)(2)<sup>3</sup> and 36(a)<sup>4</sup> of the Exchange

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<sup>1</sup> 15 U.S.C. 78o(a)(1).

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 15 U.S.C. 78o(a)(2).

Act, to any licensed real estate agent and/or broker who has substantial experience (as discussed below) in commercial real estate<sup>5</sup> (a “Commercial Real Estate Professional”) and the real estate brokerage firm with which such Commercial Real Estate Professional is licensed (a “Real Estate Firm”) (referenced together, when appropriate, as a “RE Participant”) that receives a real estate advisory fee (a “Real Estate Advisory Fee”) from a purchaser of an undivided tenants-in-common interest in real property (a “TIC Interest”) that is offered and sold together with other arrangements that cause it to be deemed to be a security under the federal securities laws (a “TIC Security”) in the circumstances and subject to the conditions set forth below. A Real Estate Advisory Fee may be paid by the purchaser directly or on behalf of the purchaser by the sponsor or issuer of the TIC Security (a “sponsor”), which may, thereby, reduce the commission or other compensation received by a registered broker-dealer involved in the TIC Security transaction (a “TIC Security Transaction”). For the reasons discussed below, we believe the proposed exemption is appropriate in the public interest and consistent with the protection of investors.

## **I. BACKGROUND**

**A. NAR.** NAR is a national trade association for the real estate industry, founded in 1908. NAR is a voluntary organization comprised of licensed real estate agents and brokers who are involved in residential and commercial real estate as brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. Today, NAR has over 1.3 million individual members, 54 state associations (including Guam, Puerto Rico, and the Virgin Islands) and approximately 1,500 local associations. The term REALTOR® is a registered collective membership mark that identifies a licensed real estate agent or broker who is a member of the NAR and, therefore, subscribes to the NAR Code of Ethics. Licensed real estate agents and brokers who are members of NAR display NAR’s “REALTOR®” trademark on their signs, business cards and stationeries in order to inform customers of their membership. Many national and local Real Estate Firms will only employ licensed real estate agents and brokers who are members of NAR.

NAR has established standards for efficient, effective, and ethical real estate business practices and provides a facility for professional development, research and the exchange of information among its members and to the public for the purpose of preserving and enhancing the right to own, use, and transfer real property. In 1913, NAR first adopted a Code of Ethics that is applicable to the conduct of its members. The NAR

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<sup>4</sup> 15 U.S.C. 78mm(a).

<sup>5</sup> For purposes of this exemption request, the term “commercial real estate” includes all real estate categories other than single-family and one- to four-unit residential dwellings, including office, retail, raw land, multi-family (*i.e.*, greater than 4-unit dwellings), industrial and others.

Code of Ethics establishes baseline principles for the conduct of the licensed real estate agents and brokers who are members of NAR.<sup>6</sup> The Code of Ethics includes detailed “Standards of Practice” that explain the application of the Code of Ethics in particular factual circumstances. The Code is organized around major principles, loosely defined as:

- Loyalty to clients.
- Fiduciary (legal) duty to clients.
- Cooperation with competitors.
- Truthfulness in statements and advertising.
- Non-interference in exclusive relationships that other licensed real estate agents and brokers have with their clients.

When a complaint is submitted to a local association of NAR regarding the violation of the Code of Ethics by a licensed real estate agent or broker that is a member of NAR, a disciplinary proceeding is initiated by the Grievance Committee of the relevant local association to determine whether a violation occurred and, if so, the appropriate sanction to be applied to the violator. NAR’s explanation of the complaint and disciplinary process is available to consumers on NAR’s website.<sup>7</sup> Licensed real estate agents and brokers may be reprimanded, fined up to \$5,000, or their membership can be suspended or terminated for serious or repeated violations. Lesser violations may result in requiring attendance at courses and seminars designed to increase the licensed real estate agents’ and brokers’ understanding of the ethical duties and other responsibilities of licensed real estate agents and brokers. Those Real Estate Firms that require their affiliated licensed real estate agents and/or brokers to maintain membership in the local association of NAR will terminate a licensed real estate agent’s and/or broker’s affiliation if the person’s NAR membership is terminated as a result of a disciplinary action.

NAR has five affiliated institutes, societies, and councils that provide a wide array of programs and services that assist licensed real estate agents and brokers that are NAR members in increasing skills, productivity and knowledge in particular real estate fields and specialties. Designations acknowledging experience and expertise in various real estate sectors are awarded by each affiliate upon completion of required courses. These programs include, for example, designation as a Certified Commercial

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<sup>6</sup> NAR members are required to attend 2-1/2 hours of education on the Code of Ethics every four years to maintain membership in NAR. *See, e.g.,* [www.ncrealtors.org/edu/ethicstraining.htm](http://www.ncrealtors.org/edu/ethicstraining.htm). However, individual states go further, offering 8-hour seminars on the Code of Ethics and the processes to enforce the Code. *See, e.g.,* <http://www.ncrealtors.org/edu/06prostnds.pdf>.

<sup>7</sup> *See,* [http://www.realtor.org/mempolweb.nsf/0/e63110cecf643240862569670063bcbe/\\$FILE/Before%20Yo u%20File%20and%20Ethics%20Compliant%20Brochure.DOC](http://www.realtor.org/mempolweb.nsf/0/e63110cecf643240862569670063bcbe/$FILE/Before%20Yo u%20File%20and%20Ethics%20Compliant%20Brochure.DOC).

Investment Member (“CCIM”) for members who have satisfied certain education and experience requirements related to commercial real estate brokerage, leasing, valuation, and investment analysis. This program requires completion of an introductory course, four core courses and a series of one-day advanced education programs, online courses, and special symposiums provided by the CCIM Institute.<sup>8</sup>

**B. TIC Interests.** TIC Interests are generally offered as a replacement property 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>9</sup> TIC Interests are also offered as investment property to individuals who are seeking to own undivided fractional interests in real property. Unlike an interest in a partnership or trust that owns the underlying investment property or properties, each co-owner owns a specified direct fractional interest in a TIC property. Therefore, each co-owner of a TIC Interest receives at a real estate closing a deed in the owner's name representing his or her undivided fractional interest in the TIC property and can obtain title insurance for his or her percentage interest in the property. Each co-owner's TIC Interest can be sold, gifted, bequeathed by will, or inherited, and is subject to property, gift, estate, and inheritance taxes in the same manner as an interest held by a sole owner of real property. Such TIC Interests are illiquid in the same manner as other real property.

