A White Paper on

TURNKEY REAL ESTATE INVESTMENTS AS SECURITIES

ABSTRACT

Turnkey Real Estate Investments have become extremely popular across the country for promoters and investors alike. The question that has come up, however, is whether Turnkey Real Estate Investments are actually securities in disguise or just vanilla real estate transactions. This White Paper addresses that subject.

Section 17(a) of the Securities Act makes it unlawful to engage in certain conduct "directly or indirectly" in "the offer or sale of securities." To determine whether the offer and sale of turnkey investments constitute the offer and sale of a security as opposed to an investment in real estate, it is necessary to start with the statutory definition of a "security" under the Securities Act of 1933 15 U.S.C. § 77a et seq. and/or the Securities Acts of 1934, 15 U.S.C. § 78a et seq.

WHAT IS A ***SECURITY*** UNDER FEDERAL LAW?

INTRODUCTION

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THE STATUTORY DEFINITION

The term "security" is broad[1], and encompasses a wide range of instances such as a note, stock, debenture or investment contract, just to name a few[2]. A security includes both instruments whose names alone carry well-settled meaning, as well as instruments of "more variable character [that] were necessarily designated by more descriptive terms," such as "investment contract" and "instrument commonly known as a 'security.'"[3] While real property is not specifically included in the statutory list, this does not mean that offerings of real estate are not or cannot be securities and therefore, outside the perused of the requirements of the Securities Act of 1933 15 U.S.C. § 77a et seq. and/or the Securities Acts of 1934, 15 U.S.C. § 78a et seq.

The statutory definition is helpful in identifying some types of securities, yet it is not exclusive. The Supreme Court of the United States has consistently held that "form should be disregarded for substance and the emphasis should be on economic reality."[4] The congressional purpose in enacting the securities laws was to regulate investments, regardless of the form and structure of the instrument,[5] in order to protect the general public. The term "security" has been defined to include documents in which there is common trading for speculation or investment. Congress included "investment contracts" in its definition of "securities" in order to encompass complex and creative investment schemes.[6] Due to the "virtually limitless scope of human ingenuity," a security should be construed broadly enough to include almost any device or scheme that might be offered or sold as an investment.[7] The "task has fallen to the SEC and ultimately to the federal courts to decide which of the myriad financial transactions in our society come within the coverage of these statutes."[8]

In the specific context of turnkey real estate investments —whereby a sponsor or promoter buys a piece of real estate, fixes it up, sells it to an investor, and then either leases it back or manages it for them — whether such an offering constitutes an "investment contract" as defined by the Act or not may undoubtedly be a factually specific inquiry as to the stylistic details of the deal. That notwithstanding, an analysis of whether a real estate offering is a security can be distilled to a simple question: does the offering have the characteristics of other securities? Namely, does the offering of the turnkey real estate investment opportunity consist of the elements that would constitute an investment contract under securities laws?

INVESTMENT CONTRACTS UNDER THE HOWEY TEST

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To that end, we look first to the preeminent case regarding investment contracts, Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946), where the United States Supreme Court set out what has become the material elements of the test for whether a security exists or has otherwise been created. The Supreme Court in Howey determined that the major legal issue in the case was whether or not the contracts that Howey was selling (which were basically leaseback agreements) constituted an "investment contract" within the meaning of § 2(a)(1) of the Securities Act of 1933.The Court found that Howey was selling an "investment contract" within the meaning of § 2(a)(1) of the Securities Act of 1933. The Howey Court found an "investment contract" has the following elements:

1

It Is An Investment Of Money

Although in Howey the term "money" was used, subsequent case law has expanded this concept to include any form of consideration with value.

2

The Investment Of Money Is In A Common Enterprise

Forms of common enterprise[9]:

"Horizontal Commonality," which involves the pooling of money or assets from multiple investors whereby the investors share in the profits and risk in some proportion. (Horizontal commonality is the test most lower federal courts use.)

"Vertical Commonality," which focuses on the relationship of the parties. In vertical commonality, the investor's profit or loss is subject to the efforts of the promoter putting together the deal, regardless of the existence or status of other investors. Vertical commonality can further be broken down into "broad vertical commonality" whereby the promoter's profits are not tied to the investor's profits and "narrow vertical commonality" whereby the promoter only profits if the investor profits.

3

There Is A Reasonable Expectation Of Profits From The Investment

Profits can either be in the form of capital appreciation, cash return on investment or other earnings (including dividends or interest). Profits for purposes of the Howey Test refers particularly to a return to the investor and not necessarily the success of the enterprise as a whole. A Ponzi scheme clearly involves a security, even though the enterprise itself is designed to be a failure. The analysis turns on a finding that the investor is motivated by a return on his investment.

4

Any Profit Comes From The Entrepreneurial Or Managerial Efforts Of Others, Whether It Be Efforts Of A Promoter Or A Third Party, Etc.

The efforts of the promoter(s) or third party(ies) must be undeniably significant in the success or failure of the enterprise.

The Howey court did not adopt this test as a bright line rule, however. Rather, the Howey court stated the test is a "flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[10] The Supreme Court has considered investment contracts since espousing the Howey test in 1946, but only sparingly, and without any substantial evolution in law.[11] We will briefly examine all four prongs of the Howey test, including the split among U.S. District and Circuit Courts regarding horizontal and vertical commonality under the "common enterprise" prong of the Howie test and expound upon their differences and potential applicability.

AN EXAMINATION OF EACH PRONG

1

Investment of Money

The first prong of the Howey test, an investment of money, is rarely an issue when the courts attempt to identify investment contracts. Although in Howey the term "money" was used, subsequent case law has expanded this concept to include any form of consideration with value.[12] In every decision made by the Supreme Court that recognizes the presence of an investment contract under the Securities Acts, the person found to have been an investor voluntarily chose to give up specific consideration in return for a separable financial interest.[13] Thus, the tangible consideration in the form of cash or like-kind credit given by investors in exchange for their interests satisfies the first prong of the Howey test.

AN EXAMINATION OF EACH PRONG

The investment of money is in a common enterprise.

The second prong of the Howey test requires the existence of a common enterprise. There is currently a split among the circuits as to the requirements of the second prong of the Howey test and have established two different versions of commonality: horizontal and vertical. Most circuits that have considered the issue of a common enterprise in relation to investment contracts find that the common enterprise requirement is satisfied through horizontal commonality.[14] Horizontal commonality involves the pooling of money or assets from multiple investors whereby the investors share in the profits and risk in some proportion.

