

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-56779; File No. S7-26-07]**

**Nov. 9, 2007**

### **NOTICE OF APPLICATION OF THE NATIONAL ASSOCIATION OF REALTORS FOR EXEMPTIVE RELIEF UNDER SECTIONS 15 AND 36 OF THE EXCHANGE ACT AND REQUEST FOR COMMENT**

The National Association of Realtors<sup>®</sup> (“NAR”) has requested an exemption pursuant to Sections 15(a)(2) and 36(a) of the Securities Exchange Act of 1934 (“Exchange Act”) from the broker-dealer registration requirements of Section 15(a)(1) and the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)), and the rules and regulations thereunder, that apply to a broker or dealer that is not registered with the Commission. Subject to the conditions specified in NAR’s application (“Application”) and discussed below, the requested exemption would permit a licensed real estate agent or broker who is predominantly engaged in and has substantial experience in the commercial real estate market and the real estate brokerage firm with which such agent or broker is licensed to receive compensation in the form described below for the sale of a TIC Security, as defined below.

In order to provide an opportunity for interested persons to comment on the Application, the Commission is publishing this notice and request for comment pursuant to Rule 0-12 under the Exchange Act. The Commission will carefully consider all comments submitted, and, should it determine to issue an exemption, could eliminate or add to, or modify, the conditions discussed below.

#### **BACKGROUND**

Section 15(a)(1) of the Exchange Act generally requires any broker or dealer who makes use of the mails or any instrumentality of interstate commerce to effect transactions in, or induce the purchase or sale of, any security to register with the Commission. Section 3(a)(4)(A) of the Exchange Act generally defines a “broker” as “any person engaged in the business of effecting

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

Section 15(a)(2) of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt from the broker-dealer registration requirements of Section 15(a)(1) any broker or dealer or class of brokers or dealers, by rule or order, as it deems consistent with the public interest and the protection of investors.<sup>1</sup> Similarly, but more broadly, Section 36 of the Exchange Act authorizes the Commission 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 any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.<sup>2</sup>

## **SUMMARY OF THE APPLICATION**

NAR requests an exemption to allow any licensed real estate agent or broker who is predominantly engaged in and has substantial experience<sup>3</sup> in the sale of commercial real estate<sup>4</sup>

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<sup>1</sup> See 15 U.S.C. 78o(a)(2).

<sup>2</sup> See 15 U.S.C. 78mm.

<sup>3</sup> The Application defines “substantial experience” to mean a Commercial Real Estate Professional who (1) has received a Certified Commercial Investment Member designation from the Commercial Investment Real Estate Institute, a designation from the Society of Industrial and Office REALTORS<sup>®</sup>, or an Accredited Land Consultant designation from the REALTORS<sup>®</sup> Land Institute; (2) has education and transaction experience that is equivalent to those required to obtain those designations; or (3) has participated in at least five 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

(“Commercial Real Estate Professional”) and the real estate brokerage firm with which he or she is licensed (“Real Estate Firm”) (collectively, a “RE Participant”) to receive a real estate advisory fee (“Real Estate Advisory Fee”) from a purchaser of an undivided tenant-in-common interest in real property (“TIC Interest”)<sup>5</sup> that is offered and sold together with other arrangements that cause it to be deemed to be a security under the federal securities laws (“TIC Security”).<sup>6</sup>

Under NAR’s exemptive request, a Real Estate Advisory Fee could be paid by the purchaser directly or on behalf of the purchaser by the sponsor or issuer of the TIC Security, which could, thereby, reduce the commission or other compensation received by a registered broker-dealer involved in the TIC Security transaction. The Real Estate Advisory Fee generally would be paid to the Real Estate Firm with which the Commercial Real Estate Professional is licensed. The Firm would distribute all or a previously agreed upon percentage of the Real

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10 years, including 3 transactions in the prior 3 years. Alternatively, the Application provides that a Commercial Real Estate Professional will satisfy 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 has 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.

<sup>4</sup> For purposes of the Application, “commercial real estate” includes all real estate categories other than single-family and one- to four-unit residential dwellings, including office, retail, raw land, multifamily (i.e., greater than four dwellings), industrial and others. It does not include TIC Securities.

<sup>5</sup> 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.

<sup>6</sup> TIC Securities are sold by a sponsor through a registered broker-dealer acting as a placement agent (“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”). A Lead Placement Agent also may act as a Selling Broker-Dealer.