Each co-owner has certain rights, including the right to share pro rata in the income, gain, loss, deductions and credits from the property. Regardless of whether a TIC Interest is prepackaged with an agreement for the employment of a professional property management company, a TIC Interest owner retains the right to vote on decisions affecting the property. We understand that a purchase of a TIC Interest generally requires an investment of at least \$100,000. Further, no more than 35 purchasers may participate in the purchase of a property sold in the form of TIC Interests in order to qualify those interests for an IRC Section 1031 exchange.<sup>10</sup>

**C. Treatment of TIC Interests as Securities.** A sponsor may purchase an investment property, negotiating the purchase price and the loan, and then may sell to unrelated investors TIC Interests in the property that remain subject to existing contracts

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<sup>8</sup> The Department of Labor webpage on Real Estate Brokers and Sales Agents specifically references the NAR as a “sponsor of courses covering the fundamentals and legal aspects of the field.” The webpage also states that “[a]dvanced courses in mortgage financing, property development and management and other subjects also are available.” See, U.S. Department of Labor, Bureau of Labor Statistics, [www.bls.gov/oco/ocos120.htm](http://www.bls.gov/oco/ocos120.htm).

<sup>9</sup> In March 2002, the Internal Revenue Service (the “IRS”) issued guidelines on how TIC Interests 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>10</sup> *Id.*

for leasing, management, and operation of the property. As the National Association of Securities Dealers, Inc. (“NASD”)<sup>11</sup> stated in NASD Notice to Members 05-18 (March 2005), *Private Placements of Tenants in Common Interests* (“Notice 05-18” or the “NASD Notice”),<sup>12</sup> discussed more fully below, “[w]hen TICs are offered and sold together with other arrangements, they generally would constitute investment contracts and thus securities under the federal securities laws.”<sup>13</sup> The SEC staff has, in connection with one no-action request, disagreed with the view that a triple net lease arrangement that is sold to a single investor or multiple investors as tenants-in-common is not a security.<sup>14</sup>

**D. Compliance with the Federal Securities Laws.** Sales of TIC Securities are conducted by a sponsor without registration of the offering in reliance on the private placement exemption under Section 4(2) of the Securities Act of 1933 (“Securities Act”), generally in reliance on Rule 506 of SEC Regulation D adopted under that provision.<sup>15</sup> Since the federal securities laws require that any sales commission or other compensation paid with respect to the sale of a security be paid only to a broker or dealer registered under Section 15(b) of the Exchange Act (unless an exception or exemption from such registration is available), private placements of TIC Securities are sold by a sponsor through a registered broker-dealer acting as a placement agent (referred to herein as the “Lead Placement Agent”). Such Lead Placement Agent may be the sole distributor of the TIC Securities or may enter into an agreement with one or more other registered broker-dealers to sell the TIC Securities as participating brokers (each, a “Selling Broker-Dealer”).<sup>16</sup> The private placement memorandum for an offering of TIC Securities will include a “plan of distribution” section that discloses the name of the Lead Placement Agent and the maximum commission and other compensation that will be paid to participating registered broker-dealers for the sales of the TIC Securities, which commissions and fees are also disclosed on the cover page of the private placement memorandum.

**E. Application of State Real Property Law to TIC Security Transactions.** 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 a TIC

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<sup>11</sup> As of July 30, 2007, the NASD was consolidated with the member regulation, enforcement and arbitration operations of the New York Stock Exchange. The name of the combined entity is the Financial Industry Regulatory Authority. For purposes of this request, the organization will continue to be referred to as the NASD.

<sup>12</sup> The full text of Notice 05-18 is available at [www.finra.org](http://www.finra.org).

<sup>13</sup> Notice 05-18, at 3.

<sup>14</sup> *See, Triple Net Leasing, LLC*, SEC No-Action Letter (Aug. 23, 2000).

<sup>15</sup> Notice 05-18, at 6.

<sup>16</sup> The Lead Placement Agent may also act as a Selling Broker-Dealer.

Security as involving the sale of an interest in real property that is subject to state real estate laws, regardless of whether such investments are also considered to be subject to state securities laws. Accordingly, we believe that many states recognize that real estate considerations are a major component in the sale of a TIC Security and that, therefore, purchasers should receive the protections afforded by relevant state real estate laws even if the transaction is also subject to state securities laws.

**F. Compliance with NASD Issued Guidance.** As previously mentioned, NASD issued guidance in Notice 05-18 on the sale of TIC Securities by registered broker-dealers that are members of the NASD. Notice 05-18 states “TIC interests in real property standing alone generally are not securities . . . .”<sup>17</sup> The NASD Notice also states that, however, “[w]hen TICs are offered and sold together with other arrangements, they generally would constitute investment contracts and thus securities under the federal securities laws.”<sup>18</sup> The NASD Notice points out that TIC Securities are illiquid, unanimous consent may be required for a subsequent sale, any subsequent sale may be at a substantial discount from the value of the underlying real estate, and that the “NASD is not aware of any secondary market for TIC interests.”<sup>19</sup>

The NASD Notice provides guidance to NASD members and their associated persons when offering TIC Securities with respect to compliance with NASD and SEC rules, including those addressing the payment of referral fees to unregistered individuals or firms.<sup>20</sup> Although the NASD recognized that “some states may require that a licensed real estate agent participate in the transfer of a [securitized] TIC interest to an investor,”<sup>21</sup> the NASD cautioned that a broker-dealer may not pay a real estate agent who is not registered as a broker-dealer for “participating in the transfer of a TIC interest that is structured as a security, nor may a member pay such real estate agent for referring TIC business that involves securities.”<sup>22</sup> The NASD Notice stated that any such payment may be deemed to have violated NASD Rule 2420, which prohibits a member of the NASD, among other things, from paying selling concessions, discounts, or other allowances to any person that is not registered as a broker-dealer but is required to be so registered. The NASD Notice went on to point out that “It is our understanding that the SEC staff would deem a real estate agent’s receipt of a referral fee from a broker-dealer in connection with the sale of a [securitized] TIC interest to be the type of activity that would render the real estate agent an unregistered broker-dealer.”<sup>23</sup>

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<sup>17</sup> Notice 05-18, footnote 5, at 8.

<sup>18</sup> Notice 05-18, at 3.

<sup>19</sup> Notice 05-18, at 4.

<sup>20</sup> Notice 05-18, at 5

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

The NASD Notice also cautioned members that “[a] member also may not evade Rule 2420 through indirect payments; for example, a member may not engage in an arrangement in which it reduces its normal commission for a TIC exchange so that the customer will pay the difference to the real estate agent for participating in the TIC exchange or for referring business to the broker-dealer.”<sup>24</sup> However, the NASD stated in footnote 12 to Notice 05-18 that “[a] member that pays fees to an unregistered person who acts as a finder would not be deemed to violate Rule 2420 if the member obtained a no-action letter from the SEC staff indicating that the finder is not required to register as a broker-dealer.” Thus, to the extent that the payment of a Real Estate Advisory Fee to a RE Participant leads to a reduction of the commission or other compensation received by the registered broker-dealer involved in a TIC Security Transaction, the registered broker-dealer may be deemed by the NASD to have violated NASD Rule 2420 unless the RE Participant is covered by a no-action letter from SEC staff indicating that the RE Participant is not required to register as a broker-dealer or by an exception or exemption from broker-dealer registration granted by the SEC.