The Fifth[15], Ninth[16], and Eleventh Circuits,[17] however, have adopted some version of vertical commonality. In vertical commonality, the investor's profit or loss is subject to the efforts of the promoter putting together the deal, regardless of the existence or status of other investors. Vertical commonality focuses on the relationship between the investors and the promoter, not on the relationship among the individual investors.[18] Vertical commonality requires the fortunes of the investor to be "interwoven with and dependent on the efforts and success of those seeking the investment or of third parties."[19] Within the circuits that have adopted vertical commonality under the second prong of the Howey test, two variations exist: Narrow Vertical Commonality and Broad Vertical Commonality.[20]

Under the Ninth Circuit's narrow vertical commonality, there must be a direct correlation between the promoter's success or failure and the investors' profits or losses. Under the Ninth Circuit standard, there is no common enterprise if, for example, the promoter receives a flat commission irrespective of whether the investor makes or loses money on the underlying venture. Under "narrow vertical commonality," commonality will be found if the promoter only profits if the investor profits. The Fifth Circuit view is not as stringent, however, finding "broad vertical commonality" where the promoter's profits are not tied to the investor's profits. "[T]he critical inquiry is confined to whether the fortuity of the investments collectively is essentially dependent upon promoter expertise."[21]

The Tenth Circuit test of whether a common enterprise exists is not based solely on the presence of either horizontal or vertical commonality.[22] "The determining factor of a common enterprise and the economic reality of the transaction is whether or not the investment was for profit."[23]

In the typical non-affiliate turnkey transaction, the sponsor or managing third party does not gain profits or suffer losses independent of action exercised by investors, thereby reducing the trigger of Howey's second prong, albeit just in two circuity. However, if the sponsor or managing third party does gain profits or suffer losses in accordance with, (whether proportionally, causally, or maybe even correlationally) the investor, would arguably satisfy the second prong of Howey. In turnkey real estate operations, investor fortunes and profits are most likely adequately interwoven with, and dependent on, the efforts of the sponsor and third parties to the extent necessary to satisfy vertical commonality in both forms.

AN EXAMINATION OF EACH PRONG

3

There is a reasonable expectation of profits from the investment.

The third prong of the Howey test requires an "expectation of profits." Profits can either be in the form of capital appreciation, cash return on investment or other earnings (including dividends or interest). The enticement of tax deferral may also constitute profits under the third prong of Howey.[24] In the typical non-affiliate transaction, investors purchase turnkey investments with the expectation that the property will produce monthly income through rentals and leasing, that the value of the property will appreciate, or both. Alternatively, investors may purchase turnkey investments in order to defer taxes through SE section signed 1031 exchanges. Turnkey investors most certainly have an expectation of profits for the purposes of the third prong of the Howey test.

4

Reliance on the efforts of others - The efforts of the promoter(s) or third party(ies) must be undeniably significant in the success or failure of the enterprise.

The fourth prong of the Howey test requires that the expectation of profits come "solely from the efforts of [others]." While the Supreme Court has used the word "solely" in its articulation of the fourth prong of Howey test, the lower courts have essentially disregarded the word "solely," instead requiring that the third-party efforts be "undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[25] All but the First Circuit has adopted the Ninth Circuit's liberal interpretation.[26] Moreover, in SEC v. Edwards, the Supreme Court quoted the investment contract definition from Howey and restated the four-part test as "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others," notably omitting the word "solely."[27] The Edwards court emphasized that when it held that "profits" must "come solely from the efforts of others," it was "speaking of the profits that investors seek on their investment."[28]

Some Circuit Courts have further broken down the "efforts of others," as described in the fourth prong, into two categories when analyzing investor transactions: pre-purchase and post-purchase.[29] Pre-purchase efforts are defined as those carried out by the sponsor prior to the close of the investment. Post-purchase efforts are those carried out by the third-party property and asset managers after the close of the investment. The Supreme Court has never formally distinguished pre-purchase from post-purchase efforts under the fourth prong of Howey, however; and the distinction is not likely to offer the applicability of the fourth prong in turnkey real estate investments, as the following cases make clear. In order to satisfy the fourth prong of Howey, or at the very least play a significant role in the determination, the sponsor's pre-purchase efforts must significantly impact the profits sought in the return on the investment.[30]

PRE-PURCHASE EFFORTS

7

Strict Application- SEC v. Life Partners, Inc

In SEC v. Life Partners, Inc., the D.C. Circuit Court of Appeals considered whether fractionalized ownership interests in viatical settlements were investment contracts under the Howey test.[31] The court's decision in Life Partners hinged on the fourth prong of Howey. The SEC argued that although the defendant sponsor, Life-Partners, Inc. (LPI), did not perform substantial post-purchase efforts, the court could nonetheless find that the viatical settlements at issue were investment contracts based on the pre-purchase efforts carried out by LPI. The court, however, did not agree with the SEC's position that the time of sale is an artificial dividing line.[32] Rather, the court interpreted the dividing line as a significant legal construction that should be recognized by the courts when analyzing a particular instrument under the fourth prong of Howey. The Life Partners court reasoned that if the investor's profits depend primarily upon the promoter's efforts after closing, then the investor may benefit from the disclosure and other requirements of the federal securities laws.

The court outlined that (1) if the value of the sponsor's efforts had already been factored into the promotional fees or the purchase price of the investment, and (2) if neither the sponsor nor any other third-party was expected to make additional efforts that would have had an impact on the failure or success of the enterprise, then the need for investor protection under the Securities Acts is cognizably reduced.[33] Thus, according to the Life Partners court, absent substantial post-purchase effort undertaken by the sponsor or a third-party, the fourth prong of Howey cannot be satisfied.

A More Flexible Approach: SEC v. Mutual Benefits Corp.

The Eleventh Circuit Court of Appeals, however, siding with the Life Partners dissent, declined to follow the Life Partners decision and rejected the pre-post bright-line distinction.[34] Mutual Benefits Corp. similarly faced the question of whether fractionalized ownership interest in viatical settlements were investment contracts under the Howey test and likewise, also hinged on the fourth prong of Howey. The Mutual Benefits Corp. court concluded that the fourth prong of Howey is not confined to a "forward-looking inquiry" from the point of closing. While it may be true that the "efforts of others" prong of the Howey test is more easily satisfied by post-purchase efforts of the sponsor or third-parties, there is no statutory or judicial authority upon which to exclude post-purchase entrepreneurial or managerial activities from the analysis, the court reasoned. Thus, according to Mutual Benefits Corp., the fourth prong of Howey can be satisfied even in the absence of substantial post-purchase activities undertaken by the sponsor or a third party.

