Congress of the United States
House of Representatives

September 12, 2022

Melanie Senter Lubin
Maryland Securities Commissioner
President, North American Securities Administrators Association
750 First Street, N.E., Suite 1140
Washington, D.C. 20002

Dear Commissioner Lubin,

We write to express our concerns with the North American Securities Administrators Association (NASAA) revisions to its Statement of Policy Regarding Real Estate Investment Trusts (the "Proposal"), which was produced by NASAA's Corporation Finance Section, chaired by Andrea Seidt, Ohio Securities Commissioner, and by NASAA's Direct Participation Programs Project Group, chaired by Mark Heuerman, Ohio's Registration Chief Counsel.

The Proposal may have a profound impact on the Ohio economy and Ohio investors. More than 32,000 Ohioans have invested in 32 federally-registered non-listed real estate investment trusts (REITs). The total value of these investments exceeds $1.1 billion and the average Ohioan's investment is $35,000. These investments offer Ohioans exposure to geographically diverse opportunities across a range of property types. They support the acquisition and development of affordable housing, commercial properties for small businesses, and other types of real estate that supports economic growth and employment, including in Ohio.

The proposed concentration, net worth, and gross income limits may prevent many Ohio investors from attaining adequate portfolio diversification by investing in non-listed REITs. Real estate can provide Ohio investors with portfolio diversification, inflation protection, a source of income, and long-term growth. The Proposal would impose restrictions that limit investor choice and may prevent investors from attaining sufficient retirement savings. A wealthy investor with enough cash and investments to meet reasonably foreseeable needs could run up against the concentration limits, even if she has excess liquidity needs and is seeking to avoid volatility in the stock market.

Pension plans and other institutional investors allocate a portion of their portfolio to real estate. The Proposal would deny retail investors of the same opportunities. For example, the Ohio Public Employees Retirement System Defined Benefit Plan targets over 23% of its assets to alternative investments, with 10% to real estate.[1]

[1] OPERS 2022 Annual Investment Plan at 6 https://www.opers.org/pubs-archive/investments/inv-plan/2022-Annual-Investment-Plan.pdf.

The Proposal also may have a harmful effect on the real estate industry and may cause unintended and unnecessary risks to the strength and stability of U.S. real estate markets. Federally-regulated, public non-listed REITs are a growing source of capital to the acquisition and development of affordable housing, commercial properties for small businesses, and other types of real estate that supports economic growth and employment. In 2021, non-listed REITs raised over $36.5 billion and in the first half of 2022 raised another $21.3 billion.[2] Recent surveys of non-listed REITs indicated that approximately 63% of their investments in multifamily housing support workforce housing, defined as multifamily housing with rent less than 25% of mean family income in the surrounding area. Continued investment in infrastructure such as warehouses that are an essential link to the nation's supply chain increases the capital directed toward this national priority.

Many small and medium-sized businesses lack access to the deep capital markets that finance the activities of large corporations. The inclusion of affiliated products, including business development companies and private offerings, in the proposed concentration limits may severely limit access to capital for these companies, including minority-owned, women-owned, and veteran-owned businesses which may lack access to traditional sources of capital. The affiliate language extends even beyond these products to listed funds, mutual funds and exchanged-traded funds offered by well-established asset managers.

As you know non-listed REITs are regulated by the U.S. Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA), subject to the reporting requirements of any public company, and distributed to investors through federally regulated broker-dealers and registered investment advisers. The federal government has established standards of conduct for these investment professionals, who know their customer's financial situation, liquidity needs, and investment objectives. The Proposal would establish new, additional standards of conduct on broker-dealers and investment advisers that may conflict with the federally established obligations and interfere in the relationship with their customer.

Finally, the Proposal would create a blanket prohibition on the use of gross offering proceeds to fund distributions which is tantamount to establishing new federal law. Moreover, it would directly conflict with the fundamental fiduciary obligation of a REIT's board of directors, Maryland corporation law where most REITs are chartered, and SEC pronouncements on appropriate disclosures. In fact, this blanket prohibition could jeopardize a company's tax status as a REIT.

Just last year, Commissioner Seidt withdrew her objection to the use of gross offering proceeds to fund non-listed REIT distributions provided there is sufficient disclosure (which is already required by the SEC). We are concerned that by advocating for the Proposal, the Securities Commissioner hopes to adopt the gross offering proceeds prohibition "through the back door," by incorporating the Proposal, once adopted, into the policies of the Division of Securities without following statutorily-required administrative procedures.

Because of these concerns we respectfully request a response to the following:

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[2] The Stanger Market Pulse (December 2021 and June 2022).

1. What Ohio data from the examination of market participants by NASAA members or from their enforcement of state law demonstrate the need for the Proposal for Ohioans?

> a. Please provide Ohio state-level data, not statistics from the FINRA website or other federal data.
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> b. Please separate the data between legacy lifecycle REITs and net asset value REITs.
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> c. Please distinguish between data that support NASAA's concerns about the structure and operations of non-listed REITs, versus data that support NASAA's concerns about the manner in which they are distributed by federally-regulated investment advisers and broker-dealers.

2. The SEC and FINRA comprehensively regulate broker-dealers and investment advisers who recommend non-listed REITs. The federal regulators require that these financial advisors act in the client's best interest. What data, economic analysis, or policy would support the conclusion that a state administrator's arbitrary concentration limit (e.g., 10% of liquid net worth) for *all* retail investors should replace a financial advisor's determination about the best interest of his client?

3. The proposed concentration limits would apply in aggregate to an investment in non-listed REITs, other securities of an affiliate, and direct participation programs. Why should an investor be precluded from purchasing other funds managed by a non-listed REIT sponsor, such as an index fund?

4. Please explain why the concentration limits would apply to liquid net worth. To help your explanation, please assume an investor with a $15 million portfolio, $1 million of which is "liquid." Why should this investor be precluded from purchasing more than $100,000 in the aggregate of a non-listed REIT, an index fund managed by the REIT sponsor, and a direct participation program?

5. Please explain the data and economic analysis used to support the proposed minimum annual gross income/net worth limits of $95,000/$340,000. What data and analysis led NASAA to these proposed limits?

6. Please explain why:

- Section 203A of the Investment Advisers Act of 1940 would not preempt the Proposal's application to federally-registered investment advisers;
- Section 15(i) of the Securities Exchange Act would not preempt the proposed requirement that each person selling shares maintain records of the information used to determine that an investment is suitable and appropriate;
- Section 18 of the Securities Act of 1933 would not preempt the proposed application of a concentration limit in the aggregate to affiliated index funds and other investment companies managed by the sponsor; and

- Section 514(a) of ERISA would not preempt the Proposal's application to investment advisers and broker-dealers who recommend REIT shares to employee benefit plans.

7. Please provide any assurances that NASAA can provide that states will uniformly apply the conduct standards and other proposed requirements, including those states that currently impose varying concentration limits.

We would appreciate a response no later than October 12, 2022. If you or your staff have any questions, please contact Ashley Gutwein at (202) 225-2216 or Tim Hite at (202) 225-6205.

Sincerely,

Steve Chabot Member of Congress	Warren Davidson Member of Congress

cc:
Governor Mike DeWine
Lt. Governor Jon Husted
Sheryl Maxfield, Director, Ohio Department of Commerce
Andrea Seidt, Ohio Commissioner of Securities