Invesco

VIA ELECTRONIC SUBMISSION

September 12, 2022

Andrea Seidt, Section Chair
Mark Heuerman, Project Group Chair
NASAA Corporation Finance Section
North American Securities Administrators Association, Inc.
750 First Street, N.E., Suite 1140
Washington, DC 20002

Re: Request for Public Comment on Proposed Revisions to the Statement of Policy Regarding Real Estate Investment Trusts

Dear Section Members, Commissioner Seidt and Mr. Heuerman:

Invesco Ltd. ("**Invesco**" or "**we**") appreciates the opportunity to provide comments to the North American Securities Administrators Association, Inc. ("**NASAA**") on the request for public comment ("**Request for Comment**") on the Proposed Revisions to the Statement of Policy Regarding Real Estate Investments Trusts (the "**Proposal**").

Invesco is a leading independent global investment manager with approximately $1.4 trillion in assets under management as of July 31, 2022. Invesco is focused on providing investment solutions through a wide range of strategies and vehicles, including open-end mutual funds, closed-end funds, exchange-traded funds (ETFs), collective trust funds, separately managed accounts, real estate investment trusts, unit investment trusts and other pooled vehicles.

Invesco sponsors a non-traded REIT that registers continuous offerings with the Securities and Exchange Commission (the "**SEC**") and in each state, making it subject to the NASAA REIT Guidelines to the extent adopted by the states.

Invesco opposes the Proposal in general and especially the proposed concentration limit and prohibition against using gross offerings proceeds as an investment objective or strategy to make distributions. We appreciate the opportunity to outline our views below.

- *The Proposal, and especially the proposed concentration limits, would arbitrarily limit investor choice.*
    - The proposed concentration limits restrict investor choice without justification or economic analysis and does not explain why the standard should be liquid net worth rather than the size of the investor's investment portfolio.
    - The concentration limits would include affiliates of the non-traded REIT. For Invesco and similar institutional investment managers, "affiliates" include listed REITs and registered investment companies, such as index funds and exchange traded-funds, none of which implicate the liquidity or other concerns identified in the Request for Comment and Proposal. An investor's choice between non-listed REITs could be dictated by what listed products and registered investment companies are in her

retirement account or stock portfolio, which cannot be NASAA's intent in imposing a concentration limit.

- *The Proposal would introduce ambiguity by imposing an unwarranted restriction on the use of proceeds.* The Proposal prohibits distributions from gross offering proceeds, without defining such terms or providing guidance regarding compliance with the restriction.
- *The Proposal would cause confusion in compliance programs and create operational difficulties.* The Proposal would attempt to impose a myriad of conduct standards on federally regulated investment advisers and broker-dealers and would do so indirectly through the registration of REIT securities. It would confuse the compliance programs of investment advisers and broker-dealers and could impose unworkable expectations on sponsors. It also would introduce a host of interpretive questions that will complicate compliance and present operational difficulties.
- *The Proposal attempts to address concerns the market has already solved.*
    - The Proposal confuses legacy lifecycle REITs with REITs like Invesco's that continuously offer and regularly redeem at net asset value ("**NAV REITs**") -- virtually the only non-listed REITs offered today.[1]
    - NAV REITs differ from legacy lifecycle REITs that are the focus of the Proposal. NAV REITs offer better liquidity through repurchase programs and pay lower fees to sponsors and broker-dealers. They are heavily regulated by the SEC and the Financial Industry Regulatory Authority, as are the broker-dealers and investment advisers that recommend them.

I. Regulations should not dictate or arbitrarily limit investor choice

The concentration limits and increase in the income and net worth requirements would restrict investment choice and discourage investment in a diversifying asset.

The Proposal would disadvantage retail investors

The Proposal would prevent investors from obtaining the portfolio diversification and other benefits from investing in publicly-offered, federally-registered NAV REITs. NAV REITs are distributed through registered broker-dealers and investment advisers who must comply with Regulation Best Interest ("**Reg BI**") promulgated under the Securities Exchange Act of 1934, as

[1] In 2020, a total of approximately $10.9 billion was raised for non-traded REITs, about 98.9% of which was raised for NAV REITs. In 2021, capital raising for non-traded REITs increased to approximately $36.5 billion, about 99.97% of which was raised for NAV REITs. In 2022 through June, capital raising for non-traded REITs has been approximately $21.3 billion, about 99.93% of which was raised for NAV REITs. *See* The Stanger Market Pulse, December 2021 and June 2022.

amended (the "**Exchange Act**") or the investment adviser fiduciary duty and in doing so, must consider the income and net worth of the retail investor.

