



TICA

TENANT-IN-COMMON ASSOCIATION

March 2, 2007

Honorable Rick Metsger
Chairman
Senate Business, Transportation and Workforce Development Committee
State Legislative
900 Court St. NE., S-307
Salem, OR 97301
Email: sen.rickmetsger@state.or.us

RE: Senate Bill 449

Dear Senator Metsger:

On behalf of the members and Board of Directors of the Tenant-In-Common Association ("TICA"), I am writing to oppose Senate Bill 449 ("The Bill").

Who is the Tenant-In-Common Association?

TICA is a national trade association for professionals involved in all aspects of group real estate investment programs.

Professionals involved in TICA include, but are not limited to Sponsors of Tenant-In-Common ("TIC") programs, Lawyers, Accountants, Realtors, Financial Advisors, Broker-dealers, Qualified Intermediaries, and Title Companies.

TICA exists to advance, promote and protect the TIC industry by:

- Protecting the interests of investors.
- Promoting the quality and integrity of programs offered to investors.
- Promoting high standards of professional conduct, including legislative and regulatory compliance.
- Providing members with quality education, information resources and networking opportunities.

Key Historical Events that Shaped the TIC Industry

- **Revenue Procedure 2002-22**
TICA members served as advisors and a resource to the Internal Revenue Service and Treasury Department in the development of Revenue Procedure 2002-22. This Revenue Procedure clarified the difference between a multiple owner, real estate partnership and an offering to multiple owners of undivided, fractional interests in real estate. Its conclusion was that given that certain conditions are met, the offering of undivided, fractional interests is deemed valid "like-kind" property under Section 1031 of the Internal Revenue Service Code. At the time of the Revenue Procedure's development, it was acknowledged that the TIC Program

Offerings were considered real estate for 1031 exchange purposes and securities for the protection of investors.

(Reference TICA White Paper entitled "Treatment of Tenancy-In-Common Interests as Securities" which is enclosed)

- **Revenue Ruling 2004-86**

TICA members were also instrumental in working with the IRS and Treasury Department on Revenue Ruling 2004-86 which permitted, under certain conditions, the use of the Delaware Statutory Trust ("DST") for TIC offerings and like-kind exchange replacement property. Under this format, investors receive an assignment of beneficial interest in a trust. This Revenue Ruling, which is stronger guidance than the Revenue Procedure, provides greater credence to the acknowledged securities format.

- **NASD Notice to Members 05-18** (Included in Best Practices which is enclosed)

The National Association of Securities Dealers ("NASD") called upon members of TICA for input in the development of "Notice to Members 05-18" regarding private placements of TICs. A primary emphasis of this notice was a reminder of the prohibition on advertising and general solicitation. In addition to working with TICA, it was communicated that the NASD also received input from the SEC, IRS and Treasury.

- **TICA Alert 06-01 - Guide to Certain TIC Best Practices** (Enclosed)

Beginning in 2003, numerous meetings of broker-dealers, sponsors, attorneys and third-party due diligence professionals were held to develop recommended practices to better serve the needs of investors in TIC and DST programs. The collaborative effort among industry participants resulted in the preparation of this guide which addresses TIC interests sold by sponsors in a securities format.

- **TICA Builds Alliance with the National Association of Realtors ("NAR")**

In 2005, the NAR published a white paper that acknowledged that the vast majority of TICs are offered in a securities format. (Enclosed) TICA and NAR worked in alliance to defeat a proposal in the 2006 Budget Reconciliation Act which posed a threat to TICs and 1031 exchanges. TICA is supportive of NAR's initiative to gain SEC approval for the payment of TIC transaction based fees to realtors.

Why TICs Offered as Securities Provide Investors Greater Protection

The typical profile of the tenant-in-common investor cries out for the protections of a securities format. These investors are aging and retiring baby boomers who bought and actively worked real estate, such as farms, ranches, rental duplexes or smaller rental or retail properties. Their current desire is to move from being an active real estate participant to a passive real estate participant, as well as, to parlay their appreciation into

another real estate asset with predictable, stable income for their retirement earnings and the added benefit of deferring their taxes via a 1031 exchange. These investors want to rely on a TIC program sponsor for the following:

- 1) Finding a quality property and structuring an offering of same;
- 2) Negotiating favorable financing;
- 3) Property and asset management;
- 4) Leasing;
- 5) Market studies;
- 6) Refining and implementing business plans;
- 7) Investor relations and communications;
- 8) Cash distributions;
- 9) Tax reporting information; and
- 10) Conflict resolution between co-owners.

And, it is this very heavy dependence and reliance on the sponsor from the birth of the asset to final disposition that necessitates that the program be offered as a security. Currently, across the United States over 90 percent of TIC sponsored programs are offered in the securities wrapper.

Legal standards regulating the sale of securities are much more stringent. For example, cold calling, seminars, print and website marketing are not allowed. It is prohibited to suggest that a sponsor offers TIC programs or advertise a particular property offering to the general public.

Disclosure requirements are much steeper for securities and the fines and penalties associated thereto, run in favor of the investor and can be costly to the sponsor, broker-dealer and registered representatives in the form of lost licenses, monetary awards to investors, jail time and abolishment from the business forever. "Puffing" is an offense when it comes to the securities laws. Even in the case of an unintentional omission of information, the sponsor can be required to offer the investor the right of rescission on his/her investment.

