

CCIM INSTITUTE LEGISLATIVE BULLETIN JULY 2008

TIC Security Update

On November 16, 2007, the Securities and Exchange Commission (SEC) published the National Association of REALTORS's ® (NAR) request for exemption from the SEC. This exemption would permit a licensed real estate broker or agent who is predominately engaged in and has substantial experience in the commercial real estate business, such as CCIMs, to receive a fee for a Tenant-In-Common (TIC) Security transaction.

On December 17, 2007, CCIM Institute submitted comments to the SEC in support of NAR's exemption request. The SEC has not decided its course of action on this issue; however, NAR continues to have positive discussions with the agency. NAR and CCIM Institute are cautiously optimistic that the SEC will implement a final rule favorable to the commercial real estate industry in the near future.

Recently, CCIM Institute and other Realtor's Commercial Alliance (RCA) affiliates agreed to collaborate on the production of educational material which would be distributed to the RCA members once the SEC ruling is issued. RCA will produce a "buyer's representation" or agency agreement that the commercial real estate practitioner would use if he or she is involved in a TIC Security transaction.

Additionally, RCA will begin producing articles on the SEC ruling that would be distributed to members as well as the legal documentation and disclosures that commercial brokers and agents would need to use if they want to be compensated in a TIC transaction. RCA also will create a PowerPoint presentation that can be used by the RCA members on TICs. All of the materials mentioned above would be reviewed and approved by the leadership of CCIM Institute, IREM, SIOR, CRE, and RLI before final distribution.

Small Business Health Plans Update

Rising health insurance premiums have made it difficult for small businesses and the self-employed to access health insurance coverage. In order to mitigate this crisis, National Association of REALTORS ® (NAR) originally supported small business health plan (SBHP) legislation, S. 1955, which would have permitted real estate practitioners to come together through their association and negotiate for health insurance coverage, thus creating a larger pool of participants. However, changes in Congressional leadership in 2007 made it unlikely for this bill to become law.

As it became clear that S. 1955 would have a short life in Congress, NAR began working with Senate leaders as well as insurance and small business organizations to develop a compromise built on the underlying components of S. 1955. As a direct result of NAR's negotiations, S. 2795, the Small Business Health Options Program (SHOP) was introduced in the Senate on March 2, 2008. SHOP would encourage states to reform their small group insurance regulations through tax incentives. Additionally, this legislation would create a nationwide insurance purchasing pool for small businesses and the self-employed as well as provide tax credits to the self-employed and small employers who offer health insurance to their workers.

CCIM Institute supports proposals to allow bona fide associations to offer health insurance coverage to its memberships via Small Business Health Plans under a single set of federally prescribed rules.

IRS Identifies Cell Phones as “Listed Property”

The Internal Revenue Service (IRS) presently identifies a number of items as “listed property,” including cell phones, cars, and computers. Records for these assets must be kept to distinguish between the personal and business use of these items by self-employed individuals and individuals whose employers provide listed property assets. If these assets are used for business purposes, the expenses are tax deductible. However, expenses incurred for these assets are not deductible if they are used for personal affairs.

Self-employed individuals face the challenge time and again of differentiating between the personal and business use of their “listed property” assets, especially cell-phones. A recent tax court case ruled that a particular self-employed individual was not allowed to deduct his cell phone expenses because he could not substantiate the difference between his business and personal use of the phone. This ruling has created concern amongst employers, employees, and self-employed in the real estate community.

HR 5450 was introduced to remove cell phones from the “listed property” category which would prevent any further IRS challenges. A similar bill, S. 2668, has been introduced in the Senate and both bills have significant bipartisan support. NAR is currently participating in a wide-ranging coalition to ensure that this relief provision is included in these bills or other legislation that arises.

Identity Theft Rules Establishes by FTC and Federal Banking Agencies

On October 30, 2007, the Federal Trade Commission (FTC) and all of the Federal banking agencies published a joint final rule on Affiliate Marketing Regulations. Specifically, this rule bars a person or company from using consumer information acquired from an affiliate unless the consumer is notified and given reasonable means to opt out of potential solicitations. However, any solicitations made to a customer with a “pre-existing” relationship with the affiliate are exempt from this rule. Individuals and companies must be in full compliance with this regulation by October 1, 2008.