In turning to turnkey real estate investments, it may be argued that the pre-purchase efforts of turnkey sponsors are either insignificant or analogous to a real estate investor who flips properties. Yet sponsors charge significant sponsor fees for their services, which are pre-purchase efforts, thereby begging the question of their claim of insignificance. Additionally, turnkey real estate investment sales are not structured where the buyer is also the end-user. The sponsor initially makes all of the important decisions with respect to the acquisition of the property, even if the investor has the autonomy to ultimately choose from properties (and/or location(s)) from which the sponsor has already purchased. Sponsors prepare marketing materials and documents, and websites which include descriptions of the property, and may include financial projections, overall or monthly. Finding the property and negotiating the purchase price play an important role in the short- and long-term success of the investment. From the very beginning through closing, all of the activities undertaken by sponsors are the types of efforts that affect the "failure or success of the enterprise," and therefore, in our opinion, would satisfy the "pre-purchase efforts" under Howey's fourth prong.

POST-PURCHASE EFFORTS

9

In determining whether turnkey investors have a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others, the post-closing inquiry is largely confined to the degree of actual control given to and exercised by turnkey owners/investors, versus the degree to which this purported control is insubstantial and illusory.[35] Post-purchase efforts have been analyzed under two different approaches:

- The "Written Agreements Test"[36]
- The "Target Audience"

Under the "written agreements" test, the actual control exercised by the turnkey owner/investor after closing is irrelevant—as long as the investor has the right to control the purchased asset, the fourth prong of Howey is not satisfied.

1

The Written Agreements Test: Albanese v. Florida National Bank of Orlando

In Albanese v. Florida National Bank of Orlando, the Eleventh Circuit examined claims from plaintiffs-investors who invested capital in an ice machine leaseback program.[37] The sponsor in Albanese agreed to place ice machine in various hotels and motels and contracted with the investor to service and collect money from the machines. The Albanese court concluded that the fourth prong of Howey was satisfied, as it determined that profits were derived solely from the efforts of the corporation. In articulating its reasoning, the court stated that "the crucial inquiry [for the fourth prong] is the amount of control that the investors retain under their written agreements."[38] The Albanese court reasoned that if an investor had retained the ability to control the profitability of his or her investment through power expressly articulated in the written agreements, unlike what occurred in this case, then the purchaser/investor would not have been dependent on the sponsor or a third-party for the "undeniably significant efforts" that affect the "failure or success of the enterprise and the fourth prong of the Howey test is not satisfied."

2

The Target Audience Approach: SEC v. Aqua-Sonic Products Corp. and United States v. Leonard

In SEC v. Aqua-Sonic Products Corp., the Second Circuit considered an SEC enforcement action brought under the federal securities laws where the sponsor offered licenses to sell dental products, while an affiliate of the sponsor was described to potential investor-licensees as an optional sales agent.[39] Under that optional agreement, the investor retained the right to terminate the optional sales agent at any time upon ninety (90) days written notice and also retained control over pricing and other conditions relating to the offer and sale of the dental products, including the right to sell the dental products within the specified territory himself. Notwithstanding the control, actual or apparent, that the investor possessed, the court ultimately held that the arrangements were investment contracts and therefore securities.

The Second Circuit reasoned that the amount of investor control provided in the written agreements governing the investment was not determinative, emphasizing that the Howey court did not focus on whether it was somehow possible for an investor to profit without the efforts of others, or whether the investor had a theoretical right to reject the efforts of others.[40] According to the Aqua-Sonic court, the Howey court focused on whether the typical investor who was being solicited would be expected, under all the circumstances, to accept the efforts of others and be passive, or reject the efforts of others and be active.[41] Sponsors "sought to attract the passive investor for whose benefit the securities laws were enacted."[42]

In the Aqua-Sonic court's view, the fact that an investor might retain "some legal rights over distribution does not render it unnecessary for him to have the benefits of the disclosures provided in registration statements or the protection of the anti-fraud provisions."[43] "If, by contrast, the reasonable expectation was one of significant investor control, a reasonable purchaser could be expected to make his own investigation of the new business he planned to undertake and the protection of the 1933 and 1934 Acts would be unnecessary."[44]

2

In United States v. Leonard, a Second Circuit case relying on Aqua-Sonic Products Corp., "criminal charges were brought against twenty-five individuals involved in the marketing of investment interests in two limited liability companies."[45] The Leonard court revisited the target audience approach from Aqua-Sonic Products Corp. and upheld a jury finding that membership interests in the LLCs constituted "investment contracts," because defendants sought out passive investors who did not actively participate in the venture. Rather than confining the inquiry to the theoretical authority given to investors in the written agreements, Leonard recognized the importance of "the factual circumstances" and the written agreements, as well as the actual exercise of control surrounding the investment.[46]

In reaching its conclusion, the Leonard court silently acknowledged the written agreements rationale and rejected such a limited inquiry when it reasoned that if the court confined itself to "a review of the organizational documents," it would "likely conclude that the interests ... could not constitute securities because the documents would lead us to believe that members were expected to play an active role in the management of the companies." Specifically interesting, the Leonard court emphasized that one of the original promoters of the investment interests at issue in that case testified at trial that the interests were structured to minimize the possibility that the investment units would constitute securities but rather were drafted in a way "to get into ... the gray areas of the securities laws."[47]

Variation – Economic Reality

In Continental Marketing Corp. v. Securities & Exchange Com.,[48] the court used the economic reality test in holding that the sale of beavers was a security, as the success of the investment was "inescapably tied to the efforts of the ranchers and the other defendants and not to the efforts of the investors."

Context Clause

In addition to the traditional analysis under the Howey test when deciding whether an instrument should properly fall within the scope of the Securities Acts, the Supreme Court has also applied the "context" clause in limited scenarios.[49] The "context" clause analysis considers the existence of other regulatory schemes that would govern a particular investment instrument in the event that such an instrument was found not to be a security. Using the context clause reasoning, it is clear that the regulatory scheme governing real estate and real property transactions do not provide the comprehensive and pervasive federal regulation that governs other particular areas of law. Similarly, real estate laws currently do not require the registration and disclosure requirements of a security, nor do they contain appropriate anti-fraud provisions security laws enabled to protect the public.

HOWEY'S FOURTH PRONG: COMPARISON & ANALYSIS

The heart of the inquiry under Williamson and Albanese is whether the investor theoretically retains substantial control over the investment on the face of the written agreements. The problem with this approach is the emphasis on the word theoretical.

Under a theoretical interpretation, turnkey investments might not constitute investment contracts as long as the turnkey investor has theoretical control under the written agreements, even where the honest expectation and ultimate reality is one of passive investment. If the written agreements test in Albanese were strictly applied to turnkeys, and the actual control exercised by the investor were found to be irrelevant to the analysis, then turnkey sponsors could evade coverage of the securities laws simply by giving investors power in the written agreements, even when the sponsor is aware that such powers will not in fact be exercised. In my opinion, it would simply lead to a "drafting war," as the best tightly knit and dressed documents could be purposely structured so as to theoretically avoid the securities laws, while still subterfuge the intention behind the protections.

