



**FIRST AMERICAN TITLE INSURANCE COMPANY**

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**Underwriting Bulletin GA-82**

**To:** All Agents of First American Title Insurance Company and Attorney's Title Guaranty Fund

**Subject:** **Tenancy-in-Common Investment Programs**

It has come to the attention of the Home office Underwriting Department that our offices are being approached by promoters of Tenancy-in-Common Investment Programs, and being asked to insure sales to investors. The common thread to these investment programs is that the investors purchase a tenancy-in-common interest in a property (or properties) along with other investors who also are buying tenancy-in-common interests in the same property (or properties). The promoter usually also is involved with a property manager who manages and controls the properties, and pays the rents to the investors after taking out their "management fee." There are also commonly fees involved in investing in these properties that are paid to the promoters. These transactions pose potential escrow and title risks beyond those in typical transactions.

The promoters of these programs usually represent that:

1. An investor can defer paying capital gains taxes through use of a tax-deferred exchange if it is structured properly;
2. The investor can have a passive investment in real estate as opposed to having to manage a property they own;
3. This program allows investors to invest in and own a part of large commercial properties, which would normally be too expensive for them to own; and
4. These types of transactions provide a place to put funds in a tax-deferred exchange where the exchanger has not found suitable replacement property.

There are many reasons First American does not look favorably on this type of transaction. They have many of the same attributes and problems we have struggled with over the last twenty (20) or more years with insuring multiple beneficiary mortgages and deeds of trust. There are potential securities law violation problems. The benefits represented by the promoters may not materialize. The IRS has adopted very strict and complicated rules that, if not complied with, may leave the investor without the safe harbor tax shelter. If the IRS rules are complied with, it may be next to impossible for any investor to get out of the investment short of very expensive and protracted litigation. Over selling of the fractional tenant-in-common interests is a very real potential issue. One could not insure any fractional interest without searching the entire project ownership for other fractional interests to make sure that not more than 100% ownership has been sold.

Another typical requirement of the promoter is a commitment from the title insurer in either letter or endorsement form to insure the proposed exit strategy wherein the promoter or some other entity will be buying up all of the tenancy-in-common interests at some time in the future. We are asked to insure that these buyout or exit agreements are enforceable and can be enforced in the future notwithstanding an investor bankruptcy, death or mental incapacity. We will not do this. The risks are not just title risks, but escrow risks as well, and because of these extraordinary risks, approval **MUST BE** sought from the Home Office Underwriting Department before any office or agent agrees to insure these types of transactions.

It should be pointed out that First American is ready, willing and able to insure properties that are being sold and/or bought for tax-deferred exchanges. It is the particular structure (fractionalized interests) of these types of transactions that concern us.

Please contact the Underwriting Department at the Georgia State Office at 800-328-2642 or 404-250-1604 if you have any questions.