**G. NAR Initiative.** In light of the denial of no-action relief by the staff of the SEC Division of Corporation Finance in *Triple Net Leasing, LLC*, SEC No-Action Letter (Aug. 23, 2000) and the publication of Notice 05-18, NAR issued a “Hot Topics” publication in the Fourth Quarter of 2005 on *Tenants-In-Common Interests* (the “NAR Notice”). In the NAR Notice, NAR addressed questions related to the differences between a TIC Security and non-security TIC Interest, the bar on payments to RE Participants by sponsors and broker-dealers that sell TIC Securities, the need to comply with state real estate licensing requirements, the ethical considerations applicable to the sale of TIC Securities, the information that should generally be provided to investors on replacement properties, and the penalties that may be imposed for securities law violations.

NAR warned its licensed real estate agents and brokers that the NASD had explicitly stated that persons solely licensed as real estate agents “may not be compensated by the sponsor or a broker-dealer for participation in the marketing and sale of [securitized] TICs, either by means of a fee or commission.”<sup>25</sup> NAR also emphasized that licensed real estate agents and brokers “should take care not to market securitized TIC investments without careful attention to compliance with securities and real estate laws and regulations. Doing so may trigger enforcement action by the appropriate state regulatory enforcement entities.”<sup>26</sup> NAR also advised its licensed real estate agents and brokers that investors should be advised to consider not only the tax aspects of any TIC Security investment, but also the economics as well -- including any risks that may be

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<sup>24</sup> *Id.*

<sup>25</sup> NAR Notice, at 3.

<sup>26</sup> NAR Notice, at 4.

perceived with respect to properties “in which a sponsor may or may not remain engaged in the project's operation.”<sup>27</sup> With respect to ethical considerations that apply to licensed real estate agents and brokers working with a client who wishes to acquire a TIC Security as a replacement property, NAR urged licensed real estate agents and brokers to “familiarize themselves with and understand the TIC marketplace before referring clients into a TIC investment, whether it is securitized or not . . . .”<sup>28</sup> With respect to providing assistance to a client in connection with the sale of a TIC Security, NAR reminded its licensed real estate agents and brokers of their obligations under Article 11 of the NAR Code of Ethics, which states that:

REALTORS® shall not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client. Any persons engaged to provide such assistance shall be so identified to the client and their contribution to the assignment should be set forth.

## **II. THE IMPORTANCE OF REAL ESTATE EXPERTISE TO A PURCHASER OF A TIC SECURITY**

As previously described, a purchaser who acquires a TIC Interest acquires an undivided fractional interest in a particular parcel of real estate -- and that fact is unchanged by whether the real estate is sold with other arrangements that results in the TIC Interest being deemed a security. We believe that the state statutory and regulatory framework implies that many states have made a policy determination that the protection of a purchaser of real estate, including a TIC Security, is enhanced when the purchaser receives real estate services from a Commercial Real Estate Professional.<sup>29</sup> In comparison, an associated person of a broker-dealer may not be qualified to provide information on the nature and characteristics of comparable real estate unless the person also holds a real estate license. Because of their extensive training and experience in matters relating to the real estate and the predominant role of real estate in a TIC Security Transaction,<sup>30</sup> NAR believes that Commercial Real Estate Professionals would provide valuable guidance and assistance to a purchaser of a TIC Security.

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<sup>27</sup> NAR Notice, at 3.

<sup>28</sup> NAR Notice, at 4.

<sup>29</sup> Even when a state securities regulator has determined that investments in TIC Securities should be subject to the state's securities laws, sales of TIC Securities have also remained subject to state real estate laws. *See*, “Offering or Selling Tenancies-In-Common (TICs) -- Securities Implications in the Promotion/Offer and Sale,” Division of Finance & Corporate Securities, State of Oregon, under “Hot Topics” at <http://www.dfcs.oregon.gov>

<sup>30</sup> A key element in the performance of an investment in a TIC Security is the performance of the real estate.



Each state requires licensed real estate agents and brokers to pass a written examination and the majority of states also require brokers to have significant practical experience.<sup>31</sup> In most instances, prior to being eligible for licensing as a “broker,” a person must have completed between 60 and 90 hours of formal training and also must have between one to three years selling experience (unless the applicant has a Bachelor's Degree in real estate).<sup>32</sup> Persons licensed as “agents” are ordinarily subject to less rigorous requirements, but an agent may only engage in real estate activities in affiliation with and subject to the oversight and supervision of a broker, who bears responsibility for such salesperson's conduct. State licenses typically must be renewed every 1 or 2 years, and many states require continuing education for licensing renewals.<sup>33</sup> Many Real Estate Firms offer formal in-house training programs for their affiliated licensed real estate agents and brokers.

The Commercial Real Estate Professionals for which we are requesting this relief will be predominantly engaged in sales of real estate other than TIC Securities. Therefore, the Commercial Real Estate Professionals that would provide assistance to purchasers of TIC Securities would have an active, working knowledge of the real estate market, including experience with and ready access to relevant real estate information necessary to analyze the property and comparable properties, and experience analyzing and explaining relevant demographics, market trends and other real estate data.

In addition, such Commercial Real Estate Professionals will have substantial experience in commercial real estate as demonstrated by transactional experience or relevant education, depending on the circumstances. NAR has three affiliate organizations that confer designations upon commercial real estate professionals that have achieved educational and experience benchmarks in commercial real estate practice. The Commercial Investment Real Estate Institute (the “CCIM Institute”), an affiliate of NAR, offers a program to licensed real estate brokers and agents for designation as a CCIM, which requires education and experience related to commercial real estate brokerage, leasing, valuation, and investment analysis.<sup>34</sup> The Society of

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<sup>31</sup> Information provided in this paragraph is from the webpage of the U.S. Department of Labor, Bureau of Labor Statistics, at [www.bls.gov/oco/ocos120.htm](http://www.bls.gov/oco/ocos120.htm).

<sup>32</sup> More than a thousand universities, colleges, and junior colleges offer courses in real estate. At some, a student can earn an associate's or bachelor's degree with a major in real estate; several offer advanced degrees. The relevant college courses are in real estate, finance, business administration, statistics, economics, and law.

<sup>33</sup> *See, e.g.*, education courses offered by the North Carolina Association of Realtors® and the local associations at [www.ncrealtors.org](http://www.ncrealtors.org).

