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September 12, 2022

NASAA Corporation Finance Section
Andrea Seidt, Section Chair
Mark Heuerman, Project Group Chair

c/o North American Securities Administrators Association, Inc.
750 First Street, N.E., Suite 1140
Washington, D.C. 20002

Office of the Illinois Secretary of State
69 West Washington Street, Suite 1220
Chicago, IL 60602

Re: Proposed Revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "Proposal")

Dear Section Members, Commissioner Seidt, Mr. Heuerman and Mr. Nix:

LaSalle Investment Management, Inc.("LaSalle") is a wholly owned, operationally independent subsidiary of Jones Lang LaSalle ("JLL"), a publicly-traded corporation listed on the New York Stock Exchange (NYSE: JLL), one of Ethisphere's World Most Ethical Companies for 15 years straight and one of Fortune's World's Most Admired Companies for five years straight.

For over 40 years, we have invested solely in one asset class; Real Estate. We invest on behalf of individuals and institutions globally. Our institutional clients manage assets for millions of workers and pensioners; from teachers to firefighters to healthcare workers, creating a better future for people around the world.

JLL is the sponsor of Jones Lang LaSalle Income Property Trust, Inc. ("IPT") and LaSalle is its advisor. IPT was the first NAV REIT and has been in existence since 2012, meeting the financial and diversification needs of tens of thousands of investors and their financial advisors.

LaSalle appreciates the opportunity to comment on the Proposal which, if adopted by the states, would dramatically expand state regulation of non-listed REITs, among other investments, and will serve as a template for guidance about other products.

Summary of LaSalle's Comments

LaSalle strongly opposes the Proposal for many reasons:

- *The Proposal Evidences an Unfamiliarity with the Product*. The Proposal confuses legacy lifecycle REITs with REITs that continuously offer and regularly redeem at net asset value ("NAV REITs") -- virtually the only non-listed REITs offered today and fails to recognize the level of sponsorship of these products by some of the best known and most trusted financial services firms in the country. The Proposal would amend the existing NASAA Statement of Policy regarding Real Estate Investment Trusts ("Guidelines"), but the Guidelines -- adopted over 25 years ago and never significantly updated – are already out of alignment with the structure and operation of non-listed REITs. 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 United States Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"), as are the investment advisers that recommend these products and broker-dealers that distribute them. NASAA does not acknowledge any of the differences between the two products or their newer sponsors.

- *The Proposal – Particularly the Concentration Limits -- Would Limit Investor Choice*. Many institutional investors allocate part of their investment portfolio to real estate in order to achieve diversification, lower portfolio risk, and obtain inflation protection and a source of income. Yet NASAA would limit the ability of even sophisticated, wealthy investors to follow similar investment strategies. LaSalle supports the ability of retail investors to obtain the same opportunities for portfolio diversification, inflation protection, and income as institutional management companies.

- *The Proposal Would Inhibit Capital Formation*. Capital from the NAV REIT industry has been a significant source of economic activity and employment, supporting thousands of jobs in health care facilities, apartment buildings, shopping centers, office buildings and industrial warehouses. The Proposal would inhibit the flow of capital to these properties.

- *The Proposal Would Regulate Investment Advisers and Broker-Dealers Through Issuer Disclosure*. The Proposal would impose a myriad of conduct standards on federally-regulated investment advisers and broker-dealers and would do so through issuer disclosure. It would confuse the compliance programs of investment advisers and broker-dealers and could impose unworkable expectations on sponsors.

- *The Proposal Would Introduce an Unwarranted Prohibition on the Use of Proceeds*. In a single sentence the Proposal prohibits distributions from gross offering proceeds. This provision would conflict with federal regulation and state corporate law with little justification.

- *State Adoption of the Proposal May be Subject to Legal Challenge*. States would be expressly preempted from adopting the Proposal by ERISA, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. Moreover, routine incorporation of the Proposal into state rules would violate the laws of many jurisdictions that require state regulators to follow administrative rulemaking procedures.