Estate Advisory Fee to the Commercial Real Estate Professional that signed a buyer's agent agreement with the client and to any other Commercial Real Estate Professional or Real Estate Firm that was added to the agreement with the consent of the client.

As proposed by NAR, in order for any Commercial Real Estate Professional or any Real Estate Firm with which such person 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 for the TIC Security transaction would 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>7</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.<sup>8</sup>
- b. Each client of the RE Participant purchasing a TIC Security must receive at closing a deed representing his or her undivided fractional interest in the TIC Security property and the TIC Security must qualify as a "replacement property" for purposes of an IRC Section 1031 exchange, regardless of whether the client is purchasing the TIC Security for that purpose.

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<sup>7</sup> See note 3.

<sup>8</sup> Although not proposed as a condition to NAR's requested exemption, NAR states in its application that it "believes" the buyer's agent agreement "should include" a representation that the Commercial Real Estate Professional who receives or shares a Real Estate Advisory Fee has substantial experience in commercial real estate.

- 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.
- 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 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 Rule 501(h) of the Securities Act of 1933;
- 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.

**(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.
- 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).

#### **SUMMARY OF REASONS FOR THE EXEMPTION**

NAR states that the requested exemption would allow a potential purchaser of a TIC Security to benefit from the real estate expertise of a Commercial Real Estate Professional, while receiving necessary protections afforded by federal and state securities laws and regulations. NAR states that the proposed conditions would limit the role of a Commercial Real Estate Professional and Real Estate Firm with which such person is licensed that would receive a Real Estate Advisory Fee. As a result, NAR states that an exemption from registration and regulation of the Commercial Real Estate Professional and the Real Estate Firm with which such person is licensed as a broker-dealer would be appropriate in the public interest and consistent with the protection of investors.



NAR has waived its request for confidential treatment and the Application is available on the Commission's Web site (<http://www.sec.gov/rules/other.shtml>) and at the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm.

## **REQUEST FOR COMMENT**

The Commission invites any person to submit comments or other information that relates to the exemptions requested in the Application, including whether the exemption should be granted, whether the conditions are appropriate, and whether conditions should be added, eliminated, or modified. In particular, the Commission requests comment as to the following:

- Is the Application's definition of "substantial experience in commercial real estate" appropriate? Should "substantial experience in commercial real estate" be defined differently? If so, how?
- Should a Commercial Real Estate Professional be considered to have "substantial experience in commercial real estate" if he or she meets a combination of two subjective factors (such as education and dollar value of transactions), or should substantial experience only be demonstrated by the specific education or transactional benchmarks enumerated in the Application?
- Should the quantitative factors included in the Application's definition of "substantial experience in commercial real estate" be periodically adjusted for inflation? If so, how often and which measure of inflation should be used?
- Are there education and experience designations from groups other than those affiliated with NAR that would be appropriate to name specifically as evidencing "substantial experience in commercial real estate"?

- Should the exemption include a quantitative threshold to describe when a Commercial Real Estate Professional would be “predominantly engaged” in the sale of real estate other than TIC Securities? If so, what should that threshold be? For example, should 85 percent of the dollar value of a Commercial Real Estate Professional’s sales during one or more prior calendar years be in real estate other than TIC securities in order to meet the predominance requirement?
- Should the exemption be conditioned on the buyer’s agent agreement including a representation that the Commercial Real Estate Professional who receives or shares a Real Estate Advisory Fee has substantial experience in commercial real estate?
- Is there a possibility that the exemption, if granted, could create an incentive for Commercial Real Estate Professionals to sell TIC Securities instead of non-security forms of commercial real estate investments to their clients? Are there countervailing factors that would mitigate or neutralize any such incentive? Should the possibility of any such incentive be addressed by one or more conditions, for example, by requiring Commercial Real Estate Professionals to disclose in the buyer’s agent agreement the various fees they would receive for selling TIC Securities and non-security forms of commercial real estate investments? Are there other conditions that could address this incentive?
- Are the proposed conditions that would impose obligations on registered broker-dealers appropriate? Would they be sufficient to accomplish the desired goals, including maintaining investor protection? Should any be eliminated or modified, or should additional conditions be included? Commenters are invited to suggest conditions and explain their purpose.

For further information, contact Catherine McGuire, Chief Counsel; Brian Bussey, Assistant Chief Counsel; or Michael Hershaft, Special Counsel, at (202) 551-5550, Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6628.