<sup>34</sup> The CCIM curriculum consists of four core courses that incorporate the essential CCIM skill sets: financial analysis, market analysis, user decision analysis, and investment analysis for commercial real estate. Additional curriculum requirements may be completed through CCIM elective courses, transfer credit for graduate education or professional recognition, and qualifying non-CCIM education. Following the course work, candidates must submit a resume of closed transactions and/or

Industrial and Office REALTORS® (“SIOR”) confers its designation on those who have completed course work and have met gross fee income requirements for commercial real estate transactions.<sup>35</sup> Similarly, the REALTORS® Land Institute is a real estate organization for land professionals and offers the Accredited Land Consultant (“ALC”) designation for members who meet advanced educational and experience requirements in land sales, leasing, management and development.<sup>36</sup> Commercial Real Estate Professionals, including licensed real estate agents and brokers who are not members of NAR, may not have obtained CCIM, SIOR or ALC designations, but may have nonetheless completed the required coursework offered by those organizations or have taken similar courses related to commercial real estate offered through universities, colleges and junior colleges. In addition, Commercial Real Estate Professionals may not have taken formal coursework but may have transactional and/or consulting experience in commercial real estate that would meet the standards of those designations. Further, licensed real estate agents or brokers may have acquired substantial experience in commercial real estate, as demonstrated by the number and size of closed transactions and/or consultations in commercial real estate transactions and the time period over which such transactions occurred.

Many TIC Security investors have previously established business and client relationships with Commercial Real Estate Professionals and the Real Estate Firm with which such Professional is licensed, in many cases because the Commercial Real Estate Professional previously acted as the "seller's agent" for the purpose of selling the investor's existing commercial or residential property. Once the client's existing commercial or residential property is sold, the client will often expect that the Commercial Real Estate Professional will continue to assist the client to complete the purchase of a replacement commercial property within 180 days in order to effect an IRC Section 1031 exchange or to reinvest residential sale proceeds in another property. However, unless the Commercial Real Estate Professional can be compensated for providing additional real estate services as a "buyer's agent" to the client with respect to

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consultations showing a depth of experience in the commercial real estate field. After fulfilling these requirements, candidates must successfully complete a comprehensive examination to earn the CCIM designation.

<sup>35</sup> The SIOR designation requires (among other things) that a licensed real estate agent or broker have at least five years of industrial or office real estate brokerage experience; be actively engaged as an industrial or office real estate broker or salesperson; and meet a minimum gross fee income standard per year and minimum number of transactions.

<sup>36</sup> The ALC designation requires that a licensed real estate agent or broker complete 120 credits of approved courses, including required courses in Land, Land Investment Analysis, and Tax Deferred 1031 Exchanges, and submit documentation demonstrating that the person's purchase, sales and lease experience in land transactions meet a minimum number and dollar amount of transactions over the prior five years.

the purchase of a TIC Security, the Commercial Real Estate Professional is unlikely to be willing to continue to assist the investor.

Furthermore, even when a potential purchaser of a TIC Security has not sold a prior commercial or residential property and is not seeking to benefit from an IRC Section 1031 exchange, a person intending to invest in commercial property can reasonably be expected to seek assistance on potential property investments from a Commercial Real Estate Professional.

The client of a Commercial Real Estate Professional that is interested in purchasing a commercial property has the option to purchase either an entire property or a TIC Interest in a property. The Commercial Real Estate Professional will generally provide information to the client about several potential replacement properties meeting the client's specifications, including both TIC Security properties and properties that do not involve the issuance of a security (*i.e.*, "non-securities properties"). Once a Commercial Real Estate Professional has identified and, in some cases, arranged for its client to inspect a TIC Security property (and any other non-securities property) and the client advises that he or she is considering the purchase of a specific TIC Security property, the Commercial Real Estate Professional will introduce the client to a Selling Broker-Dealer that is participating in the distribution of the TIC Security. At that point in the transaction, it may be neither in the client's best interest nor practical to require that the client be precluded from receiving continued real estate assistance from the Commercial Real Estate Professional after being introduced to a Selling Broker-Dealer. The client may not have made a determination as to whether to purchase the particular TIC Security property, another TIC Security property, or a non-securities property. In fact, the client may be introduced to more than one Selling Broker-Dealer selling different TIC Securities and also continue to consider one or more non-securities properties. In considering these alternatives, the client will reasonably expect to continue to receive the assistance of its Commercial Real Estate Professional on the comparative real estate aspects of the various possible purchase opportunities. Those clients seeking to effect an IRC Section 1031 exchange will also likely want information about the general real estate requirements of an IRC Section 1031 exchange with respect to acquiring a non-securities property or a TIC Security.

NAR is concerned that a client who no longer has the benefit of the Commercial Real Estate Professional's real estate assistance, once contact has been made with a Selling Broker-Dealer, may purchase a TIC Security when, in fact, a non-securities property may be a better investment for the client.<sup>37</sup> Further, the ability of a client to

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<sup>37</sup> We wish to clarify that, in this example, we are assuming that all of the securities and non-securities properties are considered suitable to the client's financial situation and investment objectives but that a non-securities property may provide a better return to the investor in comparison to a TIC Security under consideration.

compare TIC Security and non-securities properties may be impaired if the client no longer has the benefit of the real estate assistance of the Commercial Real Estate Professional with respect to a TIC Security. If, moreover, the client ultimately determines to purchase a non-securities property after considering one or more TIC Security properties, the federal securities laws will not be applicable to the participation of the Commercial Real Estate Professional in the non-securities property transaction and the continued participation of the Commercial Real Estate Professional will be beneficial to the client until the closing of the transaction.

### **III. PROPOSED REAL ESTATE ADVISORY FEE**

**A. Request for Exemption.** The real estate industry is faced with multiple regulatory requirements with respect to the sale of TIC Securities. Most states view the sale of a TIC Security as subject to the state's real estate and securities laws, whereas for federal law purposes a TIC Security must be sold in compliance with the registration requirements of the Securities Act or any exemption therefrom and any sales commission or other compensation paid for the sale of such TIC Security must be paid to a broker-dealer that is registered under Section 15(a)(1) of the Exchange Act unless an exception or exemption is available.<sup>38</sup>

We respectfully request that the SEC grant an exemption from the broker-dealer registration requirements of Section 15(a)(1) of the Exchange Act and from the reporting and other requirements specifically imposed by the Exchange Act, and the rules and regulations thereunder, on a broker or dealer that is not registered with the Commission (except Sections 15(b)(4) and 15(b)(6) of the Exchange Act), pursuant to Sections 15(a)(2) and 36(a) of the Exchange Act, to any Commercial Real Estate Professional and Real Estate Firm with which such Professional is licensed that receives a Real Estate Advisory Fee from a client in connection with the purchase of a TIC Security pursuant to a written Buyer's Agent Agreement, which fee may be paid by the client or the sponsor of a TIC Security on the client's behalf. In addition, we request that the SEC grant the exemption even though the payment of such a Real Estate Advisory Fee may reduce the sales commission or other compensation received by the Lead Placement Agent and/or Selling Broker-Dealer involved in the TIC Security Transaction.<sup>39</sup>

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<sup>38</sup> NAR recognizes that similar issues are raised by the sale of TIC Securities under state securities laws and intends to consult with the North American Securities Administrators Association in order to address state securities regulatory issues.