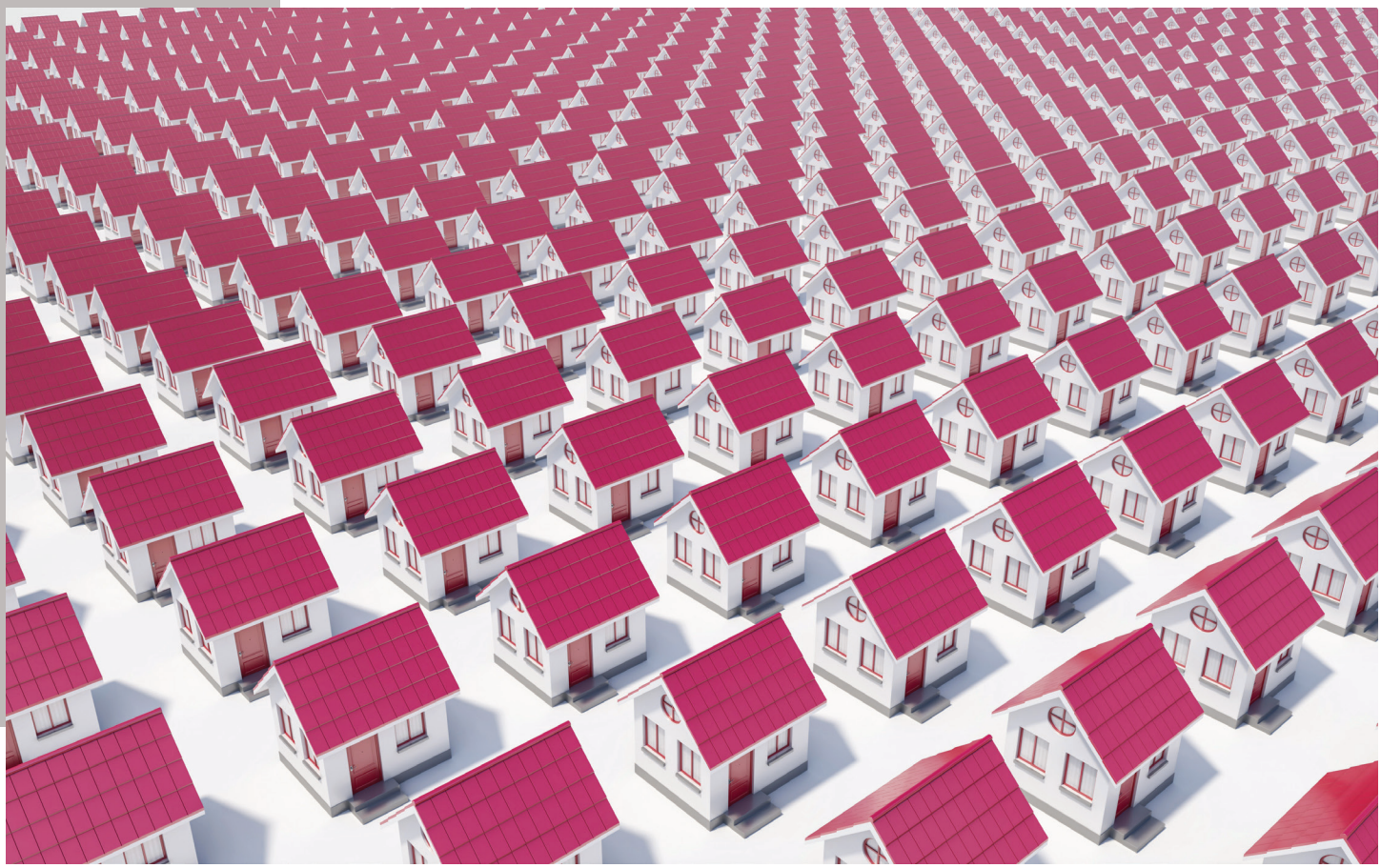
The focus under Williamson and Albanese is on the investors' expectations under the written agreements at the time of investment and "is not directed at what actually transpires after the investment was made...." Accordingly, Williamson and Albanese recognize that if the power to control an investment is merely illusory, then actual control will be deemed not to exist.[50] If actual control is found not to exist after closing, then the owners/investors will clearly rely on the essential managerial efforts of others, thus satisfying the fourth prong of Howey.[51] Furthermore, "under Williamson, a plaintiff may establish reliance on others within the meaning of Howey if he can demonstrate not simply that he did not exercise the powers he possessed, but that he was incapable of doing so."[52] This would be particularly poignant to a plaintiff who has no experience in real estate and/or property management.

Under the Leonard and Aqua-Sonic Products rationale, which seems a more holistic view, the totality of the investment would be considered. Even if investors may vote to hire and fire a third-party property manager, to partition the property, or to sell the property, then the investors are actually in control of the investment, the mere fact that an investor may have the ability to hire or fire a property manager or sell his or her interest in the turnkey property, in and of itself, may not be sufficient to bring an otherwise securitized transaction outside the purview of the federal securities laws.

This position is bolstered by the fact that turnkey investors may be lured in by representations touting the experience and expertise of the sponsor and the prospect of receiving monthly income with no management responsibilities, which is most often the case. If turnkey investors do virtually nothing, while third-party property and asset managers approve leases, collect and

distribute the pro-rata gain and loss to investors, undertake maintenance and improvements, and carry out all other day-to-day management responsibilities, the insignificant control exercised by investors as compared to the post-purchase efforts exerted by third-parties, affiliated with the seller or not, is insubstantial for the purposes of the fourth prong of the Howey test.

While we feel turnkey investments, generally, would be considered securities under this reasoning, that would not preclude some syndicated real estate investment arrangements to fall outside the purview of the federal securities laws. For example, there is an argument to be made that should investors go out and select the property, perform the significant pre-purchase functions, and then actively manage or exercise control over the property, under a consulting or coaching relationship with the sponsor, turnkey investments would not constitute a security, but rather an investment in real estate. This might be accurate, though it would be a little extreme and, in any event, represents an entirely different business model. Situations where the sponsor purchases, restores, and rents out the property for the benefit of the investor is still the norm for turnkeys, that extent, constitutes a security.