The gross income and net worth limits are therefore unnecessary constraints upon investor choice. It would exclude investors who do not have access to the private markets from accessing well-regulated, public NAV REITs and diversifying their portfolios.

Many institutional investors allocate part of their investment portfolio to real estate to achieve diversification, reduce portfolio risk, and obtain inflation protection and a source of income. The Proposal includes a concentration limit prohibiting an aggregate investment in the issuer, its affiliates, and other non-traded direct participation programs that exceeds 10% of the investor's liquid net worth, which would deprive retail investors of similar investment opportunities. The Proposal provides no carve-out for accredited investors and therefore would limit the ability of even sophisticated or wealthy investors, advised by their federally regulated broker or investment adviser, from following portfolio diversification strategies like those employed by large institutions. For example, an investment adviser might recommend that a client with enough cash to meet reasonably foreseeable needs, diversify her portfolio by investing more than 10% of her liquid net worth in a NAV REIT. The REIT might be one in which she has a long history of successful investing. The Proposal would preclude the fiduciary's recommendation.

The barrier to a well-regulated investment might divert investors toward the less regulated private securities market that operates outside the oversight of state regulators.

Investors and their financial advisors are in the best position to evaluate what is best for investors. Regulators should not interfere with these decisions, especially with respect to wealthier or sophisticated investors.

<u>The concentration limits would inappropriately apply to other securities and disadvantage institutional sponsors</u>

The proposed concentration limits would apply not only to retail investment in non-traded REITs, but also to securities of an "affiliate."

The Proposal would define "affiliate" to include "any person directly or indirectly controlling, controlled by, or under common control with such other person." The concentration limits would thus apply to securities issued or managed by an affiliate of the NAV REIT sponsor. For large institutional sponsors like Invesco, the definition of affiliate encompasses highly liquid exchange-traded funds, listed REITs, and mutual funds. These products do not implicate the liquidity or other concerns identified in the proposal, and imposing the concentration limits on these funds would be unnecessary and counterproductive.

Registered investment companies are regulated under the Investment Company Act of 1940. They typically have separate boards of directors charged with overseeing conflicts and daily liquidity, among other issues. Exchange-listed companies are regulated by the SEC under the Exchange Act and the listing standards of the exchange, which include corporate governance and liquidity and financial requirements. The proposed concentration limits could force investors to choose whether to limit their investment in the NAV REIT (limiting their diversification opportunities) or in these types of affiliated financial products (limiting their investment choice).

A concentration limit that restricts investment in a particular non-traded REIT based on the index funds held in an investor's retirement account does not protect investors. Instead, including affiliates in the concentration limit may encourage investors to direct capital to non-traded REITs sponsored by smaller and less sophisticated advisors based on the sponsor's limited product suite rather than the quality or performance of that sponsor's REIT. In addition to limiting investor choice, the inclusion of affiliates in the concentration limit privileges smaller sponsors and discourages institutional-quality sponsors from entering the space.

II. Regulations should not introduce ambiguity or create confusion and inconsistency

The Proposal is ambiguous in many respects. It would present a myriad of interpretive questions for sponsors, broker-dealers and investment advisers.

The Proposal would impose an unwarranted prohibition on the use of proceeds that would conflict with federal tax regulations and state corporate law and be difficult to implement due to its ambiguity

The Proposal would provide that "the REIT may not reserve the right that gross offering proceeds from the sale of shares will be reserved or used to source regular or declared distributions."

It is unclear how sponsors are expected to implement this prohibition and comply with the regulation. The proposed language does not clarify what metric should be used to determine whether distributions are paid from gross offering proceeds or over what period. For example, the Proposal does not provide guidance with respect to whether the sponsor should use line items from the REIT's statements of cash flows or use a non-GAAP measure such as funds from operations, adjusted funds from operations or funds available for distribution, which non-GAAP measures are calculated differently by different sponsors. If a sponsor can settle on a calculation methodology, it is not clear over what period the calculation should be done (the prior quarter, the prior four quarters, etc.).

