

Requested Exemption by the National Association of Realtors®

Supporting Statement

A. Justification

1. Necessity of Information Collection

a. Background

The National Association of Realtors® (“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”), the requested exemption would allow any licensed real estate agent or broker who is predominantly engaged in and has substantial experience in the sale of commercial real estate (“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”) 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”).

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 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.

b. Proposed Collections of Information

The requested exemption would contain five collections of information. First, the requested exemption would require a RE Participant to deliver a copy of the executed buyer’s agent agreement to the registered broker-dealer acting as a placement agent (“Lead Placement Agent”).

Second, 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.

Third, the requested exemption would require broker-dealers that sell the TIC Securities as participating brokers (“Selling Broker-Dealers”) 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.

Fourth, 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.

Fifth, 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>1</sup>

2. Purpose of, and Consequences of Not Requiring, the Information Collection

The purpose of the first collection is to assist in implementing the requested exemption and monitoring for compliance with the exemption’s conditions. 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 for compliance. Without this collection of information, the Commission and applicable self-regulatory organization (“SRO”) would be unable to monitor the Lead Placement Agent’s compliance.

The purpose of the second collection is to ensure that the Lead Placement Agent has a copy of the statutory disqualification representation in order to comply with its recordkeeping obligations, which would facilitate monitoring for compliance with the conditions of the requested exemption. Without this collection of information, the

<sup>1</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, such as Rule 17a-4 of the Exchange Act.

Commission and applicable SRO would be unable to monitor the Lead Placement Agent's compliance.

The purpose of the third collection is to ensure that the Lead Placement Agent has a copy of the suitability analysis in order to comply with its recordkeeping obligations, which would facilitate monitoring compliance with the conditions of the requested exemption. Without this collection of information, the Commission and applicable SRO would be unable to monitor the Lead Placement Agent's compliance and would be unable to ensure that the Selling Broker-Dealer had conducted an appropriate suitability analysis.

The purpose of the fourth collection is 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, which would facilitate monitoring for compliance with the conditions of the requested exemption. Without this collection of information, the Commission and applicable SRO would be unable to monitor the Lead Placement Agent's compliance and would be unable to ensure that the Selling Broker-Dealer had conducted a suitability analysis and informed the client of this determination.

The purpose of the fifth collection is to facilitate monitoring for compliance with the conditions of the requested exemption by compelling the Lead Placement Agent to maintain records of all documents that are required to be delivered at closing. Without this collection of information, the Commission and applicable SRO would be unable to monitor the Lead Placement Agent's compliance.

3. Role of Improved Information Technology and Obstacles to Reducing Burden

Improved information technology would not reduce the burden because each respondent would still be required to provide the same disclosure.

4. Efforts to Identify Duplication

Not applicable; there is no duplication of information.

5. Effects on Small Entities

The requirements of the proposed rules would not be unduly burdensome on smaller entities.

6. Consequences of Less Frequent Collection

Less frequent collection of information under the proposed collections of information would undermine the purpose of the requested exemption.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

Not applicable. The requested exemption is not inconsistent with 5 CFR 1320.5(d)(2).

8. Consultations Outside the Agency

All Commission proposals are published in the Federal Register for public comment before adoption. The comment period for this release is 30 days. This comment period will afford the public an opportunity to respond to the requested exemption

9. Payment of Gift to Respondents

Not applicable.

10. Assurance of Confidentiality

Not applicable. The collections of information would be available for inspection by the Commission and the Applicable SRO.

11. Sensitive Questions

Not applicable; no questions of a sensitive nature are asked.

12. Estimate of Respondent Reporting Burden

- a. Delivery of the Buyer's Agent Agreement to the Lead Placement Agent

The Commission estimates that approximately 800 RE Participants 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>2</sup> a year. Based on these estimates, the Commission estimates that this requirement would result in approximately 5,304 disclosures<sup>3</sup> per year. The Commission also estimates that a RE Participant would spend approximately five minutes per disclosure to the Lead Placement

<sup>2</sup> The Commission is estimating approximately 5,304 TIC Security transactions would occur under the requested exemption. Accordingly, 5,304 TIC Security transactions/800 RE Participants = 6.63. For purposes of this Statement, the Commission has rounded all of its calculations to two decimal places.

<sup>3</sup> 6.63 x 800 = 5,304.

Agent. Thus, the estimated total annual reporting and recordkeeping burden for this requirement is 442 hours<sup>4</sup> for the RE Participants.

b. Delivery of Statutory Disqualification

The Commission estimates that approximately 800 Commercial Real Estate Professionals 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>5</sup> a year. Based on these estimates, the Commission anticipates that this requirement would result in 5,304 disclosures<sup>6</sup> per year. The Commission estimates that approximately 95 percent of Commercial Real Estate Professionals would spend approximately five minutes for each representation to the Lead Placement Agent. The Commission also estimates that approximately five percent of Commercial Real Estate Professionals would spend approximately 30 minutes for their first representation to the Lead Placement Agent, 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>7</sup> for Commercial Real Estate Professionals.

c. Suitability Determination by the Selling Broker-Dealer

The Commission estimates that approximately 150 Selling Broker-Dealers would either deliver or make a representation at closing and each Selling Broker-Dealer would on average deliver or make such a representation 33.59 times<sup>8</sup> a year. 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>9</sup> for Selling Broker-Dealers.