Submission of Comments:

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. S7-26-07 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. S7-26-07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/other.shtml>). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. S7-26-07 and should be submitted on or before [insert date 30 days after date of publication in the Federal Register]. The Commission will take final action on the Application no earlier than [insert date 31 days after date of publication in the Federal Register].

## PAPERWORK REDUCTION ACT ANALYSIS

Certain provisions of the requested exemption contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995.<sup>9</sup> The Commission has submitted these information collections to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507(c) and 5 CFR 1320.10. These collections of information under the requested exemption are new, and OMB has not yet assigned a control number for them. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.<sup>10</sup>

A. Delivery of the Buyer’s Agent Agreement to the Lead Placement Agent at Closing

1. Collection of Information

The requested exemption would be conditioned on the RE Participant delivering a copy of the executed buyer’s agent agreement to the Lead Placement Agent at closing.

2. Proposed Use of the Information

The proposed buyer’s agent agreement is designed to assist in implementing the requested exemption and monitoring for compliance. The proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the buyer’s agent agreement in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the requested exemption.

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<sup>9</sup> 44 U.S.C. 3501, *et seq.*

<sup>10</sup> 44 U.S.C. 3512.

### 3. Respondents

The proposed collection of information would apply to RE Participants who rely on the requested exemption.

### 4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 800 RE Participants<sup>11</sup> would rely on the requested exemption and each RE Participant would on average deliver to the Lead Placement Agent a copy of an executed buyer's agent agreement 6.63 times<sup>12</sup> a year. Based on these estimates, the Commission estimates that this requirement would result in approximately 5,304 disclosures<sup>13</sup> per year. The Commission also estimates that a RE Participant would spend approximately five minutes per disclosure to the Lead Placement Agent. Thus, the estimated

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<sup>11</sup> Based on discussions with industry participants on the number of registered representatives currently involved in TIC Security transactions, the Commission estimates that approximately 800 Commercial Real Estate Professionals would rely on the requested exemption. Although this collection of information covers RE Participants, which includes Commercial Real Estate Professionals and the real estate brokerage firms with which they are licensed, the Commission expects that the Commercial Real Estate Professionals, and not the firms, would actually fulfill the delivery requirement.

<sup>12</sup> Based on discussions with industry representatives, we understand that there were approximately 312 TIC Security offerings in 2006 and approximately 17 participants per offering for a total of 5,304 TIC Security transactions. For purposes of calculating the reporting and recordkeeping burden, the Commission estimates that all TIC Security transactions would be conducted pursuant to the requested exemption. The Commission recognizes that it is highly unlikely that all TIC Security transactions would involve a RE Participant pursuant to the requested exemption in light of the existing broker-dealer sales channel for TIC Securities. However, the Commission does not have sufficient information to estimate participation rates of less than 100 percent, and thus has chosen the most conservative estimate for calculating the reporting and recordkeeping burden. Accordingly, 5,304 TIC Security transactions/800 RE Participants = 6.63. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would deliver to the Lead Placement Agent a copy of an executed buyer's agent agreement six times a year, and others would do so seven times a year.

<sup>13</sup>  $6.63 \times 800 = 5,304$ .

total annual reporting and recordkeeping burden for this requirement is 442 hours<sup>14</sup> for the RE Participants.

5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for RE Participants who rely on the requested exemption.

6. Confidentiality

The proposed collection of information would be provided by the RE Participant to the Lead Placement Agent and would be available for inspection by the Commission and the applicable SRO.

7. Record Retention Period

The requested exemption does not contain a separate record retention period.<sup>15</sup>

B. Delivery of the Statutory Disqualification Representation at Closing

1. Collection of Information

The requested exemption would require any Commercial Real Estate Professional that is to receive, directly or indirectly, a portion of a Real Estate Advisory Fee to not be subject to any “statutory disqualification,” as defined in Section 3(a)(39) of the Exchange Act (other than subparagraph (E) of that section), and to deliver a representation in writing to that effect to the Lead Placement Agent at closing.<sup>16</sup>

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<sup>14</sup> 5,304 TIC Security transactions x five minutes per transaction = 26,520/60 = 442.

<sup>15</sup> The Lead Placement Agent, as a registered broker-dealer, would be subject to the record retention provisions of Exchange Act Rule 17a-4. OMB has approved the collection of information related to these record retention provisions. See OMB control number 3235-0279.