Additionally, the above mentioned agencies published another joint final rule on November 9, 2007, in regards to Identity Theft Red Flags and Address Discrepancies. Starting November 1, 2008, users of credit reports must implement a process designed to discover, prevent, and mitigate identity theft, when responding to address discrepancy notices. A detailed Questions and Answers document about Identity Theft Red Flag Requirements can be found on the National Association of REALTORS® Government Affairs webpage, or [Click Here](#) for a direct link.

2008 CCIM Institute and IREM Capitol Hill Visit Day a Success

CCIM Institute and IREM members joined together to lobby their legislators on Wednesday, April 16, 2008. A combined total of over 275 commercial real estate professionals, including 45 CCIM Institute Members, participated in the annual event. Members representing 40 states and

Washington, D.C. voiced our industry's concerns on energy, natural disaster insurance, leasehold improvements, and capital gains/depreciation recapture in 225 separate meetings with U.S. Senators and Representatives and staff. Issue papers on the four issues are posted on the CCIM Institute Capitol Hill Visits page at http://www.ccim.com/members/govaffairs/capitol_hill.html.

CCIM Institute and IREM names U.S. Senator Christopher Dodd of Connecticut the legislator of the year. Senator Dodd serves as Chairman of the Senate Banking Committee. CCIM Institute and IREM appreciate his commitment to the real estate industry. Amongst his accomplishments, he was the chief architect behind TRIA passage in the Senate.

House Passes Leasehold Improvement, Brownfields, and Energy Incentives Legislation

Recently on May 21, the U.S. House of Representatives passed legislation (H.R. 6049) by a vote of 263 to 160 that would renew and extend several important real estate provisions through December 31, 2008. These extensions include the 15-year cost recovery period for leasehold improvements and the immediate deduction of brownfield cleanup costs.

The bill also includes several incentives for commercial and residential real estate developers to use environmentally friendly construction methods and install energy efficient heating, air conditioners, and appliances. Similar legislation is pending in the Senate Finance Committee.

CCIM Institute Members lobbied for leasehold improvement depreciation, energy tax credits, and positive incentives for green buildings during the Capitol Hill Visits Day on April 16. To view the CCIM Institute briefing papers on these issues, [click here](#).

House Passes Bill Providing Energy Efficient Commercial Buildings Tax Incentives

On February 28, 2008, the House passed H.R. 5351, the Renewable Energy and Energy Conservation Act of 2008, by a vote of 236 to 182. The bill would extend federal tax incentives for energy efficiency and renewable energy technologies that have expired or will expire at the end of this year. Specifically, it extends tax incentives for energy efficiency in commercial buildings.

CCIM Institute, IREM, and NAR are part of a coalition that supports H.R. 5351. The coalition sent a letter in support of the bill to House Representatives prior to the House vote on the bill. In its letter the coalition stated that the incentives must be extended immediately to avoid significant harm to the developing clean energy industries in the United States. The technologies produced by these industries play a vital role in reducing global warming pollution, creating new high-wage jobs in our country, and saving consumers and businesses money on their energy bills.

CCIM Institute Adopts Statement of Policy on Energy Emission Trading

One option for reducing pollution and greenhouse gas emissions is a program called emissions trading, or "cap and trade". This type of program provides economic incentives to achieve reductions in emissions. Under this approach, regulated industries can buy and sell what are, in effect, permits to pollute. Usually a governmental agency will set a limit on the amount of pollutants that a company or organization can emit. Each company will be allocated a number of

credits equal to its limit. Companies that reduce their emissions below the threshold can then sell or trade their credits to companies that exceed the cap.

In the U.S., only direct emitters such as power plants and utilities are allocated credits. Some organizations have proposed allowing owners of real estate to participate in this type of program to encourage reduction in greenhouse gas emissions. The feasibility of emissions trading for buildings is unknown. It would require all buildings to participate in energy audits to determine current emissions levels. Voluntary participation would not work as trade programs require all actors to participate. In addition, it will be hard to quantify direct and indirect emissions.