<sup>39</sup> It is our understanding that a Commercial Real Estate Professional that is registered as an associated person of the Selling Broker-Dealer from whom the client purchases a TIC Security may not rely on the proposed relief to receive a Real Estate Advisory Fee for representing a client in the purchase of a TIC Security in such distribution. In such circumstances, the Commercial Real Estate Professional would be compensated by the broker-dealer with whom he or she is associated.

**B. Conditions of Exemption.** This request for exemption is intended to cover the RE Participant that enters into a Buyer's Agent Agreement (as further described below) with a client that purchases a TIC Security,<sup>40</sup> as well as any other Commercial Real Estate Professional and Real Estate Firm with which such Professional is licensed that may be engaged by the contracting RE Participant with the permission of the client to provide real estate-related information to the client.

In order for any Commercial Real Estate Professional or any Real Estate Firm with which such Professional is licensed to receive or share in a Real Estate Advisory Fee in reliance on the requested exemption, the Commercial Real Estate Professional, the Real Estate Firm, the Selling Broker-Dealer and the Lead Placement Agent (which may also be the Selling Broker-Dealer) for the TIC Security Transaction shall comply with the following conditions, as applicable.

**(1) General Conditions**

- a. A Real Estate Advisory Fee shall only be paid to or shared with a Commercial Real Estate Professional who is predominantly engaged in sales of real estate other than TIC Securities, has substantial experience in commercial real estate,<sup>41</sup> is appropriately licensed in compliance with the applicable state real estate laws, and is identified in the Buyer's Agent Agreement (as further described below) with the client.
- b. Each client of the RE Participant purchasing a TIC Security must receive at closing a deed representing their undivided fractional interest in the TIC Security property and the TIC Security must qualify as a "replacement

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<sup>40</sup> A client will enter into the Buyer's Agent Agreement with the Real Estate Firm with which the Commercial Real Estate Professional who the client wishes to employ is licensed and the Commercial Real Estate Professional will generally sign the Agreement on behalf of the Real Estate Firm. For ease of reference, however, both the Commercial Real Estate Professional and Real Estate Firm will be treated as entering into the Buyer's Agent Agreement with the client and will continue to be referenced together as a "RE Participant."

<sup>41</sup> For purposes of this exemption, a Commercial Real Estate Professional will meet the "substantial experience" requirement if the person (1) has received a designation as a CCIM, SIOR, or ALC; (2) has education and transaction experience that is equivalent to those required to obtain those designations; or (3) has participated in at least 5 commercial real estate transactions having an aggregate value of at least \$3 million in the prior five years or at least 10 commercial real estate transactions having an aggregate value of at least \$10 million in the prior 10 years, including 3 transactions in the prior 3 years. A Commercial Real Estate Professional may also meet the "substantial experience" requirement based on a combination of at least two of the following factors: education in commercial real estate; the length of time during which the person engaged in commercial real estate transactions; the dollar value of commercial real estate transactions in which the individual has participated; and the number of commercial real estate transactions in which the individual has participated.

property” for purposes of an IRC Section 1031 exchange, regardless of whether the client is purchasing the TIC Security for that purpose.

- c. The TIC Security Transaction must be effected through a registered broker-dealer.

## **(2) Buyer’s Agent Agreement and Introduction to Selling Broker-Dealer**

- a. Prior to the Commercial Real Estate Professional discussing a specific TIC Security property with his or her client, the client must enter into a written Buyer’s Agent Agreement with the RE Participant, which shall obligate the RE Participant to solely represent the client in connection with the purchase of a TIC Security.<sup>42</sup>
- b. The Buyer’s Agent Agreement must identify any other RE Participant who is to receive or share in the Real Estate Advisory Fee and any such other RE Participant may only be added to the Buyer’s Agent Agreement with the consent of the client.
- c. The Buyer’s Agent Agreement must state the aggregate maximum amount of the Real Estate Advisory Fee to be paid by the client to all RE Participants, including any RE Participant that is added to the Agreement, which shall be expressed as either a fixed dollar amount or as a dollar amount that is determined in accordance with a predetermined formula (*e.g.*, a fixed percentage of the property’s full purchase price or a fixed percentage of the cash paid for the property).
- d. The aggregate maximum amount of Real Estate Advisory Fee that is actually paid by the client to all RE Participants, including any RE Participant that is added to the Buyer’s Agent Agreement, will not exceed the amount of the contracted Real Estate Advisory Fee even if the client, the sponsor or another person is willing to pay a higher fee.
- e. The Commercial Real Estate Professional may discuss the real estate characteristics of a TIC Security property with the client and arrange for the client to inspect a TIC Security property and any other non-securities property before introducing the client to the Selling Broker-Dealer, but shall arrange such introduction upon the client advising the Commercial

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<sup>42</sup> Generally, the Real Estate Advisory Fee will be paid to the Real Estate Firm with which a Commercial Real Estate Professional is licensed, which will distribute all or a previously agreed-upon percentage of the Fee to the Commercial Real Estate Professional that signed the agreement and to any other Commercial Real Estate Professional or Real Estate Firm that was added to the agreement with the consent of the client.

Real Estate Professional that he or she is considering the purchase of a specific TIC Security property.

**(3) Restrictions on Conduct of the RE Participant**

A RE Participant that, directly or indirectly, receives a portion of a Real Estate Advisory Fee will not:

- a. list or otherwise advertise the availability of TIC Securities or advertise that the RE Participant represents clients in connection with the purchase of TIC Securities;
- b. share a Real Estate Advisory Fee with any person not permitted to receive such Fee under the requested exemption;
- c. handle customer funds or securities in a TIC Security Transaction;
- d. negotiate the terms and conditions of the purchase of any TIC Security on behalf of the client with a broker-dealer or sponsor selling a TIC Security or have any power to bind the client in the TIC Security Transaction, but may transmit documents and information between the parties and may attend meetings between the Lead Placement Agent, Selling Broker-Dealer, and the sponsor and the client (solely in order to assist the client);
- e. represent the client as a "purchaser representative," as defined in SEC Rule 501(h) of SEC Regulation D;
- f. participate in the structuring of a TIC Security investment offered to the client;
- g. have the authority to close a purchase of a TIC Security on a client's behalf; or
- h. assist a client that purchases a TIC Security to obtain financing, except to provide a list of potential lenders.<sup>43</sup>

**(4) Other Obligations of the RE Participant**

- a. The RE Participant must deliver a copy of the executed Buyer's Agent Agreement to the Lead Placement Agent at closing.

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<sup>43</sup> To the extent that a RE Participant receives a fee from a lender for providing a referral that is permitted under The Real Estate Settlement Procedures Act of 1974 (as amended), such fee must be disclosed to the client. *See*, 12 U.S.C. 2607.