<sup>16</sup> Although the requested exemption would require a Commercial Real Estate Professional to update the “statutory disqualification” representation at closing, if the “statutory disqualification” notice were already included in the buyer’s agent agreement, there would be no requirement to include the representation in the buyer’s agent agreement. Commercial Real

## 2. Proposed Use of the Information

The proposed “statutory disqualification” representation would be used in implementing the requested exemption and monitoring its use. The proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the statutory disqualification representation in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the exemption.

## 3. Respondents

The proposed collection of information would apply to Commercial Real Estate Professionals who would receive, directly or indirectly, a portion of a Real Estate Advisory Fee pursuant to the requested exemption.

## 4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 800 Commercial Real Estate Professionals<sup>17</sup> would rely on the requested exemption and each Commercial Real Estate Professional would on average deliver the written statutory disqualification representation 6.63 times<sup>18</sup> a year. Based on these estimates, the Commission anticipates that this requirement would result in 5,304 disclosures<sup>19</sup> per year. The Commission estimates that approximately 95 percent of Commercial Real Estate Professionals would spend approximately five minutes for

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Estate Professionals would have only one “statutory disqualification” representation disclosure requirement per transaction.

<sup>17</sup> See note 11.

<sup>18</sup> See note 12. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would deliver to the Lead Placement Agent a written statutory disqualification representation six times a year, and others would do so seven times a year.

<sup>19</sup> See note 13.

each representation to the Lead Placement Agent. The Commission also estimates that approximately five percent of Commercial Real Estate Professionals<sup>20</sup> would spend approximately 30 minutes for their first representation to the Lead Placement Agent,<sup>21</sup> and five minutes for each of the 5.63 subsequent representations. Thus, the estimated total annual reporting and recordkeeping burden for these requirements is 458.67 hours<sup>22</sup> for Commercial Real Estate Professionals.

#### 5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for Commercial Real Estate Professionals who rely on the requested exemption.

#### 6. Confidentiality

The collection of information would be provided by the Commercial Real Estate Professional to the Lead Placement Agent and to the customer and would be available for inspection by the Commission and the applicable SRO.

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<sup>20</sup> Based on the Commission's experience with disciplinary disclosures by registered representatives on Forms U-4, the Commission estimates that five percent of Commercial Real Estate Professionals could be subject to a statutory disqualification and would require more time to make such a determination.

<sup>21</sup> The Commission estimates that these Commercial Real Estate Professionals would spend 25 minutes to determine whether they would be subject to a statutory disqualification and to generate the representation, and five minutes to disclose the representation.

<sup>22</sup>  $800 \times .95 \times 6.63 \times 5 = 25,194/60 = 419.90$  total burden hours for 95 percent of the Commercial Real Estate Professionals.  $800 \times .05 \times 1 \times 30 = 1,200/60 = 20$  hours for the first representation by five percent of the Commercial Real Estate Professionals.  $800 \times .05 \times 5.63 \times 5 = 1,126/60 = 18.77$  hours for the second and third representations by five percent of the Commercial Real Estate Professionals. Thus total burden hours would be  $419.90 + 20 + 18.77 = 458.67$ . The Commission has rounded its calculations to two decimal places.



## 7. Record Retention Period

The requested exemption does not contain a separate record retention period.<sup>23</sup>

### C. Suitability Determination by the Selling Broker-Dealer

#### 1. Collection of Information

The requested exemption would require a Selling Broker-Dealer to deliver a representation in writing that the Selling Broker-Dealer performed a suitability analysis to the Lead Placement Agent at closing, or, if the Selling Broker-Dealer is the Lead Placement Agent, to make such a representation in writing at closing.

#### 2. Proposed Use of the Information

The proposed suitability representation would be used in implementing the requested exemption and monitoring its use. The proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the suitability analysis in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the exemption.

#### 3. Respondents

The proposed collection of information would apply to Selling Broker-Dealers, who deliver or make a suitability determination pursuant to the requested exemption.

#### 4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 150 Selling Broker-Dealers<sup>24</sup> would either deliver or make a representation at closing and each Selling Broker-Dealer would on average

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<sup>23</sup> See note 15.

<sup>24</sup> The approximate number of Selling Broker-Dealers is based on discussions with industry participants.

deliver or make such a representation 33.59 times<sup>25</sup> a year. Based on the simplicity of the record to be created, the Commission also estimates that a Selling Broker-Dealer would spend approximately five minutes on each disclosure. Thus, the estimated total annual reporting and recordkeeping burden for this requirement is 419.90 hours<sup>26</sup> for Selling Broker-Dealers.

#### 5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for Selling Broker-Dealers who rely on the requested exemption.