Cap and trade programs require participants to commit to a level of emissions reduction. These requirements also include associated activities like monitoring and verifying emissions levels. These activities add cost. Lastly, some emissions from buildings are at least partially caused by tenants. It would be difficult for property owners to control the actions of tenants that may contribute to emissions.

On the other hand, many argue this is an incentive-based approach that would be more workable than energy efficiency mandates. In addition, allowing property owners to sell credits would help pay for energy efficient improvements in buildings.

Providing an economic incentive, in the form of credits, would encourage energy efficiency improvements and assist in paying for those upgrades. CCIM Institute supports market-based incentives for energy efficiency. CCIM Institute supports federal funding of a cost/benefit analysis and research into the feasibility of an emissions trading program for the real estate industry.

State Legislatures Pass Energy Efficiency Legislation

Concern for the changing climate and higher fuel prices have caused both the federal and state governments to address energy use. States have become increasingly more active in adopting energy efficiency measures. Across the country, from California to Connecticut, state legislatures are working to reduce greenhouse gas emissions while boosting the economy.

Commercial, residential, and industrial buildings consume almost 50% of the total energy used in the country. State legislatures are expected to target new construction in an effort to change the performance of buildings. Building codes and educational programs are being used to encourage both commercial and residential developers and contractors to build more energy efficient buildings. For instance, Minnesota introduced a new residential building code this year that is one of the most energy efficient codes in U.S. Other states may follow Minnesota's lead.

A few states, including California, Hawaii, New Jersey, Rhode Island, and Washington, have enacted laws in the last year to reduce greenhouse gas emissions. Washington has set target dates to reduce emissions to 1990 levels by 2020 and eventually to 50% below 1990 levels by 2050. One component of the law is that the state is authorized to work with the Western Climate Initiative in developing a regional cap-and-trade system aimed at reducing greenhouse gases in the west. Colorado recently enacted a law that creates the Governor's Energy Office which will promote high performance buildings.

Alabama is considering legislation that would require the Building Commission to adopt the 2006 International Energy Conservation Code (IECC) as a minimum requirement for the design of all new construction and renovations to commercial buildings in the state.

Fortunately, many states are considering tax incentives to encourage commercial real estate professionals to make energy-efficiency improvements. For instance, Connecticut is considering property tax exemptions for certain energy saving systems and for buildings using energy saving heating and cooling systems.

President Bush and Presidential Candidates Call for Greenhouse Gas Reduction

Combating climate change is currently the number one environmental issue in Congress and for the first time during his Administration, President Bush called for a specific target date to reduce greenhouse gas emissions. The President's aim is to find a solution encompassing both regulations and market incentives. However, the President offered no plan on how to achieve reduced greenhouse gas emissions. In addition, he rejected a proposal in the Senate concerning mandatory limits on greenhouse gas emissions that would start in 2013 and gradually increase over the years.

Presidential hopefuls Barack Obama and John McCain both support a mandatory "cap and trade" system aimed at reducing pollution and greenhouse gas emissions. This type of program provides economic incentives to achieve reductions in emissions. Under this approach, regulated industries can buy or sell what are, in effect, permits to pollute. Much like the current European system, a government agency will set a limit on the amount of pollutants that a company or organization can emit. Each company will be allocated a number of credits equal to its limit. Companies that reduce their emissions below the threshold can then sell or trade their credits to companies that exceed the cap.

Providing an economic incentive, in the form of credits, would encourage energy efficiency improvements in commercial buildings and assist in paying for those upgrades. CCIM Institute supports this market-based incentive for energy efficiency. CCIM Institute supports federal funding of a cost/benefit analysis and research into the feasibility of an emissions trading program, including the participation and input from CCIM Institute, for the real estate industry.

Voluntary Emergency Preparedness Update

On August 16, 2007, President Bush signed into law the "Implementing Recommendations of 9/11 Commission Act of 2007" (HR 1). This law includes a provision requiring the Department of Homeland Security (DHS) to set up a program by Spring 2008 for certifying private sector entities as meeting a "voluntary" national standard for emergency preparedness.