- b. Any Commercial Real Estate Professional that is to receive, directly or indirectly, a portion of a Real Estate Advisory Fee must not be subject to any “statutory disqualification,” as that term is defined in Section 3(a)(39) of the Exchange Act (other than subparagraph (E) of that section), and will deliver a representation in writing to that effect to the Lead Placement Agent at closing. To the extent the statutory disqualification representation is included in the Buyer’s Agent Agreement, it must be updated at closing with respect to each Commercial Real Estate Professional that may, directly or indirectly, receive any portion of a Real Estate Advisory Fee.

**(5) Obligations of the Selling Broker-Dealer and Lead Placement Agent**

- a. Before the TIC Security Transaction is effected, the Selling Broker-Dealer must perform a suitability analysis of the TIC Security Transaction in accordance with the rules of the Selling Broker-Dealer’s applicable self-regulatory organization (“SRO”) as if the Selling Broker-Dealer had recommended the TIC Security Transaction and must deliver a representation in writing to that effect to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, must make a representation in writing to that effect at closing.
- b. The Selling Broker-Dealer will inform the customer if the Selling Broker-Dealer determines that the TIC Security Transaction to be effected for the customer is not suitable under the rules of the Selling Broker-Dealer’s applicable SRO, and will not effect the TIC Security Transaction unless it obtains the customer’s written affirmation that the customer wants to proceed with the TIC Security Transaction notwithstanding the Selling Broker-Dealer’s determination. The Selling Broker-Dealer must deliver the written affirmation to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, must maintain the written affirmation as specified below.
- c. The Lead Placement Agent must maintain a copy of each of the documents that is to be made and/or delivered at closing pursuant to the requested exemption (*i.e.*, the Buyer’s Agent Agreement, the statutory disqualification representations, the suitability representation, and, if applicable, the customer’s written affirmation), the relevant part of the real estate closing documents that evidences the amount of the Real Estate Advisory Fee paid to any RE Participant involved in the TIC Security Transaction, and any other records that are required to be maintained in accordance with the recordkeeping requirements of the federal securities laws for a period of three (3) years in accordance with Exchange Act Rule 17a-4(f).



**C. Discussion of Buyer's Agent Agreement.** We believe that the requirement for a Buyer's Agent Agreement will help to ensure that any Real Estate Firm or Real Estate Professional that shares in a Real Estate Advisory Fee operates within the terms of the requested exemption. Such an Agreement may also be used to facilitate the disclosure of relevant information to the client regarding a TIC Security. Therefore, in addition to the disclosures required as a condition of this exemption, we believe that the client should receive, via the Buyer's Agent Agreement or another document, disclosures related to the possibility that the client will consider a TIC Security property, including but not necessarily limited to the following.

1. Educational disclosures regarding the structure of TIC Interests.<sup>44</sup>
2. A statement that neither the Real Estate Firm nor the Commercial Real Estate Professional is registered as a broker-dealer with the SEC and, therefore, cannot sell a TIC Security, but that the Commercial Real Estate Professional may discuss the real estate characteristics of a TIC Security with the client, and arrange for the client to inspect a TIC Security property before introducing client to a Selling Broker-Dealer.<sup>45</sup>
3. A statement of information and services that the Commercial Real Estate Professional may provide to the client with respect to a TIC Security under consideration after introduction to a Selling Broker-Dealer.<sup>46</sup>

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<sup>44</sup> For example, a Buyer's Agent Agreement may include the following educational disclosures regarding TIC Interests:

Client may consider an interest in real property in the form of a tenants-in-common interest ("TIC Interest"), which is an undivided fractional interest in real property. Each owner of a TIC Interest receives a deed in that co-owner's name, can obtain title insurance for his or her percentage interest in the property, has a right to a pro-rata portion of the income, gain, loss, deductions and credits from the property, and can sell, gift, or bequeath the property by will. TIC Interests in real property are often considered as a replacement property by individuals seeking to complete a tax-deferred exchange transaction pursuant to Section 1031 of the Internal Revenue Code. In addition, individuals may consider purchasing a TIC Interest in real property in order to pool their funds with those of other investors to invest in a larger property.

<sup>45</sup> For example, a Buyer's Agent Agreement may include the following to meet this and other suggested disclosures.

Firm may provide information to Client on certain TIC Interests that are deemed to be securities for purposes of state and federal laws (a "TIC Security"). The Firm is not a registered broker-dealer with the Securities and Exchange Commission ("SEC") and cannot sell TIC Securities. However, the Firm may discuss with Client and assist Client in evaluating the real estate characteristics of TIC Security properties and arrange for Client to inspect TIC Security properties. Upon Client's advice to Firm that Client is considering the purchase of a TIC Security property, Firm will introduce Client to a SEC-registered broker-dealer that represents the seller of the TIC Security. After such introduction, the Firm may continue to provide real estate consulting services with respect to Client's consideration of the TIC Security property being offered by the broker-dealer.

<sup>46</sup> For example, a Buyer's Agent Agreement may include the following description of services:

4. A statement that the Selling Broker-Dealer will be responsible for compliance with the federal and state securities laws that apply to the sale of a TIC Security.

We also believe that the Buyer's Agent Agreement should include a representation by any Commercial Real Estate Professional who is to receive or share in the Real Estate Advisory Fee that the Professional has substantial experience in commercial real estate.<sup>47</sup>

#### **IV. ANALYSIS OF EXEMPTION**

Section 15(a)(1) of the Exchange Act provides that "[i]t 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 subsection 15(b) of this section."<sup>48</sup> 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>49</sup> In determining whether a party comes within the definition of "broker," the SEC has, among other things, focused

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- Locate, identify and obtain information about potential TIC Security properties and non-security real properties.
  - Conduct tours for Client of potential TIC Security properties and non-security real properties.
  - Advise Client on comparative characteristics of alternative properties (both TIC Security properties and non-security real properties) that meet Client's specifications, including location; income history and projections; tenant demographics and financial strength; market data; current or other potential uses for the property; current property financing; need for cash reserves for repairs and on-going operations; need for cash impounds to pay future taxes; and known property and environmental hazards and potential sources of expert assistance regarding the same.
  - Discuss with Client financing alternatives, the amount of leverage, current comparative lending rates, adjustable and fixed rate options, and length of loan maturities, and information on potential financing sources (but will not assist Client to obtain financing in the case of a TIC Security).
  - Evaluate and advise Client about documents related to TIC security and non-security properties, such as TIC agreements, master leases, covenant and condition agreements, parking agreements, operating cost data, tenant leases, financial statements and pro forma financial statements, and transaction documents
  - Provide general, but not legal, tax assistance to Client regarding the requirements and complexities to be satisfied in an IRC Section 1031 exchange in order for Client to qualify for tax deferral under such provision.

<sup>47</sup> See footnotes 5 and 41 above on the meaning of "substantial experience in commercial real estate."

<sup>48</sup> 15 U.S.C. 78o(a)(1).