TURNKEY REAL ESTATE INVESTMENTS: A CASE STUDY

FACTS TAKEN FROM SEC V. ART INTELLECT, INC., 2013 U.S. DIST. LEXIS 32132

Patrick Brody and his wife Laura Roser created Mason Hill, a company that solicited investments in real estate. Ms. Roser was the founder and president of Art Intellect, the founder of VirtualMG, and the CEO of Mason Hill. Mr. Brody largely kept his name off of any entity or property owned or controlled by Mason Hill. Ms. Roser wrote and managed all of the marketing material of Mason Hill, including the website, brochures, webinars, and press releases. She also interviewed and hired staff and had a position of control at Mason Hill.

Representatives and employees of Mason Hill solicited investors and acted on behalf of Mason Hill at the direction of Laura Roser and Patrick Brody. Neither Mr. Brody nor Ms. Roser had ever been registered in any capacity with the SEC or any other securities regulatory agency. Mason Hill did not register its offer and sales with the SEC. Mason Hill offered "The Mason Hill Real Estate Investment Model" to prospective investors, who entered into a "Reservation Agreement" and "Real Estate Purchase Agreement" with Mason Hill. Mason Hill solicited investors through its website, through "webinar" presentations, and through other communications with investors. Mason Hill also engaged a network of "strategic partners" to solicit investors nationwide in exchange for a "referral fee."

The Mason Hill model offered a "turnkey" approach to real estate investing. In its promotional materials, Mason Hill promoted "How a new kind of real estate investment can produce a 14% to 26% cash-on-cash return, year after year, even if you never lift a finger to manage the properties, fix the properties or find a tenant…" Specifically, Mason Hill claimed that it purchased distressed real estate at a low price, rehabilitated the properties and secured tenants, all for the benefit of its investors. In addition, Mason Hill told investors that it would collect the rents and maintain the properties. In short, it promised investors a "hassle free" option for real-estate investing.

TURNKEY REAL ESTATE INVESTMENTS: A CASE STUDY

Mason Hill claimed that it had an on-site, in-house property management team that screened and placed tenants so that the properties would already be rented and the investor could immediately obtain an income stream from a purchased property. According to Mason Hill, "Reliable renters want to live in these properties — tenants with a better track record of on-time payments, good employment history, and a clean background. We have an on-site property management team with a waiting list of these tenants — delivering an average occupancy rate of 93% for all of our properties." Mason Hill explained that it would manage the property after purchase, handle all maintenance, services, and rent collection, and that it would provide clients with a monthly payment and cash flow report. Although the property management service was not a requirement after the property was purchased through Mason Hill, it was offered as an incentive to prospective investors, and it was one of the features that attracted investors. Mason Hill promised investors returns that ranged from 10% to 30%, with monthly net rental profits of $650 to $1,000 or more. This was touted as a passive investment, and the court found that is what attracted and motivated investors and that, given the nature of the investment, the incentives, and the promised returns, any appreciation in value was of secondary importance.

The Securities and Exchange Commission brought suit against both Mr. Brody and Ms. Roser. Summary Judgment[53] was entered in favor of the SEC was and both were found guilty of selling securities, violating the registration requirements of the Securities Act, and violating Section 15(a) of the Exchange Act by promoting these investment opportunities.

ANALYSIS OF CASE STUDY UNDER HOWEY

1

Investment of Money

Investors unquestionably invested money with Mason Hill.

2

Common Enterprise

The Art Intellect court determined that the economic realities in the case demonstrated that the second prong of Howey (common enterprise) was met. Mason Hill coupled the sale of real estate with Mason Hill's management to generate promised returns. Mason Hill offered a free year of management services as added value for investors. Mason Hill, in brief, touted itself as a hassle-free investment. Its website claimed that it presented a "turnkey cash flow real estate investment." Mason Hill told investors they would receive annual returns of 10% to 30% and represented that investors would see immediate cash flow of at least $650 per month. Mason Hill represented to investors that it would generate profits through Mason Hill's simple, five-step approach to real estate investing. Mason Hill's literature was replete with diagrams, charts and step-by-step illustrations presenting Mason Hill as a passive investment.

3 & 4[54]

Reasonable expectation of profits from others.

The profits from the investment were to be derived solely from the efforts of Mason Hill. Investors had no role in the selection of the properties and provided nothing beyond their principal investment. Mason Hill found the properties, selected the tenants, sent out monthly checks, and offered (and in the majority of cases provided) property management services to the investors. The investors expected to make a profit on the investment with Mason Hill.

SOME EXAMPLES OF TURNKEY INVESTOR WEBSITES

Vesdor.com

According to Vesdor's website, Vesdor[55] is a platform where anyone interested in real estate investing can "get in the game" with an investment as small as $5,000. Vesdor specializes in high-capitalization-rate income-producing properties that can also appreciate in value. The focus is on single-family residential rental properties in highly targeted markets. Vesdor offers investors no-hassle passive investment opportunities with total cash-on-cash return rates projected to be 8-12% per year. Most investment platforms require people "to be rich" in order to invest, Vesdor "levels the playing field" – all investors are welcome, wealthy or not. For each property, invested alongside of Vesdor, investors are assured that Vesdor will not make any money until investors make money (a minimum preferred return). Vesdor is NOT a fund, and Vesdor is NOT a platform for listed properties that are brokered by third parties.

Join by paying an annual membership fee and creating an account.

The next step is to fill out the "suitability questionnaire" which helps Vesdor understand investors' investment situation, so the company can focus on the best opportunities for its investors. Together, Vesdor will make sure the investors' investment situation and objectives are aligned with Vesdor's opportunities, and investors can start investing.

The properties made available on the Vesdor platform are individually selected by Vesdor management. The number of properties available at any given time can vary, based on market conditions, platform demand, and other variables. Members may also submit an Investment Indication, so they are in queue for the next qualifying property when it becomes available.

- Vesdor - Passive income from real estate rentals
- Invest with a successful partner
- No down payments
- No property management responsibility
- Invest what you can afford — starting at $5,000
- For accredited AND non-accredited investors
- Vesdor selects specific high-yield real estate rental properties that can support 8-12% cash-on-cash returns. When you invest, you are partnering with Vesdor in the ownership of your property.