<sup>4</sup> 5,304 TIC Security transactions x five minutes per transaction = 26,520/60 = 442.

<sup>5</sup> 5,304 TIC Security transactions/800 Commercial Real Estate Professionals = 6.63.

<sup>6</sup> 6.63 x 800 = 5,304.

<sup>7</sup> 800 x .95 x 6.63 x 5 = 25,194/60 = 419.90 total burden hours for 95 percent of the Commercial Real Estate Professionals. 800 x .05 x 1 x 30 = 1,200/60 = 20 hours for the first representation by five percent of the Commercial Real Estate Professionals. 800 x .05 x 5.63 x 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.

<sup>8</sup> The Commission estimates that there would be approximately 5,304 TIC Security transactions a year. Thus, a Selling Broker-Dealer would make or deliver approximately ((5,304 x .95)/150) = 33.59 determinations.

<sup>9</sup> (5,304 x .95) x five minutes per transaction = 25,194/60 = 419.90.

d. Customer Affirmation by the Selling Broker-Dealer

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>10</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>11</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. Thus, the estimated total annual reporting and recordkeeping burden for this proposed requirement is an aggregate of 132.60 hours for customers<sup>12</sup> and 154.70 hours for the Selling Broker-Dealers.<sup>13</sup>

e. Recordkeeping by the Lead Placement Agent

The Commission estimates that approximately 45 Lead Placement Agents 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>14</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>15</sup>

f. Aggregated burdens for entering data into ROCIS.

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<sup>10</sup> The Commission estimates that approximately five percent of all proposed TIC Security transactions would be determined to be not suitable.  $5,304 \times .05 = 265.20$ .

<sup>11</sup> The Commission estimates that there would be approximately 5,304 TIC Security transactions under the requested exemption. 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. Thus, a Selling Broker-Dealer would obtain approximately  $((5,304 \times .05)/150) = 1.77$  affirmations a year.

<sup>12</sup>  $265.20$  TIC Security transactions  $(5,304 \times .05) \times 30$  minutes per transaction =  $7956/60 = 132.60$ .

<sup>13</sup>  $265.20$  TIC Security transactions  $(5,304 \times .05) \times 35$  minutes per transaction =  $9282/60 = 154.70$ .

<sup>14</sup>  $5,304$  TIC Security transactions/ $45$  Lead Placement Agents =  $117.87$ .

<sup>15</sup>  $5,304$  TIC Security transactions  $\times 10$  minutes =  $53,040/60 = 884$ .

For purposes of entering the above collections into the OMB ROCIS system, the burdens discussed above have been summarized and aggregated as follows. There are approximately 995 total respondents.<sup>16</sup> There are approximately 21 responses for each respondent.<sup>17</sup> There are approximately 20,895 total responses.<sup>18</sup> Thus, there are approximately .11 hours per response for each respondent.<sup>19</sup> There are approximately 2,298 total burden hours for all respondents.<sup>20</sup>

13. Estimate of Cost to Respondents

Not applicable; (a) it is not anticipated that respondents will have to incur any capital or start up cost to comply with the proposed rules; (b) it is not anticipated that the respondents will have to incur any additional operational or maintenance cost to comply with the proposed rules.

14. Estimate of Cost to the Federal Government

Not applicable.

15. Explanation of Changes in Burden

Not applicable; as these are new collections of information.

16. Information Collections Planned for Statistical Purpose

Not applicable. There is no intention to publish the information for any purpose.

17. Explanation as to Why Expiration Date Will Not be Displayed

Not applicable.

18. Exceptions to Certification

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<sup>16</sup>  $800 + 150 + 45 = 995$ .

<sup>17</sup>  $20,895$  (total responses)/ $995$  (total respondents) =  $21$ . Although total responses should be  $21,216$  ( $(800 \times 6.63) + (800 \times 6.63) + (150 \times 33.59) + (150 \times 1.77) + (45 \times 117.87)$ ), the number has been reduced to  $20,895$  to ensure consistency with the other data, specifically the  $21$  responses per respondent and  $.11$  hours per respondent, being entered into ROCIS.

<sup>18</sup>  $995$  (total respondents)  $\times$   $21$  (responses per respondent) =  $20,895$ .

<sup>19</sup>  $2,359$  (total burden hours)/ $20,895$  (total respondents) =  $0.11$ .

<sup>20</sup>  $20,895$  (total responses)  $\times$   $.11$  (hours per respondent) =  $2,298.45$ . For purposes of entering this number into ROCIS, it has been rounded to  $2,298$ .

Not applicable.

B. Collection of Information Employing Statistical Methods.

The proposal does not employ statistical methods.