<sup>49</sup> 15 U.S.C. 78c(a)(4). The activities of a RE Participant that receives a Real Estate Advisory Fee would not constitute the activities of a "dealer" under Section 3(a)(5) of the Exchange Act, which defines the term, in relevant part, as any person, other than a bank, "engaged in the business of buying and selling securities for his own account through a broker or otherwise." 15 U.S.C. 78c(a)(5).

on whether the person receives commissions or other compensation in connection with transactions in securities.<sup>50</sup>

The sales activities of a RE Participant together with the receipt by a RE Participant of a Real Estate Advisory Fee in connection with the sale of a TIC Security generally would require that the RE Participant register as a broker under Section 15(a)(1) absent an exception or exemption from registration. Moreover, according to Notice 05-18, a NASD member may not evade the prohibitions of NASD Rule 2420 by reducing its normal commission or other compensation in a TIC Security Transaction so that the customer will pay the difference to a RE Participant unless the RE Participant is covered by a no-action letter from SEC staff indicating that the RE Participant is not required to register as a broker-dealer or by an exception or exemption from broker-dealer registration granted by the SEC.

Section 15(a)(2) of the Exchange Act provides the Commission with authority, consistent with the public interest and the protection of investors, to conditionally or unconditionally exempt any broker or dealer or class of brokers or dealers from the registration requirements set forth in Section 15(a)(1).<sup>51</sup> Similarly, and more broadly, Section 36(a) of the Exchange Act provides the Commission with authority to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the Exchange Act or of any rule or regulation thereunder, to the extent that “such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”<sup>52</sup>

In light of the extensive safeguards proposed by NAR with respect to the limited activities to be performed in exchange for payment of the proposed Real Estate Advisory Fee, the policy considerations that recognize the role of real estate in a TIC Security Transaction, and the participation in any such TIC Security Transaction in which a RE Participant receives a Real Estate Advisory Fee of a registered broker-dealer that will perform a suitability analysis before the transaction is effected, we believe that the requested exemption for unregistered RE Participants is appropriate in the public interest and is consistent with the protection of investors.

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<sup>50</sup> See, e.g., SEC Release No. 34-22172 (June 27, 1985), 50 FR 27940 (July 9, 1985), at 27942 (discussion in connection with footnote 12). See also, *SEC v. Corporate Relations Group, Inc.*, 2003 U.S. Dist. LEXIS 24925, at \*56 (M.D. Fla. Mar. 28, 2003) and *SEC v. Hansen*, 1984 U.S. Dist LEXIS 17835, at \*26 (S.D.N.Y. April 6, 1984).

<sup>51</sup> 15 U.S.C. 78o(a)(2).

<sup>52</sup> 15 U.S.C. 78mm(a).

**A. The Proposed Exemption Is Consistent with the Protection of Investors.**

**(1) A Broker-Dealer Will Participate in a TIC Security Transaction**

As described above, a Commercial Real Estate Professional that provides real-estate related assistance to a client pursuant to a Buyer's Agent Agreement for a Real Estate Advisory Fee must introduce his or her client to a registered Selling Broker-Dealer that is participating in the distribution of the TIC Security once the client advises that he or she is considering the purchase of the TIC Security. As a condition of the requested exemption, the Selling Broker-Dealer that participates in the TIC Security Transaction will be responsible, before the TIC Security Transaction is effected, for performing a suitability analysis of the TIC Security Transaction in accordance with the rules of the Selling Broker-Dealer's applicable SRO as if the Selling Broker-Dealer had recommended the TIC Security Transaction and must deliver a representation in writing to that effect to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, must make a representation in writing to that effect at closing. The Selling Broker-Dealer will inform the customer if the Selling Broker-Dealer determines that the TIC Security Transaction to be effected for the customer is not suitable under the rules of the Selling Broker-Dealer's applicable SRO, and will not effect the TIC Security Transaction unless it obtains the customer's written affirmation that the customer wants to proceed with the TIC Security Transaction notwithstanding the Selling Broker-Dealer's determination. The Selling Broker-Dealer must deliver the written affirmation to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, must maintain the written affirmation as further specified below.

The Lead Placement Agent will also be responsible for maintaining a copy of the Buyer's Agent Agreement, the statutory disqualification representation of each Commercial Real Estate Professional that is to, directly or indirectly, share a Real Estate Advisory Fee, the Selling Broker-Dealer's suitability representation, and, if applicable, the customer's written affirmation, as well the relevant part of the real estate closing documents that evidences the amount of the Real Estate Advisory Fee paid to a RE Participant involved in the TIC Security Transaction, and any other records that are required to be maintained in accordance with the recordkeeping requirements of the federal securities.

The regulatory responsibilities of Selling Broker-Dealers and the Lead Placement Agent and the suitability obligation imposed on the Selling Broker-Dealer as a condition of this exemption significantly minimize the risk to the investing public that may arise due to the role of a Commercial Real Estate

Professional in providing real estate assistance to a purchaser of a TIC Security.

**(2) Continuing Real Estate Assistance Will Facilitate Consideration and Comparison of Properties**

The requested exemption is consistent with the protection of investors because the continuing real estate assistance of a RE Participant with substantial experience in commercial real estate will facilitate clients' consideration and comparison of the real estate characteristics of TIC securities as well as non-securities properties. The exclusion of a RE Participant from providing real estate-related assistance with respect to any TIC Security under consideration may impair the client's ability to appropriately compare the real estate characteristics of non-securities and TIC Security properties. If, moreover, a client ultimately determines to purchase a non-securities property after considering one or more TIC Security properties, the federal securities laws would not be applicable to the role of a RE Participant in the purchase transaction.

**(3) The Role of a RE Participant is Limited**

The requested relief is consistent with the protection of investors because of the proposed conditions that limit the role of a RE Participant that would receive a Real Estate Advisory Fee. Any RE Participant that proposes to receive a Real Estate Advisory Fee in connection with a client's purchase of a TIC Security must comply with the conditions of the exemption. To ensure that the assistance provided by a RE Participant to its client is not subject to any influence by the issuer or its agent, a RE Participant must solely represent the client in connection with the purchase of a TIC Security pursuant to a written Buyer's Agent Agreement. In order to ensure that potential clients of a RE Participant will not be confused as to the registered status of the RE Participant, a RE Participant may not list or otherwise advertise the availability of TIC Securities or advertise that the RE Participant represents clients in connection with the purchase of TIC securities.

To minimize the RE Participant's involvement in securities-related activities in connection with a TIC Security Transaction, an RE Participant would be prohibited from negotiating the terms and conditions of a purchase of any TIC Security on behalf of the client or participating in the structuring of a TIC Security offered to a client. To eliminate the risk of loss of client funds or securities, a RE Participant is prohibited from handling any client funds or securities in connection with a TIC Security Transaction.

