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SALES OF REAL ESTATE INVESTMENTS IN UTAH

Information Regarding Tenant-in-Common Interests

Background

In 2005, the Utah legislature enacted laws making significant changes in how some real estate investments are sold in Utah. Under this Utah law, undivided interests in real estate are treated only as the sale of real estate and are excluded from the definition of securities. This makes Utah law different from federal law which treats most undivided interests in real estate as securities.

Treatment of Real Estate Investments Under Federal Law

Under the federal securities laws, and the laws of most states, investments in undivided interests of real estate are treated as securities. Most commonly, the investment interests are designated as tenant-in-common (TIC) interests in the real estate property. This does not include the purchase of entire pieces of property by one owner or the purchase of real estate by companies or groups intending to use the property. If the real estate investment is a security, the offering must be registered or exempt, the seller must be licensed to sell securities, and the buyer must be given full disclosure of relevant information about the properties, its managers, risks associated with the purchase, and the financial history of the property.

For more information, see NASD Notice to Members No. 05-18, March 2005 (available at www.nasd.com).

Treatment of TIC Interests Under Utah Law

As a result of the new Utah law, TIC interests in property located in Utah are excluded from the definition of "security" under the Utah Uniform Securities Act. Moreover, the sale of TIC interests are regulated exclusively under Utah's real estate laws.

Securities Law Applicability The new law excludes TIC interests from the state securities laws. This means that Utah *state* securities law does not apply; the sellers of TIC interests are not required to be licensed by Utah *state* securities law and the sellers are not required, under *state* securities law, to give full disclosure about the property. *Nevertheless, federal law continues to apply. Under federal law, sellers are required to be licensed, the securities must be registered or qualify for an exemption, and full disclosure of material facts is required.*

This creates special challenges for TIC programs that are sold to investors nationwide. The offering cannot be qualified for sale as a security in Utah in conjunction with sales in other states. Sellers of TIC interests must look to real estate laws in Utah to ensure the interests are sold in compliance with Utah law. In addition, sellers must ensure compliance with federal securities laws for sales in Utah.

Purchasers' Perspective: Because Utah's securities laws might not apply to TIC sales, some protections provided by the securities laws might not be available. Sellers of TIC interests might not be required to have a Utah securities license. Utah's state securities law also does not require full disclosure of material information relating to transactions excluded from the law. The Utah Division of Securities may be unable to investigate deceptive conduct or take action against fraudulent promoters. Buyers may have limited rights under Utah law to seek recovery for any misconduct and purchasers may have to sue for relief under the securities statutes of the seller's state.

Sellers' Perspective: If the TIC interests are sold to investors within Utah, federal law may deem these transactions to involve securities, and individuals or entities who effect or attempt to effect these transactions may be deemed broker-dealers.¹ If the seller of the TIC is not located in Utah, the seller will most likely need to have a securities license in the state from which the sale is made. Securities statutes of these states will provide private remedies investors may seek. For Utah residents or resident entities selling to individuals outside of Utah, licensure in these foreign jurisdictions and the applicable securities laws may be required.

Licensed securities agents should always receive prior written approval from their employing broker-dealer before engaging in TIC transactions within Utah or outside its borders.

Real Estate Law Applicability The primary requirements imposed by Utah real estate laws are that the TIC interest must be sold by a real estate licensee in Utah and disclosures must be made as specified in Utah Administrative Rule R167-11. It is important to understand that these requirements apply any time the property, in which an interest is being sold, is located in Utah. If the property is in Utah, the TIC interest must be sold through a Utah-licensed real estate agent.

The Utah Real Estate Act does provide two exemptions from using a real estate licensee. First, the seller is a broker-dealer or investment adviser *and* the security being sold is *registered* under federal or Utah securities laws. Second, the seller is a broker-dealer or investment adviser, the security being sold is filed with the SEC pursuant to Regulation D, and the selling agent and purchaser are *not* Utah residents. §61-2-3(3).

