



Michael Pieciak, Chair
NASAA Corporation Finance Section
Department of Financial Regulation
89 Main Street
Montpelier, VT 05620-3101

October 7, 2016

Via E-mail

**RE: Comments of the ABA Committee on State Securities Regulation
on the Proposed Amendment to the NASAA Statement of Policy
Regarding Real Estate Investment Trusts**

Dear Mr. Pieciak:

The ABA Committee on the State Securities Regulation appreciates the opportunity to comment on the Proposed Amendment to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (“Proposed Amendment”).

Before we comment on the Proposed Rule, we would like to commend the efforts of NASAA and NASAA members in revising NASAA’s Statement Of Policy regarding Real Estate Investment Trusts (“Statement of Policy”). We welcome and appreciate the opportunity to comment on the Proposed Rule and understand the difficulty and complexity of protecting investors while providing issuers the ability to raise capital.

SUMMARY

We have several concerns that will be explained in more detail below; however, they include:

1. The potential prohibition on investing (uneveled playing field for certain investors);
2. The need for better enforcement of existing rules requiring broker-dealers and registered representatives to know their customers and determine suitability

based on various factors gathered in the completed new account form of a customer;

3. The concern that a one size fits all approach to the concentration limit (with the exception of a carve-out for Accredited Investors under the income and net worth standards set forth in Regulation D, Rule 501), is too narrow; therefore, other exemptions ought to be considered; and
4. The concern that the proposed concentration limit is too restrictive and may not be indicative of the point at which fraud or abuse occurs.

DISCUSSION

1. The potential prohibition on investing (unleveled playing field for certain investors).

There is growing concern that, while investor protection is of paramount importance, the adoption of concentration limits may result in the unintended consequence of removing investor choice from the decision making process. For example, the smaller investor may be disadvantaged as against larger institutional or wealthy investors, despite having experience in particular types of investments; therefore, this may cause situations in which wealthy or large sophisticated investors are able to make investments that are not available to the smaller investor. Thus, the smaller (non-accredited) investor may be disadvantaged in saving for retirement even when such investors have sufficient experience and knowledge in a specific product.

2. The need for better enforcement of existing rules requiring broker-dealers and registered representatives to know their customers and determine suitability based on various factors gathered in the completed new account form of a customer.

Philosophically, one reason for a concentration limit is to minimize the damage that can occur when a nefarious broker sells investments that are not suitable for a particular client. While we understand that this is one way to limit this risk, there is always the potential for a broker to modify the record keeping required under the proposed amendment as he or she can with any rule; therefore, a concentration limit does not necessarily solve the problem, but merely adds another hoop through which a nefarious broker must jump in order to game the system. We respectfully suggest that the better approach is to enforce existing rules relating to broker conduct, specifically the need for a broker to only sell investments that are suitable to a particular investor rather than based on the size of the commission paid to the broker.

3. The concern that a one size fits all approach to the concentration limit (with the exception of a carve-out for Accredited Investors under the income and net worth standards set forth in Regulation D, Rule 501) is too narrow; therefore, other exemptions ought to be considered.

In considering the possible need for concentration limits on investments in particular industries, we believe that additional exemptions beyond the Proposed Amendment are warranted. Such exemptions could include those based on an investor's education, experience in making investments in particular industries, or knowledge about investments in general (based perhaps on additional factors), so that an investor can invest in those industries and issuers in which they are best able to analyze for themselves the risks that they are accepting in a particular investment.

4. The concern that the proposed concentration limit is too restrictive and may not be indicative of the point at which fraud or abuse occurs.

Without conceding the need for a concentration limit, as described above, should NASAA determine that a concentration limit is indeed warranted, it is our belief that a 10% investment limitation would not combat fraud because, as articulated by various NASAA members, it appears that instances of fraud occur most frequently at levels of investment in excess of 30% of liquid assets. If NASAA seeks to achieve a workable tool to combat systemic fraud in certain types of investments, then a more realistic limit on concentration of investments is a better approach. Our recommendation would be that such limits should be raised to a level of 25% of liquid assets. This would provide a level of protection from fraud without affecting an investor's right to choose an investment. While the increased limitation does not obviate the need for the exemptions described above, it does provide an investor more freedom of choice, based on an understanding of a particular industry or issuer.

It should be noted that, adherence to a specific concentration limit could result in an individual allocating the majority of his liquid assets in industries in which he or she has little or no knowledge. The investor would need to rely on the very broker who regulators are concerned will put the investor in unsuitable investments.

CONCLUSION

We believe that there are valid and thoughtful alternatives to a concentration limit as presented in the Proposed Amendment. Several of those alternatives have been discussed above. As always, the Committee on the State Regulation of Securities welcomes the opportunity to discuss any of the points above in person with concerned NASAA members.

Respectfully submitted,



Martin A. Hewitt

Chair

ABA Committee on the State Securities Regulation

cc: Mark Heuerman (mark.heuerman@com.state.oh.us), Chair of Direct Participation Programs Policy Project Group;
Any Coverman, NASAA Deputy Director of Policy and Associate General Counsel
Mark Stewart, NASAA Counsel