Moreover, a RE Participant cannot receive a Real Estate Advisory Fee in an amount that exceeds the contracted fee even if the client, the sponsor of the TIC Security or another person is willing to pay a higher fee. This latter requirement is intended to ensure that a Commercial Real Estate Professional does not make choices between TIC Securities that meet the client's investment specifications based upon the amount of fee that a sponsor may be willing to pay.

The conditions of the exemption that will limit the role of any RE Participant that would receive a Real Estate Advisory Fee will minimize the risk to the investing public to the extent that little purpose would be served by requiring that such RE Participants register and be regulated as a broker-dealer.

## **B. The Proposed Exemption Is Consistent With the Public Interest**

### **(1) Opportunity to Receive On-Going Real Estate Assistance**

Given that the real estate aspects of a TIC Security are predominant characteristics of the investment and a key element of the performance of the underlying real estate, granting the requested exemption is consistent with the public interest because potential investors in TIC Securities would benefit from the expert real estate assistance of qualified Commercial Real Estate Professionals with respect to the real estate aspects of the investment. The requested exemption requires that the Commercial Real Estate Professional have substantial experience, as more specifically described above, in commercial real estate<sup>53</sup> in order to provide relevant real estate assistance to a client considering the purchase of a TIC Security.

### **(2) Investor Convenience and Choice of Real Estate Assistance**

Granting the requested exemption is consistent with the public interest because an investor that is considering an investment in real property and has entered into a relationship with a Commercial Real Estate Professional should not have to forego the assistance of its chosen Commercial Real Estate Professional regarding the real estate aspects of a TIC Security investment. As stated previously, many TIC Security purchasers have previously established business relationships with Commercial Real Estate Professionals, in many cases because the Commercial Real Estate Professional previously acted as the "seller's agent" for the purpose of selling the investor's existing commercial or residential property. Once the client's existing commercial or residential property is sold, the client will often expect that the Commercial

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<sup>53</sup> The Commercial Real Estate Professional must also be predominantly engaged in sales of real estate other than TIC Securities.

Real Estate Professional will continue to assist the client to complete the purchase of a replacement commercial property within 180 days in order to effect an IRC Section 1031 exchange or to reinvest residential sale proceeds in another property. However, unless the Commercial Real Estate Professional can be compensated for providing additional real estate services as a “buyer’s agent” to the client with respect to the purchase of a TIC Security, the Commercial Real Estate Professional is unlikely to be willing to continue to assist the investor regarding the real estate aspects of the TIC Security investment.<sup>54</sup>

### **(3) Investor Flexibility**

Granting the requested exemption is in the public interest because a client of a Commercial Real Estate Professional that is considering alternative securities and non-securities real estate investments should continue to receive the benefit of a Commercial Real Estate Professional’s real estate information on the comparative real estate aspects of the investment opportunities. The exclusion of a Commercial Real Estate Professional from providing real estate assistance with respect to any TIC Security under consideration may impair the ability of the client to appropriately compare the real estate characteristics of the non-securities and TIC Securities properties under consideration.

In these circumstances, we believe it would be impractical and unduly burdensome to require that the Commercial Real Estate Professional have passed a securities law examination and become registered as an associated person of a registered broker-dealer in order to continue to provide real estate assistance to its client in connection with the client’s consideration of one or more TIC Security properties, along with other non-security properties, because the Commercial Real Estate Professional will be predominantly engaged in sales of real estate other than TIC Securities, would be required to register in numbers of states to meet state securities registration requirements, and will be involved only on a limited basis in the securities law aspects of any TIC Security Transaction. Moreover, in many cases, the Commercial Real Estate Professional’s involvement in a TIC Security Transaction will be infrequent and, as discussed, a client may ultimately purchase a non-securities property. Similarly, we believe it would be impractical and unduly burdensome to require that Real Estate Firms register and be regulated as a broker-dealer in light of the firm’s limited involvement in securities transactions in the form of a TIC Security.

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<sup>54</sup> Of course, if the licensed real estate agent or broker that sold the client’s existing residential property does not have substantial experience in commercial real estate, the client would have to consult a Commercial Real Estate Professional.

**(4) Affording Investors the Opportunity to Select the Most Desirable Type of Investment**

Granting the requested exemption is consistent with the public interest because a client who no longer has the benefit of a Commercial Real Estate Professional's real estate assistance once contact is made with a broker-dealer representing the seller of a TIC Security property may purchase the TIC Security even though a non-securities property may provide a better investment return to the client consistent with the suitability of the investment to the client's financial situation and objectives. If, moreover, the client ultimately determines to purchase a non-securities property after considering one or more TIC Security properties, the federal securities laws will not be applicable to the participation of the Commercial Real Estate Professional in the non-securities property transaction and the continued participation of the Commercial Real Estate Professional will be beneficial to the client until the closing of the transaction.

**V. CONCLUSION**

We believe that the knowledge of Commercial Real Estate Professionals with substantial experience in commercial real estate contributes to helping a potential purchaser to understand and properly evaluate the real estate aspects of various TIC Securities and non-securities commercial properties that are available for the purchaser's consideration and that such purchasers benefit from receiving the independent assistance of a Commercial Real Estate Professional, acting as a "buyer's agent." Given the conditions of the exemption that will limit the role of a Commercial Real Estate Professional and Real Estate Firm with which such Professional is licensed that would receive a Real Estate Advisory Fee, we believe that an exemption from registration and regulation of the Commercial Real Estate Professional and the Real Estate Firm as a broker-dealer is appropriate in the public interest and consistent with the protection of investors.

Therefore, we respectfully request that the Commission exempt any Commercial Real Estate Professional and the Real Estate Firm with which such Professional is licensed that receives, directly or indirectly, a Real Estate Advisory Fee from a purchaser of a TIC Security in accordance with the conditions contained herein from the broker-dealer registration requirements of Section 15(a)(1) of the Exchange Act and from the reporting and other requirements specifically imposed by the Exchange Act, and the rules and regulations thereunder, on a broker or dealer that is not registered with the Commission (except Sections 15(b)(4) and 15(b)(6) of the Exchange Act).

\* \* \* \*



Nancy M. Morris, Secretary  
Securities and Exchange Commission  
October 11, 2007  
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**Confidential Treatment Requested by  
Skadden, Arps, Slate, Meagher & Flom LLP  
on Behalf of National Association of Realtors®**

If you require any additional information or clarification regarding this submission, please do not hesitate to contact the undersigned at Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Avenue, NW, Washington, DC 20005-2111, (202) 371-7216 or Ralph W. Holmen, Associate General Counsel, at National Association of Realtors®, 430 North Michigan Avenue, Chicago, IL 60611, (312) 329-8375. On behalf of our client, NAR, we thank you for your consideration of this matter.

Very truly yours,



Suzanne E. Rothwell

cc: Joseph M. Ventrone, Vice President  
National Association of Realtors®

Ralph W. Holmen, Associate General Counsel  
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