Roofstock.com

The company pre-inspects rental properties with information about tenant, current rent, and property manager and makes this information accessible online. Users can compare investment properties around the country

ANALOGOUS REAL ESTATE STRUCTURES – TENANCIES IN COMMON

While tenancies-in-common[56] are one of the oldest forms of interests in real estate, the modern concept based on fractionalized ownership has experienced a controversial evolution in today's marketplace, having become a booming industry in the United States in recent years. A tenancy in common investment (better known as a TIC) is an investment by the taxpayer in real estate which is co-owned with other investors.[57]

Investors acquiring a TIC interest purchase an undivided interest in property, rather than an interest in an entity that owns the property. This TIC investment vehicle offers undivided fractionalized ownership of institutional[58] grade property with limited management responsibilities.[59] Since the taxpayer holds a deed to real estate as a tenant in common, the investment qualifies under the like-kind rules of §1031.[60] Initially, TICs were offered and sold as securities, not interests in real estate.[61] In 2002, the Internal Revenue Service issued a revenue ruling clarifying the conditions under which real estate owners could defer capital gains and other tax liabilities by exchanging TICs as like-kind property under I.R.C. § 1031[62]. The issuance of Revenue Ruling 2002-22 caused an explosion in the TIC industry[63], whereby real estate professionals began selling TICs as real estate rather than as securities.[64]

Nonetheless, TIC investments are treated by most sponsors as securities because they meet the definition of securities either in the state where the property is located or in the various states where the sponsor intends to offer the investment for sale (under "Blue Sky" laws.) The SEC has not ruled on this issue, but most states are quite clear in their statutes that these investments are securities under state law. This means that only licensed security dealers may market these investments. However, even though the investments may be securities under state law, the investment is a real estate investment for purposes of §1031. Although the SEC has not issued a definitive ruling regarding whether TICs are securities, it has issued guidance implicitly stating that TICs are securities.[65]

A number of sponsors of TIC investments do not agree that the investment is a security under state law. They structure their TIC so that the investment is a real estate investment not subject to state security laws. Usually this means that the TIC sponsor will not be responsible for management of the investment and independent management will be employed. Although far more nuanced than typical turnkey real estate investments, TICs seem more apt than not to be classified as securities under federal law primarily because investors depend upon the entrepreneurial and managerial efforts of the TIC sponsor or third parties for the profitability of their investments.

Similarly to many, the first structure under which TICs are sold under a master lease or affiliate TIC structure. Under this structure, the TIC investors purchase property subject to a long-term leaseback agreement with the

sponsor or an affiliate of the sponsor. The sponsor or its affiliate leases the whole property from the TIC owners in exchange for an agreed upon amount of monthly income or rent payable to the TIC owners. Under this master lease, the sponsor or its affiliate is the only tenant. As the master lessee, the sponsor or its affiliate is ultimately responsible for all maintenance, leasing, and management-related obligations that arise in the operation of syndicated TIC investments. The master lease TIC structure requires little or no management on the part of the TIC owners. Because those who invest in an affiliated TIC depend on the undeniably significant entrepreneurial and managerial efforts of the sponsor or its affiliate for the profitability of their investment, this structure appends intrinsically to a security.

The second structure is known as the property management, or non-affiliate structure. This structure is commonly characterized as a syndicated TIC transaction coupled with a property management agreement, where the property management is not carried out by the sponsor or an affiliate of the sponsor. Thus, instead of buying the fractionalized interests subject to a leaseback agreement with the sponsor or an affiliate of the sponsor, the TIC investors rely on third-party property and asset managers to operate the investment. Most TICs structured in this manner are not sold as securities, but rather, purely as real estate. The debate wages as to whether they should be classified as securities. This analogous field should be keenly watched to see its applicability to turnkey real estate investments.

ANALOGOUS TURNKEY STRUCTURES

Master Lease

One such structure is a master lease, or affiliate, structure. Under such a structure, an investor will purchase a property subject to a long-term leaseback agreement with the sponsor or an affiliate of the sponsor. The sponsor or its affiliate leases the whole property from the owner in exchange for an agreed upon amount of monthly income or rent payable to the owner. Under this master lease, the sponsor or its affiliate is the only tenant and is ultimately responsible for all maintenance, leasing, and management-related obligations that arise in the operation of investment. The master lease structure requires little or no management on the part of the owners/investors. Those who invest depend on the significant entrepreneurial and managerial efforts of the sponsor or its affiliate for the profitability of their investment; as such it undoubtedly will be considered a security.

Affiliated or Non-Affiliated Property Management Structure

A second type of engagement is known as the property management structure performed by the sponsor, an affiliate, or a non-affiliated party. Under this scenario, the turnkey arrangement is coupled with a property management agreement, rather than a master lease.

OVERVIEW OF TIC ANALOGY

While clearly different, TIC's offer similar structures that overlap in form and function, especially in situations where marketing presents the promoter in the best light. If at least two investors purchase undivided interests and share in common ownership of the property on a pro-rata basis in accordance with the percent interest held by each respective investor, such as in a tenancy in common, the sharing of the risks and benefits of the investment, as well as the pooling of assets, should constitute horizontal commonality for the purposes of the Howey test. And in the event that the sponsor enters into a master lease or property management agreement with the investor, the structure should constitute vertical commonality under the Howey Test.

21 CONCLUSION

Based upon the takeaways from this White Paper, it is our clear conclusion that Turnkey Real Estate Investments are in fact securities under federal and state law and need to be regulated accordingly. Having said that, it is appropriate to note that there is nothing wrong with Turnkey Real Estate Investments, *per se*. In fact, the opportunity available for investors to leverage the professional expertise and management skills of sponsors and promoters in order to obtain, on a passive basis, investment returns, continues to remain attractive in the Turnkey Real Estate Investment world. Simply put, however, these investments need to be promoted for what they are – securities – and properly documented as either registered or exempt transactions under Regulation A or Regulation D of the securities laws. By doing so, not only do promoters and sponsors abide by the law and avoid the negative consequences identified in the cases noted earlier, but investors also have the types of disclosures in front of them which are appropriate for this type of investment. Our hope is that this White Paper addresses effectively the world of Turnkey Real Estate Investments as securities for promoters, sponsors and investors alike who are involved in Turnkey Real Estate Investments.