The law mandates DHS to adopt a voluntary private sector accreditation and certification standard that promotes emergency preparedness. In order to carry out its certification program, DHS is required to select a qualified nongovernmental entity to accredit qualified third parties who actually perform the certification of real estate. DHS is expected to adopt the National Fire Protection Association (NFPA) 1600 Standard on Disaster/Emergency Management and Business Continuity Programs or a similar standard.

CCIM Institute is concerned that during the rule-making process, third parties will be influential in writing regulations that expand the NFPA 1600. Additionally, CCIM Institute is concerned that the third party or parties selected to certify real estate will charge real estate owners and managers a fee to be certified. CCIM Institute opposes mandatory certification for real estate owners and managers for a fee.

Although the new law is voluntary, it has the potential to become the market and legal norm. Most importantly for real estate practitioners, the standard may allow for the insurance and credit-rating industries to look closely at a company's compliance with the standard selected by DHS.

While federal law requires DHS to have already set up this certification program, it has not yet been implemented. When DHS proposes its regulations to implement HR 1, CCIM Institute will ask its membership to review the regulations.

EPA Publishes Final Lead-Based Paint Renovation Regulation

The Environmental Protection Agency published the long-awaited final lead-based paint renovation regulations recently. These final regulations establish rules to govern lead-based paint renovation, repair, and painting activities that create lead hazards in single and multi-family housing constructed prior to 1978. Property owners, property managers and contractors are now required to follow a variety of notification, work safety and notification procedures before, during and after renovation activities to prevent the creation of lead-based paint hazards. These new rules will primarily impact a property management portfolio, as well as property managers/owners of multi-family properties.

New Guidance on "Reasonable Modifications" under the Fair Housing Act

On March 5, 2008, the Departments of Housing and Urban Development (HUD) and Justice (DOJ) released guidance reinforcing the right of persons with disabilities to make "reasonable modifications" to their dwellings if a structural change to their dwelling or to a common area of the building or complex in which they live is needed. The guidance is designed to strengthen housing providers and homeowners' associations' understanding of their obligations regarding the "reasonable modifications" provision of the federal Fair Housing Act (FHA).

The new guidelines, issued in the form of questions and answers, cover such topics as:

- What is a reasonable modification?
- Who must comply with the reasonable modification requirement?
- Who is responsible for expenses associated with the upkeep or maintenance of a reasonable modification?
- When and how should an individual request permission to make a modification?
- What types of documents and assurances may a housing provider require regarding the modification before granting the modification?
- What procedures are available to a person wishing to challenge a denial of a requested modification?

The guidelines are available online at <http://www.usdoj.gov/fairhousing>.

REALTORS® Political Action Committee

CCIM Institute members are eligible to contribute to the REALTORS® Political Action Committee (RPAC) because CCIM Institute is an affiliate of the National Association of REALTORS® (NAR). RPAC has been the largest contributor to federal candidates for the last four election cycles. In the 2006 election cycle, RPAC spent \$12 million to support REALTOR®-friendly candidates, which was a new record. However, that record will fall when RPAC spends \$17 million in the 2008 elections. RPAC is powerful and bi-partisan.

In addition to direct contributions, RPAC sent out 1.5 million pieces of mail to NAR members, including CCIM Institute members, encouraging them to vote for REALTOR®-supported candidates. Through RPAC's Independent Expenditure program, RPAC spent over \$4.3 million dollars on television, radio, and direct mail in support of six REALTOR® "Champions" in highly competitive races, half of which were successful.

For more information on RPAC, visit <http://www.realtor.org/rpacweb.nsf?OpenDatabase>.

State Legislatures Consider Legislation Punishing Employers and Landlords for Knowingly Hiring or Leasing to Undocumented Immigrants

In response to Congress' inaction on immigration reform, state legislatures have been considering a record number of proposals related to immigration. Commercial real estate professionals are particularly interested in bills impacting employment and real estate. For instance, the Arizona Fair and Legal Employment Act, which went into effect earlier this year, prohibits employers from knowingly hiring unauthorized (undocumented) workers and requires all employers to verify employment eligibility. It establishes substantial penalties and threatens noncompliant employers with suspension and potential revocation of their business licenses.

