

September 12, 2022

Via Electronic Submission (NASAAComments@nasaa.org, Andrea.Seidt@com.ohio.gov, and Mark.Heuerman@com.ohio.gov)

Andrea Seidt, Corporation Finance Section Chair
Mark Heuerman, Direct Participation Programs Project Group Chair
North American Securities Administrators Association, Inc. (NASAA)
750 First Street, NE, Suite 990
Washington, DC 20002

Re: Proposed Revisions to NASAA Statement of Policy Regarding Real Estate Investment Trusts

Dear Ms. Seidt and Mr. Heuerman:

The Investment Adviser Association (**IAA**)¹ appreciates the opportunity to comment on the Proposed Revisions to the NASAA *Statement of Policy Regarding Real Estate Investment Trusts (Proposal)*.² Among other things, the Proposal seeks to amend NASAA's existing Statement of Policy on REITs regarding the offer and sale of non-traded REITs to retail investors by amending the conduct standards to incorporate Regulation Best Interest (**Reg BI**),³ and adding a new concentration limit to the suitability section in the policy.

Our comments below are limited to ensuring that the Proposal does not directly or indirectly seek to impose substantive regulation on federal covered advisers, which would be contrary to the National Securities Markets Improvement Act of 1996 (**NSMIA**). Specifically, we request that NASAA: (i) expressly confirm that federal covered advisers are not "persons" for purposes of the conduct standards; (ii) clarify that the proposed concentration limit does not

¹ The IAA is the leading organization dedicated to advancing the interests of fiduciary investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than \$35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

² NASAA, Request for Public Comment, *Proposed Revisions to NASAA Statement of Policy Regarding Real Estate Investment Trusts* (July 12, 2022), available at <https://www.nasaa.org/wp-content/uploads/2022/07/Request-for-Public-Comment-on-Amendments-to-NASAA-REIT-Guidelines-2022.pdf>. NASAA [proposed](#) revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts earlier but did not adopt them.

³ Reg BI is the conduct standard for broker-dealers adopted by the Securities and Exchange Commission in 2019. See *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, SEC Rel. No. 34-86031 (June 5, 2019), available at <https://www.sec.gov/rules/final/2019/34-86031.pdf>.

apply to purchases resulting from advice provided by federal covered advisers; and (iii) exclude federal covered advisers and all covered securities from the definition of “affiliate” for purposes of the proposed concentration limit.

i. NASAA should expressly confirm that federal covered advisers are not “persons” for purposes of the conduct standards

The Proposal would apply suitability obligations and conduct standards, including federal fiduciary duties, to “[e]ach person selling, recommending, or providing investment advice to a shareholder or prospective shareholder with regards to shares of the REIT.”⁴ Under NSMIA, states do not have the authority to impose conduct standards on federal covered advisers. We request that NASAA explicitly confirm that it is not seeking to extend conduct standards to federal covered advisers and that federal covered advisers are not “persons” for purposes of the Proposal.

ii. The proposed concentration limit should not apply to purchases resulting from advice provided by federal covered advisers

The Proposal would also apply a concentration limit to persons who purchase shares in a non-traded REIT.⁵ A person’s aggregate investment in the REIT, its affiliates, and other non-traded direct participation programs⁶ would generally not be permitted to exceed 10 percent of the person’s liquid net worth. We do not believe that this concentration limit should apply to purchases that result from investment advice provided to clients by federal covered advisers because that would constitute an attempt to impose substantive regulation on federal covered advisers, contrary to NSMIA’s division of authority between the SEC and the states. NASAA should thus clarify that the proposed concentration limit will not apply to purchases resulting from advice provided by federal covered advisers.

iii. NASAA should exclude federal covered advisers, registered investment companies, and private funds from the definition of “affiliate” for purposes of the proposed concentration limit

As noted above, the proposed concentration limit would extend to affiliates of non-traded REITs. The term “affiliate” is defined so broadly that it could be interpreted to include federal covered advisers and covered securities, such as interests in registered investment companies or

⁴ Section III.C.1. of the Proposal. “Person” is defined to mean any natural persons, partnership, corporation, association, trust, limited liability company or other legal entity. *See* Section I.B.21. of the Proposal.

⁵ *See* Section III.D.3. of the Proposal (proposed concentration limit).

⁶ We note that non-traded direct participation programs are not defined in the Proposal, creating uncertainty as to what types of products would be covered.

private funds.⁷ Limiting investments in these entities because an investor is a shareholder in a non-traded REIT is also counter to NSMIA. Consistent with NSMIA, NASAA should make clear that the term “affiliate” excludes federal covered advisers and all covered securities.

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We appreciate your consideration of the IAA’s comments and would be happy to provide any additional information that may be helpful. Please contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

/s/ Monique Botkin

Monique Botkin
Associate General Counsel

cc: The Honorable Gary Gensler, Chair, Securities and Exchange Commission
The Honorable Hester M. Peirce, Commissioner, Securities and Exchange Commission
The Honorable Caroline A. Crenshaw, Commissioner, Securities and Exchange Commission
The Honorable Mark T. Uyeda, Commissioner, Securities and Exchange Commission
The Honorable Jaime Lizárraga, Commissioner, Securities and Exchange Commission
William A. Birdthistle, Director, Division of Investment Management, Securities and Exchange Commission

⁷ An affiliate of another person includes any of the following: (i) any person directly or indirectly owning, controlling, or holding, with power to vote 10 percent or more of the outstanding voting securities of such other person; (ii) any person 10 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held, with power to vote, by such other person; (iii) any person directly or indirectly controlling, controlled by, or under common control with such other person; (iv) any executive officer, director, trustee or general partner of such other person; or (v) any legal entity for which such person acts as an executive officer, director, trustee or general partner. Section I.B.5. of the Proposal.