FOOTNOTES

1. See Marine Bank v. Weaver, 455 U. S. 551, 556 (1982).
2. 15 USC § 78c(a)(10). The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or debenture, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.
3. S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-353, 64 S.Ct. 120, 124, 88 L.Ed. 88 (1943) (holding that the test for securities was 1. what character the instrument was given in commerce by the terms of the offer; 2. the plan of distribution; and 3. the economic inducements held out to the prospect.)
4. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967), interpreting the term "security."
5. Reves v. Ernst & Young, 494 U.S. 56, (1990)
6. Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293, 298 (1946)
7. Reves, 494 U.S. at 60-61 (holding that Congress provided a broad definition of the term security so as to encompass "virtually any instruments that might be sold as an investment").
8. United Housing. Foundation. v. Forman, 421 U.S. 837, 848 (1975)
9. The Securities and Exchange Commission, however, does not require vertical or horizontal commonality per se, nor does it view a "common enterprise" as a distinct element of the term "investment contract." In re Barkate, 57 S.E.C. 488, 496 n.13 (Apr. 8, 2004); see also the Commission's Supplemental Brief at 14 in SEC v. Edwards, 540 U.S. 389 (2004).
10. Howie, at 299.
11. See, e.g., SEC v. Edwards, 540 U.S. 389, 389 (2004); Reves v. Ernst & Young, 494 U.S. 56, 56 (1990); Landreth Timber Co. v. Landreth, 471 U.S. 681, 684 (1985); Marine Bank v. Weaver, 455 U.S. 551, 552 (1982); Daniel v. Int'l Bhd. of Teamsters, 439 U.S. 551, 552 (1979); United Housing. Foundation. v. Forman, 421 U.S. 837, 845 (1975); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); SEC v. Variable Annuity Life Ins. Co. of Am., 359 U.S. 65, 76 (1959) (analyzing investment contracts under the Howey test).
12. See, e.g., Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 559-60 (1979).
13. Id. at 559; see, e.g., Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (money paid for bank capital stock); SEC v. Variable Annuity Life Ins. Co. of Am., 359 U.S. 65, 76 (1959) (premium paid for variable-annuity contract); Howey, 328 U.S. at 293 (money paid for purchase, maintenance, and harvesting of orange grove); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 345-46 (1943) (money paid for land and oil exploration).
14. See, e.g., SEC v. Infinity Group Co., 212 F.3d 180, 188 (3d Cir. 2000); SEC v. Banner Fund Int'l, 211 F.3d 602, 614-15 (D.C. Cir. 2000); Teague v. Bakker, 35 F.3d 978, 986 n.8 (4th Cir. 1994); Wals v. Fox Hills Dev. Corp., 24 F.3d 1016, 1018-19 (7th Cir. 1994); Revak v. SEC Realty, 18 F.3d 81, 87-89 (2d Cir. 1994); Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 391-93 (6th Cir. 1989) (applying horizontal commonality as the requirement that investors share or pool their funds in order to succeed in the venture).
15. See, e.g., SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 478-79 (5th Cir. 1974).
16. See, e.g., SEC v. Glenn W. Turner Enter., Inc., 474 F.2d 476, 481-82 (9th Cir. 1973).
17. See, e.g., SEC v. ETS Payphones, Inc., 300 F.3d 1281, 1283-84 (11th Cir. 2002) (recognizing "horizontal commonality" as the majority test in the circuit courts, but applying precedent that broad vertical commonality is the controlling test in the Eleventh Circuit), rev'd. on unrelated grounds by SEC v. Edwards, 540 U.S. 389, 393-97 (2004).
18. See SEC v. Unique Fin. Concepts, Inc., 196 F.3d 1195, 1199-1200 (11th Cir. 1999).
19. Villeneuve v. Advanced Bus. Concepts Corp., 698 F.2d 1121, 1124 (11th Cir. 1983).
20. Compare Mordaunt v. Incomco, 686 F.2d 815 (9th Cir. 1992), with Long v. Shultz Cattle Co., 881 F.2d 129 (5th Cir. 1989).
21. Securities & Exchange Comm'n v. Continental Commodities Corp., 497 F.2d 516, 522 (5th Cir. 1974)
22. SEC v. Merrill Scott & Assocs., Ltd., 2011 U.S. Dist. LEXIS 134010.
23. Id. (internal quotations omitted) (citing Campbell v. Castle Stone Homes, Inc., Case. No. 2:09-CV-250 TS, 2011 U.S. Dist. LEXIS 27266, 2011 WL 902637 *4 (D. Utah Mar. 15, 2011).
24. Long v. Shultz Cattle Co., 881 F.2d 129, 132-34 (5th Cir. 1989).
25. SEC v. Glenn W. Turner Enter., Inc., 474 F.2d. 476, 482 (9th Cir. 1973), cert. denied, 414 U.S. 821 (1973).
26. See, e.g., SEC v. Unique Fin. Concepts, Inc., 196 F.3d 1195, 1201 (11th Cir. 1999) (adopting the Ninth Circuit's liberal interpretation of the word "solely" as used in the Howey test); SEC v. Int'l Loan Network, Inc., 968 F.2d 1304, 1308 (D.C. Cir. 1992); Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240 n.4 (4th Cir. 1988); Goodwin v. Elkins & Co., 730 F.2d 99, 103 (3d Cir. 1984), cert. denied, 469 U.S. 831 (1984); SEC v. Prof. Assocs., 731 F.2d 349, 357 (6th Cir. 1984); Kim v. Cochenour, 687 F.2d 210, 213 n.7 (7th Cir. 1982); SEC v. Aqua-Sonic Prods. Corp., 687 F.2d 577, 582 (2d Cir. 1982), cert. denied, 459 U.S. 1086, (1982); Williamson v. Tucker, 645 F.2d 404, 418 (5th Cir. 1981), cert. denied,

FOOTNOTES

454 U.S. 897 (1981); Aldrich v. McCulloch Prop., Inc., 627 F.2d 1036, 1040 n. 3 (10th Cir. 1980); Fargo Partners v. Dain Corp., 540 F.2d 912, 914-15 (8th Cir. 1976).