There are also questions around how this prohibition would interact with the tax treatment of distributions. For example, would distributions deemed "return of capital" (a tax benefit to stockholders representing the depreciation expense the REIT has deducted from gross income for U.S. income tax purposes) be prohibited by this regulation?

The ambiguity introduced by this provision would create uncertainty and operational complexity, as well as opportunities for sponsors to manipulate the calculation, thereby undermining the Proposal's misguided attempt at investor protection.

Additional investor protections regarding the source of distributions are unnecessary. The SEC has explicitly addressed this question, and does not prohibit the payment of distributions from offering proceeds, provided that the REITs include appropriate disclosure in the prospectus.[2] Moreover, the SEC has published disclosure guidance that requires non-listed REITs to present, on a quarterly basis, the sources of distributions.[3] Because this disclosure is available each quarter, investors have adequate historical information regarding the sources used to fund distributions prior to making an investment decision, and after investing they can redeem their shares if they object to the manner in which fund distributions are paid. Broker-dealers and due diligence firms generally review the historical distribution coverage to determine if they should make an investment in the REIT available to their clients. A REIT's failure to demonstrate full coverage or positive trends toward full future coverage could result in firms suspending or terminating selling agreements.

Moreover, most NAV REITs (including Invesco's) are Maryland corporations. Maryland law has solvency tests that address concerns about the overpayment of distributions; the REIT's board must determine that the REIT will be able to pay its debts as they become due and that after any distribution the REIT's assets will exceed its liabilities. Maryland law permits the use of proceeds for distribution if it is approved by the board of directors, which has a fiduciary obligation to both the REIT and its stockholders. The Proposal would prohibit a practice that other state laws permit and that is an essential determination of a REIT's board of directors.

Under federally imposed REIT requirements, a REIT must make distributions to stockholders equal to at least 90% of its net taxable income each year (determined without regard to the dividends-paid deduction and excluding net capital gain). If a REIT is unable to make distribute at least 90% of its net taxable income due to restrictions imposed by the Proposal, compliance with the Proposal could jeopardize a REIT's federal tax status and harm REIT stockholders.

<u>The Proposal would create a panoply of state conduct standards that would interfere with broker-dealer compliance and undermine investor protection.</u>

NAV REITs such as Invesco's are investments offered in over 50 U.S. jurisdictions distributed through nationally situated wire houses, independent broker-dealers, and registered investment advisers.

The Proposal would subject this national product to a panoply of state conduct standards. Under the Proposal each person selling, recommending or providing investment advice with regard to a REIT would have to "make every reasonable effort to determine that such sale, recommendation or investment advice is in compliance with applicable conduct standards and is a suitable and appropriate investment for each shareholder."

---

[2] SEC Division of Corporation Finance, CF Disclosure Guidance: Topic No. 6, Staff Observations Regarding Disclosures of Non-Traded Real Estate Investment Trusts, July 16, 2013, *available at* https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic6.htm ("SEC Disclosure Guidance: Topic No. 6").

[3] SEC Disclosure Guidance: Topic No. 6.

The Proposal would define "conduct standards" to include Reg BI, ERISA, and applicable fiduciary duties and anticipated state standards not yet enacted. Moreover, under the Proposal broker-dealers and their associated persons would have to "act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer or associated person making the recommendation ahead of the interest of the retail customer."

The Proposal thus would impose four categories of conduct standard:

- conduct standards that federal or state law imposes on the person selling, recommending, or providing investment advice (Reg BI, ERISA, fiduciary duty);
- a state law requirement that the investment be "suitable;"
- a state law requirement that the investment be "appropriate;" and
- a state law requirement that the investment be in the retail investor's "best interest."[4]

NASAA does not explain how these conduct standards would interact with one another. The Proposal would offer state administrators the ability to impose the conduct standards however the administrators please, under whatever facts the administrator chooses, without any expectation of consistency with the SEC, FINRA, or other state administrators. The determination of any state administrator would be subject to state judicial review as well.