#### 6. Confidentiality

The proposed collection of information would be provided by the Selling Broker-Dealer to the Lead Placement Agent, or if the Selling Broker-Dealer is the Lead Placement Agent, to create the collection of information and would be available for inspection by the Commission and the applicable SRO.

#### 7. Record Retention Period

The requested exemption does not contain a separate record retention period.<sup>27</sup>

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<sup>25</sup> The Commission estimates that there would be approximately 5,304 TIC Security transactions a year. See note 12. The Commission estimates that approximately five percent of all proposed TIC Security transactions would be determined to be not suitable for a customer under the requested exemption. This estimate is based on discussions with industry, which indicated that currently approximately five percent of proposed TIC Security transactions are determined to be not suitable for a potential purchaser. Accordingly, the Commission estimates that Selling Broker-Dealers would make or deliver a suitability determination in approximately 95 percent of all transactions. Thus, a Selling Broker-Dealer would make or deliver approximately  $((5,304 \times .95)/150) = 33.59$  determinations. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would make or deliver a suitability representation 33 times a year, and others would do so 34 times a year.

<sup>26</sup>  $(5,304 \times .95) \times \text{five minutes per transaction} = 25,194/60 = 419.90$ .

<sup>27</sup> See note 15.

## D. Customer Affirmation by the Selling Broker-Dealer

### 1. Collection of Information

The requested exemption would require a Selling Broker-Dealer that determines that a TIC Security transaction is not suitable to obtain a written affirmation that the customer wants to proceed with the TIC Security transaction notwithstanding the Selling Broker-Dealer's determination. It also would require the Selling Broker-Dealer to deliver the written affirmation to the Lead Placement Agent at closing or, if the Selling Broker-Dealer is the Lead Placement Agent, to maintain the written affirmation consistent with the record retention provisions of Exchange Act Rule 17a-4.

### 2. Proposed Use of the Information

This proposed information is designed to ensure that the customer is informed if a Selling Broker-Dealer determines a transaction is not suitable, and, if the customer wants to proceed with the transaction, that the customer has made such a decision in light of the broker-dealer's determination. In addition, the proposed delivery requirement is designed to ensure that the Lead Placement Agent has a copy of the customer affirmation in order to comply with its recordkeeping obligations discussed below, which would facilitate monitoring compliance with the exemption.

### 3. Respondents

The proposed collection of information would apply to Selling Broker-Dealers who deliver or maintain a customer affirmation determination pursuant to the requested exemption.

### 4. Reporting and Recordkeeping Burden

The Commission estimates that there are approximately 150 Selling Broker-Dealers that are potential respondents, those Selling Broker-Dealers would obtain and then deliver or

maintain a written affirmation from 265.20 customers who are clients<sup>28</sup> of Commercial Real Estate Participants a year, and each Selling Broker-Dealer would on average obtain and then deliver or maintain such an affirmation 1.77<sup>29</sup> times a year. The Commission also estimates that a customer would spend approximately 30 minutes on each disclosure and the Selling Broker-Dealer would spend approximately 35 minutes on each disclosure.<sup>30</sup> Thus, the estimated total annual reporting and recordkeeping burden for this proposed requirement is an aggregate of 132.60 hours for customers<sup>31</sup> and 154.70 hours for the Selling Broker-Dealers.<sup>32</sup>

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<sup>28</sup> As discussed in note 25, the Commission estimates that approximately five percent of all proposed TIC Security transactions would be determined to be not suitable.  $5,304 \times .05 = 265.20$ . The Commission has rounded its calculation to two decimal places. In other words, in any given year the Commission estimates there would be either 265 or 266 customers whose Selling Broker-Dealer determines that a TIC Security transaction is not suitable.

<sup>29</sup> The Commission estimates that there would be approximately 5,304 TIC Security transactions under the requested exemption. See note 12. The Commission estimates that Selling Broker-Dealers would obtain and then deliver or maintain the customer affirmation in five percent of all transactions under the requested exemption. This estimate is based on discussions with industry, which indicated that currently approximately five percent of proposed TIC Security transactions are determined to be not suitable for a potential purchaser. For purposes of calculating the reporting and recordkeeping burden, the Commission estimates that all customers whose Selling Broker-Dealer determines that a TIC Security transaction is not suitable would provide a written affirmation pursuant to the requested exemption. The Commission recognizes that it is highly unlikely that all customers would provide a written affirmation in the face of a Selling Broker-Dealer's determination that a TIC Security transaction is not suitable. However, the Commission does not have sufficient information to estimate affirmation rates of less than 100 percent, and thus has chosen the most conservative estimate for calculating the reporting and recordkeeping burden. Thus, a Selling Broker-Dealer would obtain approximately  $((5,304 \times .05)/150) = 1.77$  affirmations a year. The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some respondents would obtain an affirmation one time a year, and others would do so two times a year.

