International Council of Shopping Centers President's Message

October 09, 2009 - Shopping Centers

I wanted to make you aware of an International Revenue Service (IRS) ruling that is of significant importance to the shopping center industry. ICSC's Global Public Policy office has been working with the IRS to provide our industry with greater flexibility to rework the terms of commercial mortgage loans that have been securitized in commercial mortgage backed securities (CMBS). On September 15th, the IRS issued guidance (Revenue Procedure 2009-45) that stipulates that discussions between a borrower and a lender involving modifications to the terms of a securitized loan "may occur at any time" without triggering tax consequences.

Prior to this ruling, tax codes that governed Real Estate Mortgage Investment Conduits (REMICs) as well as investment trusts made it difficult for borrowers, who are current on their mortgage payments, to hold restructuring talks with the servicers of these loans. The Tax Code imposed severe penalties for significant changes made to commercial mortgage pools or investment interests after the startup date of the securitization vehicle. As a result, borrowers were unable to even begin discussions with their loan servicers until they had already defaulted or were within weeks or months of doing so.

The new guidance removes the tax impediments that have been preventing borrowers, lenders, and other stakeholders from having meaningful negotiations in connection with securitized commercial mortgage loans before reaching "imminent default" status.

The IRS ruling makes it clear that discussions about lowering the interest rate or extending the loan term may occur at any time without triggering tax consequences. In addition it allows servicers to modify loans regardless of when they mature, which means problems can be addressed at an early stage before the loans mature or otherwise default.

ICSC research estimates $165 billion in shopping center CMBS debt will mature over the next year. With no credit capacity for commercial real estate, most of these loans face maturity defaults unless the terms of these loans can be modified to substantially reduce the risk of default. The guidance is intended to reduce the number of loans that may go into foreclosure, limiting the potential for a profoundly negative impact on valuations throughout the commercial real estate sector and ripple effects that spread into the broader economy.

The guidance went into effect September 16th and applies to loan modifications after January 1st, 2008; it has no termination date.

For some time ICSC and its members have been actively working with congressional leaders and the Administration to highlight industry concerns about the capital market crisis and to educate decision makers about the challenges faced by retail real estate. ICSC believes it is important for policymakers to enact measures that will restore credit capacity for retail real estate that includes the following 3 points:

* Repairing the Credit Markets (the recent TALF extension into 2010 will help)
* Reducing Potential Impediments for Commercial Loan Modifications, especially rolling over performing loans (REMIC relief)
* Supporting Main Street Businesses, vs. Wall Street Bailout

The recent Treasury actions on TALF and REMICs confirm that our efforts are bearing fruit. We will continue to champion ICSC legislative issues and with the help of our membership, I am confident that we can continue to influence legislative decisions that will enable our industry to prosper.

Michael Kercheval, president and CEO, ICSC.