This myriad of requirements for the same conduct would create significant confusion and operational complications in the compliance departments of regulated firms. They would undermine, not advance investor protection.

The Proposal would require sponsors or each person "selling shares on behalf of the sponsor or REIT" to maintain records of the information used to determine that an investment is suitable and appropriate.

These provisions are ambiguous, and perhaps NASAA did not intend that issuers police the conduct of financial intermediaries over whom they lack supervisory authority. If that is the intention, however, then the Proposal will be unsuccessful. As a practical matter no sponsor can determine whether a purchase complied with the conduct standards of a broker-dealer, investment adviser or its representatives.

The Proposal could foster multiple overlapping supervisory systems, some imposed by the sponsor and some by the financial intermediary. These systems might be regulated by the SEC, FINRA, and the states. Such an approach would generate confusion and costly compliance that does not serve investors and, indeed, would harm them.

[4] The Proposal also would impose "suitability" and "appropriateness" standards on broker-dealers who recommend non-listed REITs to non-retail customers. Proposal, III.C.1.

Securities regulators should not use disclosure or charter provisions to apply conduct standards to distributors or advisers subject to fiduciary standards. Any conduct standard should be framed according to the practices of those to whom it will apply and developed through public rulemaking by the agencies regulating those parties, including those subject to federal regulation only (SEC-registered investment advisers). A prospectus, an issuer disclosure document, does not bind a broker-dealer or a registered investment adviser. Similarly, a corporate charter is a contract between the issuer, the stockholders and the state. Broker-dealers and registered investment advisers are not party to that contract nor subject to the relevant law governing the issuer's corporate activities. Neither the prospectus nor the charter is the correct medium for imposition of conduct standards which have continued to remain a focus of the SEC, Department of Labor and Congress, among other federal lawmakers and rule makers.

III. The Proposal does not reflect investor-friendly developments in the non-traded REIT market

Lifecycle REITs are no longer the predominant form of non-traded REIT distributed today. In fact, NAV REITs, not lifecycle REITs, are virtually the only type of REIT currently in distribution.

Lifecycle REITs and NAV REITs operate differently. NAV REITs continuously offer their shares through registered offerings at net asset value over an indeterminate life and generally do not seek a liquidity event. By contrast, lifecycle REITs have a "lifecycle" that is intended to terminate with a liquidity event such as a share listing or an acquisition or liquidation, which exit is subject to a variety of conditions that have traditionally impacted exit value.

NAV REIT fees are lower than those of the lifecycle REITs. It was not uncommon for legacy lifecycle REITs to include acquisition fees, financing fees, and development and disposition fees as part of their fee structure. NAV REITs have eliminated these fees.

NAV REITs also provide better liquidity for investors. They typically offer redemptions up to 2% of NAV per month and 5% of NAV per quarter – a *four-fold* increase from the amount of liquidity offered by lifecycle REITs. Unlike earlier lifecycle REITs, most NAV REITs allow shareholders to redeem at NAV after the first year.

Perhaps for these reasons, NAV REITs are distributed primarily by wire houses and other "well-established financial institutions" that, in the words of the NASAA President, do not "generally permit" a "wider array of products" that could present investor protection concerns.[5] These product improvements gained over years of evaluating investor sensitivities, appeal and considerations of the risk appetite of selling partners noted herein subject to relevant conduct and/or fiduciary standards further justify why the Proposal is not appropriately tailored to the risks posed by NAV REITs sold by those same sophisticated and regulated distribution partners.

[5] Testimony of Melanie Senter Lubin before the United States Senate Committee on Banking, Housing and Urban Affairs 7 (July 28, 2020) ("Lubin Testimony").

Invesco

*   *   *

Invesco has discussed the Proposal with peers through various industry groups and agrees with the concerns expressed in the comment letters submitted by the Asset Management Group of the Securities Industry and Financial Markets Association, by the Institute for Portfolio Alternatives and by the Investment Adviser Association.

We appreciate the opportunity to comment on this important Request for Comment, as well as consideration of our comments by NASAA and each section member. We are available to discuss our comments or provide any additional information or assistance that NASAA or any section member might find useful.

Sincerely,

Invesco Ltd.

Chris Fischer

Christopher B. Fischer
Assistant General Counsel