An Oklahoma law enacted in 2007, which requires employers to use the federal E-Verify database to confirm the legal employment eligibility of all their workers, is being challenged by the U.S. Chamber of Commerce. Recently a federal judge ruled that the implementation of that section of the law will be delayed. The Chamber of Commerce argues that the law is unconstitutional because it places undue burdens on employers.

The Governor of South Carolina recently signed legislation into law that requires employers to use the federal database to verify that their employees are legally in the U.S. Under the new law, businesses will lose their operating license if they knowingly hire illegal workers. In addition, legal workers replaced by an illegal worker will be able to sue their former employer.

Several municipalities have passed laws prohibiting real estate owners and managers from leasing to undocumented immigrants. This spring state legislators began introducing similar legislation. For instance, in Minnesota, a bill was introduced that would prohibit licensed real estate brokers from renting, leasing, or selling to undocumented immigrants. The Minnesota bill failed when the legislature adjourned. For more information on state legislation of impact to real estate professionals, visit the CCIM Institute State Legislative Database at <http://www.ccim.com/members/govaffairs/database.html>.

State Revenues Falling Short

Commercial real estate professionals need to be aware of state financial situations because when state revenues decrease, state legislators and governors propose new taxes and fees. For instance, a year ago Michigan considered a service tax on real estate management and other services related to the real estate business.

In many states across the country, state governments' finances are worsening. State revenues have been much lower than many states expected. While state officials expected revenue growth to slow in Fiscal Year (FY) 2008, they did not anticipate it to increase at such a gradual pace or decline. Budget gaps are growing because many FY 2008 budgets were based on revenue forecasts that are not materializing as expected, according to the National Conference of State Legislatures (NCSL). Sixteen states and Puerto Rico had FY 2008 budget shortfalls collectively totaling over \$11.7 billion as of April, 2008.

State legislatures have been challenged to enact balanced budgets for FY 2009. Almost half of the states are finding larger budget gaps in their FY 2009 budgets than in FY 2008. Twenty-three states and Puerto Rico have shortfalls totaling over \$26 billion. According to NCSL, two-thirds of states are concerned about FY 2009 revenue performance. If our struggling national economy falls into a recession or does not improve, then state fiscal conditions will decline further.

The National Association of REALTORS® Research is working to bring NAR members more information that is locally relevant. NAR recently released a new project on state fiscal conditions and taxes. The state and local reports are available online to members only. To view the reports, visit the following link and login:

<http://www.realtor.org/research/research/metrohomepriceanalysisreports>.

Anyone Know Where is the Nearest Racino? States Turn to Gambling to Increase Revenues

A few states are using gambling revenues to increase state revenue. Almost every state in the country has some form of legalized gambling, such as casinos, racetracks, lotteries, and tribal gaming. Gambling is appealing to many state legislators because it is a way for the state to increase revenue without increasing taxes. While the country's economy has declined, states are looking to horse racetracks and slot machines to generate revenues.

A growing trend is "racinos" which are racetrack casinos. Legislators favor this form of gambling for the following reasons: voters are less hostile to racetrack casinos; they do not require sanctioning or building new facilities; states get a larger percentage of the profits than they do with casinos; and states want to keep their residents gambling in their own state. States and localities generated \$1.4 billion from racinos in 2006, according to Statenet.

As of June, 2008, twelve states have commercial casinos and eleven states have racinos. Half of the states with racinos have opened them since 2001. The number will be increasing this summer as Indiana will be opening two new facilities and Pennsylvania and New York racinos will be expanding. In November, voters in Maryland will be casting votes on whether to permit racinos in their state. In the future, more states are expected to add racinos.

State Highlights

- The South Carolina state legislature passed legislation (H 4470) that would provide tax incentives to property owners who voluntarily install sprinklers in their buildings. The bill was sent to the Governor for his approval on June 3, 2008.
- An Illinois court upheld the Illinois state ban on smoking in public places. The challengers of the law unsuccessfully argued that it was unconstitutional.

California voters recently approved Proposition 99, which bans governments from forcing most Californians to sell their homes for private development projects. It has been three years since the U.S. Supreme Court ruled that a Connecticut redevelopment authority had the right to seize private property for hotels, shopping centers, and other private developments.