Reasons for opposing Senate Bill 449

1. The Bill inappropriately eliminates the role of the Oregon Securities Commissioner and the investor protections provided by the securities laws. Treating TIC interests as securities protects investors by: a) requiring sponsors and sellers to fully inform investors about the true value of the property, the history of its operations, any prior disciplinary history of the promoters, and the risks of the investment, b) requiring that the sellers are licensed as securities agents, c) enabling the Securities Commission to conduct investigations into fraudulent offerings so investors can have confidence in the legitimacy of real estate investments offered by licensed sellers, and d) giving investors the right to sue for redress under the securities laws in the event of fraud.

History instructs that investors need the protection of strong state securities regulation to protect against fraud and overreaching by unscrupulous promoters. State securities laws have been an effective deterrent. They

are structured as "seller beware" laws, meaning sellers are required to take affirmative steps to make investors aware of important facts and provide for appropriate remedies to investors when things go wrong, supported by well developed case law. These laws are also designed to increase, and have the effect of increasing, investor confidence - so people will be more willing to purchase these investments. Moreover, state regulators are well equipped to interdict securities fraud and overreaching. They know it in its hundreds of different forms. They are good at it. In contrast, real estate laws, while providing some important protections, are generally "buyer beware" laws and often these laws are unfriendly to disappointed purchasers. Changing the focus in Oregon would be a step down from high regulatory standards for these investments, exposing Oregon's investors to be the prey of those who welcome lower standards, establishing Oregon as a haven for fraud in this area. Our Association promotes a high standard in these products and the manner in which they are sold, because we know disappointed investors make for bad markets - something we try to prevent at all costs.

2. The Bill's principal objective could be achieved by less harmful means.

Laws like Senate Bill 449 are typically supported by real estate professionals seeking to avoid securities licenses in the handling of TIC transactions. However, that can be achieved without eviscerating Oregon's securities law. Oregon's State Securities Commission can consider and issue a no-action letter permitting licensed real estate professionals to participate in TIC transactions without the necessity of having a securities license. The National Association of Realtors (NAR) in conjunction with the Securities and Exchange Commission (SEC), as well as, various State Securities Administrators, have been considering this course of action. TICA urges the Oregon legislators to take no action on Senate Bill 449 before this potential compromise is fulfilled.

3. TIC transactions are investments by nature and should be so regulated. While blending elements of real property and investments, TICs decidedly are sold more like investments, than real estate, subject to the anti-fraud authority of government securities agencies. The vast majority of TICs are managed by capable managers and others who oversee the operations of the property without direct participation of the TIC owners. TIC owners have a say in who does the managing and they approve sales and leases, but for the most part, their investment is passive, and they rely on others' management skills for the success of their investment. It is because the real estate is sold with an investment and management component that the securities laws should apply.

For example: If a banker started a separate business division that was charging fees for separate investment advice, he/she would be subject to the securities laws in addition to being subject to banking laws. If an insurance agent sells mutual funds or variable annuities, he/she would be subject to the securities laws, as well as insurance laws. Similarly, if a licensed real estate professional sells undivided, fractionalized interests in real estate to buyers looking only for a passive, managed investment, he/she should be subject to the securities laws, as well as, real estate laws. However, in a proper instance, where there is no need for dual licenses,

appropriate state authority may waive a dual licensing requirement - but the general securities law should never be abated as that impacts investor rights.

4. The Bill is non-uniform and out-of-step with the laws of other states and the federal government which overwhelmingly treat these products as securities. Federal law generally treats TIC interests as securities. The Bill would: a) add additional cost and difficulty to the preparation of Oregon properties to be converted to TICs and sold into the national market, b) cause Oregon TIC properties to be less valuable as national investors will favor properties from states with uniform laws, greater investor protection and no conflict between state and federal laws, c) put Oregon sponsors and sellers at greater risk of violating federal securities laws - which require licensure and adequate disclosure of sales of TIC interests structured as securities, and d) cause other harmful effects to the market both in and outside Oregon's borders.

Only one other state, Utah, has a similar law, and the results of that law are uncertain to this day. The immediate result of the passage of the Utah law, was that the TIC industry stopped consideration of its purchase of Utah property. Tens of millions of dollars in pending TIC deals were held up for months and buyers passed on Utah purchases, and real property owners suffered while lawyers tried to learn whether Utah's real estate was suitable for use in TIC transactions sold outside of Utah. It took many months to straighten out some of the problems caused by Utah's law. The point is that non-uniform laws in this area are harmful to the states which are not uniform. The Bill does nothing to change federal law, and it is out of step with how these products are regulated elsewhere.

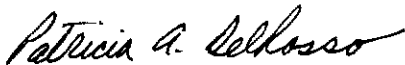
The practical outcome of the Bill is that TIC program sponsors will likely choose to do business in other states which follow the uniform laws and which have high standards for investor protection.

Conclusion

For all of the reasons discussed above, we oppose Senate Bill 449 and urge the Oregon Legislators and members of the Senate Business, Transportation and Workforce Development Committee to consider and embrace the offering of TIC undivided, fractional interests in a securities format in order to protect the interests of Oregon investors.

Sincerely,

TENANT-IN-COMMON ASSOCIATION



Patricia A. DelRosso
President

c: Jane Adkins, Administrator - Senate Committee on Business,
Transportation & Workforce
Tim Egan, Legislative Director