<sup>30</sup> We estimate that it would take the Selling Broker-Dealer 30 minutes to explain to its customer that the transaction is not suitable, and to discuss with and obtain the subsequent affirmation from the customer, and five minutes to deliver or maintain the affirmation.

<sup>31</sup>  $265.20 \text{ TIC Security transactions } (5,304 \times .05) \times 30 \text{ minutes per transaction} = 7956/60 = 132.60$ .

5. Collection of Information is Mandatory

This collection of information would be mandatory for Selling Broker-Dealers who rely on the requested exemption.

6. Confidentiality

The proposed collection of information would be provided by the Selling Broker-Dealer to the Lead Placement Agent, or retained as a record, if the Selling Broker-Dealer is the Lead Placement Agent, and would be available for inspection by the Commission and the applicable SRO.

7. Record Retention Period

The requested exemption does not contain a separate record retention period.<sup>33</sup>

E. Recordkeeping by the Lead Placement Agent

1. Collection of Information

The requested exemption would require the Lead Placement Agent to maintain a copy of each of the documents that is to be made and/or delivered at closing, as discussed above (i.e., the buyer's agent agreement, the statutory disqualification representations, the suitability representation, and, if applicable, the customer's written affirmation), and 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.<sup>34</sup>

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<sup>32</sup> 265.20 TIC Security transactions (5,304 x .05) x 35 minutes per transaction = 9282/60 = 154.70.

<sup>33</sup> See note 15.

<sup>34</sup> The requested exemption also would require the Lead Placement Agent to maintain a copy of any other records that are required to be maintained in accordance with the recordkeeping requirements of the federal securities laws. See note 15.

## 2. Proposed Use of the Information

The proposed use of this information is to facilitate monitoring compliance with the exemption by compelling the Lead Placement Agent to maintain records of all documents that are required to be delivered at closing.

## 3. Respondents

The proposed collection of information would apply to Lead Placement Agents that act pursuant to the requested exemption.

## 4. Reporting and Recordkeeping Burden

The Commission estimates that approximately 45 Lead Placement Agents<sup>35</sup> would act pursuant to the requested exemption. On average, a Lead Placement Agent would maintain copies of the relevant documents for approximately 117.87 TIC Security transactions<sup>36</sup> a year. The Commission also estimates that a Lead Placement Agent would spend 10 minutes per closing to maintain a copy of these documents. Thus, the estimated total annual reporting and recordkeeping burden for this requirement is 884 hours.<sup>37</sup>

## 5. Collection of Information is Mandatory

This proposed collection of information would be mandatory for Lead Placement Agents that act pursuant to the requested exemption.

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<sup>35</sup> Based on discussions with industry representatives, the Commission estimates that there are 45 sponsors of TIC Security transactions and that each would have a Lead Placement Agent.

<sup>36</sup>  $5,304 \text{ TIC Security transactions} / 45 \text{ Lead Placement Agents} = 117.87$ . The Commission has rounded its calculation to two decimal places. Assuming a relatively even distribution of transactions among potential respondents, some Lead Placement Agents would maintain copies of the relevant documents for 117 transactions a year, and others would do so for 118 transactions a year.

<sup>37</sup>  $5,304 \text{ TIC Security transactions} \times 10 \text{ minutes} = 53,040 / 60 = 884$ .

## 6. Confidentiality

The proposed collection of information does not address the confidentiality of information prepared under this rule; however, the collection of information would be available for inspection by the Commission and the applicable SRO.

## 7. Record Retention Period

As specified, the Lead Placement Agent would be required to maintain copies of these documents for a period of three years in accordance with its existing obligations under Exchange Act Rule 17a-4(f).

### F. Request For Comment

Pursuant to 44 U.S.C. 3506(c)(2)(A), the Commission solicits comments to:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;

(2) Evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those required to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the proposed collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy of their comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-

1090, and refer to File No. S7-26-07. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this notice in the Federal Register. Therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-26-07, and be submitted to the Securities and Exchange Commission, Branch of Records Management, 100 F Street, NE, Washington, DC 20549-1110.

By the Commission.

Nancy M. Morris  
Secretary