27. SEC v. Edwards, 540 U.S. 389, 393-97 (2004).
28. Id.
29. See SEC v. Mut. Benefits Corp., 408 F.3d 737 (11th Cir. 2005); SEC v. Life Partners, Inc., 87 F.3d 536 (D.C. Cir. 1996).
30. SEC v. Howey, 328 U.S. 293, 298-99 (1945); SEC v. Mut. Benefits Corp., 408 F.3d 737, 743-44 (11th Cir. 2005).
31. Life Partners, Inc., 87 F.3d at 538.
32. Id. at 545-49.
33. Id.
34. SEC v. Mut. Benefits Corp., 408 F.3d 737, 743 (11th Cir. 2005)
35. Albanese v. Fla. Nat'l Bank of Orlando, 823 F.2d 408, 410 (11th Cir. 1987); Williamson v. Tucker, 645 F.2d 404, 419-24 (5th Cir. 1981).
36. In Williamson v. Tucker, the Fifth Circuit determined whether general partnership interests in a real estate development scheme were securities. In dictum, the court applied a three-part test to determine whether a general partnership interest that on its face creates a true partnership is a security. 645 F.2d at 404. Under the test, a general partnership or joint venture interest can be designated a security if: (1) the agreement among the parties leaves so little power in the hands of the partner that the arrangement-in-fact distributes power as would a limited partnership; ...The first prong of Williamson is has widely become known as the written agreements test. Under this test, the Williamson court declared that "[i]n each case the actual control exercised by the purchaser is irrelevant." As long as the investor "has the right to control the asset he has purchased, he is not dependent on the promoter or on a third party for 'those essential managerial efforts which affect the failure or success of the enterprise.'" 645 F.2d at 421.
37. Albanese, 823 F.2d at 409-10.
38. Id. at 410
39. SEC v. Aqua-Sonic Prods. Corp., 687 F.2d 577 (2d. Cir. 1982).
40. Id. at 582-85.(emphasis added)
41. Id.
42. Id. at 585.
43. Id.
44. Id.
45. United States v. Leonard, 529 F.3d 83 (2d. Cir. 2008).
46. Id.
47. Leonard, 529 F.3d at 89.
48. 387 F.2d 466, 470 (10th Cir. 1967)
49. Congress prefaced the list of securities defined in the Securities Acts with the phrase "unless the context otherwise requires." 15 U.S.C. § 78c(a); See also, SEC v. National Securities, Inc., 393 U.S. 453, 466 (1969); Marine Bank v. Weaver, 455 U.S. 551, 555, 558-59 (1982).
50. Albanese v. Fla. Int'l Bank of Orlando, 823 F.2d 408, 412 (11th Cir. 1987); Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981); see also SEC v. Aqua-Sonic Prods. Corp., 687 F.2d 577, 583-84 (2d. Cir. 1982).
51. See Albanese, 823 F.2d at 412.
52. Long v. Shultz Cattle Co., 881 F.2d 129, 134 (5th Cir. 1989).
53. Mr. Brody and Ms. Roser were permanently enjoined from violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240-10b-5; Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. § § 77e(a), (c); and Sections 15(a) and 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(a)-(b).
54. The Art Intellect court only used a three (3) part test in its analysis.
55. Disclosure via Vesdor.com website – "The information contained on this website does not constitute an offer for, or a solicitation of, interest in any securities offering by Vesdor. Vesdor operates a platform to facilitate investments in real estate opportunities. Any sale, solicitation or offer of any securities shall be effected only by a private placement memorandum. No money or other consideration is hereby being solicited, and will not be accepted without such potential investor having been provided the applicable offering document. The information and services contained in this website are meant only for investors who are members of the Vesdor platform and who understand and acknowledge the risks associated with private investments. All prospective investors must acknowledge that they have received and read all investment terms and conditions. Vesdor does not make any recommendations regarding the appropriateness of particular opportunities for any Investor, or endorse any such opportunities. Investment opportunities listed by Vesdor are "private placements" of securities which are not publicly traded and are subject to holding period requirements. As such, they are not suitable for investors who need or are expecting a short-term investment. Vesdor does not give or offer any business advice, investment advice, tax or legal advice to anyone using this website. Use of this website is not an offer by Vesdor to solicit, sell or make an offer to buy any investment interest or securities. Vesdor' services are not considered "crowdfunding" as detailed in Title III of the Jumpstart Our Business Startups Act ("JOBS Act"). No federal or state securities commission or any other regulatory body has endorsed, guaranteed or approved of the investments and information or materials provided by Vesdor."
56. The tenancy-in-common continues to be defined as an undivided joint ownership interest held by two or more persons, each having a possessor right, in the same piece of land. 20 AM. JUR. 2D Cotenancy and Joint Ownership § 32 (2008); "A tenancy in common is a joint possession or occupation of real property by two or more persons in undivided shares, where each person has a right to possess or occupy the whole property." BLACK'S LAW DICTIONARY 1506 (8th ed. 2004).
57. See KATHY HESHELOW, EFFORTLESS CASH

FOOTNOTES

FLOW: THE ABC'S OF TIC'S (TENANT IN COMMON PROPERTIES) 9, 10

58. (iUniverse, Inc. 2006).
59. Id. at 1 (noting that TIC properties include sizeable high-quality real estate such as office buildings, shopping centers, and apartment complexes).
60. Id. at 7 ("TICs are passive income properties with no management and no daily responsibilities or headaches.").
61. Generally, "[section] 1031(a) provides that gain or loss will not be recognized if business property (other than inventory) or investment property (other than stocks and bonds) is exchanged for other business or investment property of like kind." Bradley T. Borden & W. Richey Wyatt, Syndicated Tenancy-in-Common Arrangements: How Tax-Motivated Real Estate Transactions Raise Serious Nontax Issues, 18 PROB. & PROP. 18, 18 (2004). "
62. See, e.g., Alvin Robert Thorup, TIC or Treat: How Tenant-In-Common Real Estate Sales Can Avoid the Reach of the Securities Laws, 34 REAL EST. L.J. 422 (2006).
63. Rev. Rul. 2002-22, 2002-1 C.B. 733 (setting forth guidelines for obtaining a ruling that TIC interest will not be treated as a security for federal income tax purposes); see also I.R.C. § 1031(a)(1) (2000) (establishing that under special circumstances, a taxpayer can defer tax liability that would otherwise be imposed as a result of the capital gains from real property).
64. See HESHELOW, supra note 55, at 9 (indicating that in the aftermath of the issuance of Revenue Ruling 2002-22, the TIC industry exploded); see also Alan J. Berkeley, Real Estate Interests in Securities: TICS/DSTS, in Regulation D Offerings and Private Placements 75 ALI-ABA 727, 729 (2006) (explaining that 2003 witnessed $ 150 million in sales of TIC interests; 2004 witnessed $ 2 billion in sales; 2005 witnessed $ 4 billion in sales; and the sales numbers may "reach $ 40-50 billion annually by 2010").
65. Thorup, supra note 59, at 426 (articulating an investment structure under which TICs are allegedly offered and sold as real estate and not securities).
66. On January 14, 2009, the SEC issued a response to a "no-action" request that supports the view that TIC investments are securities versus real estate. The no-action request to the SEC was submitted in February 2006 and described two common TIC business models being utilized by sponsors that were syndicating TIC offerings as real estate and who were compensating real estate agents. The request asked the SEC to agree to take "no action" if the companies were to syndicate offerings utilizing either the real estate model or the securities model and were to compensate licensed real estate agents, a practice prohibited for securities. Nearly three years later, the SEC issued its brief response. Specifically, the SEC response stated that "based on the facts presented" the SEC views the sale of undivided tenant-in-common interests as securities, per the Securities Act of 1933. OMNI Brokerage, Inc. Argus Realty Investors, L.P. PASSCO Companies, LLC, SEC No-Action Letter, 2009 WL 153818 (Jan. 14, 2009) [hereinafter OMNI Brokerage No-Action Letter]. However, it should be duly noted that the SEC response was a concise letter that made it clear that their decision was based only on the facts presented within the specific no-action request and may not be representative of other situations or the industry as a whole. Id.

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