¹ Prior to attempting to effect a TIC transaction, an entity or individual should contact experienced securities counsel or the United States Securities and Exchange Commission to discuss the application of federal law.

Contact Information

The telephone number for the Utah Division of Securities is (801) 530-6600. The telephone number for the Division of Real Estate is (801) 530-6747.

Additional information, including contact information for the SEC and NASD, is included in the attached Question and Answer sheet. Readers should be aware that this information is subject to change if the law is amended or rules are adopted.

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THE UTAH DIVISION OF SECURITIES

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SENATE BILL 64 AND ITS EFFECT ON THE UTAH UNIFORM SECURITIES ACT

1. When did Senate Bill 64 go into effect, and is it applied retroactively?

Senate Bill 64 went into effect May 2, 2005. It applies only to transactions entered into after that date.

2. How did Senate Bill 64 affect the Utah Uniform Securities Act?

Senate Bill 64 excluded certain real estate transactions from the definition of a security, and excludes real estate brokers or agents from the definition of agent, broker-dealer, investment adviser, or investment adviser representative when the real estate broker or agent receives compensation in connection with an offer or sale of one of the excluded transactions.

3. Which transactions did Senate Bill 64 exclude from the definition of a security?

- a. Any conveyance to a single person (or to two or more persons holding in joint tenancy) of a non-fractionalized fee estate, life estate, or other long-term estate in real property;
- b. Any conveyance of an undivided fractionalized tenancy in common, fee estate, life estate, or other long-term estate that consists of ten or fewer owners; and
- c. A conveyance of an undivided fractionalized tenancy in common, fee estate, life estate, or other long-term estate consisting of ten or more owners if, when the property is subject to a management agreement:
 1. The management agreement permits a simple majority of owners of the real property to not renew or to terminate the management agreement at the earlier of the end of the agreement's current term, or 180 days after the day on which the owners give notice of termination to the manager;
 2. The management agreement prohibits the lending of the proceeds earned from the real property estate or the use or pledge of its assets to any person or entity affiliated with the manager; and

3. The management agreement complies with any other requirement imposed by rule of the Real Estate Commission.

4. What does it mean if a transaction is excluded from the definition of a security under the Utah Uniform Securities Act?

If a transaction is excluded from the definition of a security under the Act, it means it is not considered a security, and therefore will not be regulated by the Utah Division of Securities. The exclusions created by Senate Bill 64 remove the above-mentioned transactions from the jurisdiction of the Utah Division of Securities, and places them in the hands of the Utah Division of Real Estate. It does not, however, remove them from the jurisdiction of the federal government or any of the other 49 states. The exclusions created by Senate Bill 64 are currently unique to Utah.

5. Has federal law also been amended to exclude these transactions from the definition of “security”?

No. Individuals in Utah who offer and/or sell the above-mentioned excluded transactions need to take steps to comply fully with federal securities laws. According to a May 28, 2005, NASD Notice to Members, "a determination that a particular transaction does not involve a security for purposes of state law is not determinative for purposes of federal securities law."

6. If the Utah Division of Securities no longer regulates the newly excluded transactions, whom should an investor contact with questions or complaints?

- a. The Utah Division of Real Estate
 - i. On-line Complaint Forms:
<http://www.realestate.utah.gov/complaint.html>
 - ii. Phone: (801) 530-6747
 - iii. Fax: (801) 530-6749
- b. National Association of Securities Dealers (NASD)
 - i. NASD Call Center: (301) 590-6500
 - ii. On-line Complaint Form: <http://complaint.nasd.com/>
- c. Securities and Exchange Commission (SEC)
 - i. On-line Complaint Form:
www.sec.gov/complaint/selectconduct.shtml
 - ii. Mail Complaint to: SEC Complaint Center, 100 F Street NE, Washington, D.C. 20549-0213
 - iii. Fax Complaint to: (202) 942-9634