1. Regulation Should Fit the Product.

The Proposal evidences a misimpression about the type of non-listed REIT sold today and the caliber of their sponsors. The Proposal would only apply to REITs in distribution, and the Proposal appears to assume that lifecycle REITs are sold today. In fact, NAV REITs, not lifecycle REITs, are virtually the only type of REIT currently in distribution.

A. NAV REITs are not Lifecycle REITs.

As their name implies, lifecycle REITs have a "lifecycle" that is intended to terminate with a liquidity event such as a share listing or an acquisition or liquidation. In the structure of that product, investors paid up front up to 10% of their investment as underwriting compensation and bore the REIT's other "offering and organization expenses" of up to 5%. Legacy lifecycle REITs typically limited their repurchase programs to 5% of shares outstanding in any year. Sometimes they impose other restrictions, such as not allowing repurchases to exceed distribution reinvestments.

In contrast, NAV REITs continuously offer their shares at net asset value (NAV) over an indeterminate life and generally do not seek a liquidity event. NAV REIT fees are lower than those of the lifecycle REITs. Due to a shift to multiple share class options for an investor, the majority of NAV REIT shares are sold without any commission on a fee-based platform, presumably through fiduciary investment advisory accounts rather than commission brokerage accounts. 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.

Contrary to NASAA's assertions, these redemption programs proved reliable during the pandemic. According to NASAA, the stockholders of only four NAV REITs – *constituting less than 3% of all capital raised by the NAV REIT industry since January 1, 2017* – experienced any impediment to full redemption of their shares during the pandemic. Put differently, during one of the most turbulent times in the history of modern financial markets, NAV REITs representing over 97% of all raised funds satisfied all of their stockholders' redemption requests – no pro rata redemption, no suspension. By any objective measurement, the NAV REIT redemption programs proved trustworthy during one of the most trying periods in modern finance. NASAA's characterization of this history is simply misinformed.

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.

B. NAV REITs are Not Publicly-Traded REITs.

The Proposal demonstrates an unjustified bias towards publicly-listed REITs. NAV REITs are intentionally not listed on a stock exchange. Instead, they provide liquidity through a regular redemption program. Publicly-traded REITs are listed on an exchange, like other stocks. Of course, this listing does facilitate a stockholder's ability to sell her shares on a moment's notice (assuming that the volume of the REIT's exchange trading is sufficient to accommodate her trade). This liquidity comes at a price, however. Real estate represents a long-term investment; an investor who trades the shares of a publicly-listed REIT can forfeit some of the benefits of investing in real estate for the long term.

The difference between the price and value of REIT interests is crucial to an understanding of the differences between NAV REITs and publicly-traded REITs. While the value of the real estate assets underlying a publicly-traded REIT may not have changed dramatically, the price of its shares can fluctuate significantly with the volatility of the stock market. Indeed, an investment in publicly-traded REITs can be even more volatile than an investment in the stock market. These fluctuations in share price tempt retail investors to sell in declining markets and purchase in rising ones.

By contrast, NAV REITs are generally positioned as longer-term investments yet provide liquidity through their robust redemption programs. Stockholders have greater assurance that the price that they pay or receive for their stock represents the net asset value of the underlying portfolio. NAV REITs present less "timing risk" to investors.

NAV REITs also provide another advantage – greater portfolio diversification. The correlation between publicly-traded REIT shares price and the broader stock market means that investors who allocate from the broader stock market to publicly-listed REITs may not have sufficiently increased their diversification or reduced their portfolio risk. Moreover, many NAV REITs are authorized to engage in tactical investment strategies, allocating assets to segments of the real estate sector that may provide the opportunity for more growth. Publicly-listed REITs tend to be more statically focused on particular real estate sectors, thus increasing concentration in those sectors. NAV REITs performed much better during the pandemic than publicly listed REITs.

2. Regulation Should Not Suffocate Local Business.

Capital formation in the NAV REIT sector has been a significant source of economic activity and employment, supporting thousands of jobs in health care facilities, apartment buildings, shopping centers, office buildings and industrial warehouses. Real estate development is fundamental to economic growth and employment. The Proposal would constrain growth in the real estate sector at an unpropitious time of high inflation and possible recession.

More, not less, capital is necessary to make housing affordable to middle income families. According to a 2020 Institute for Portfolio Alternatives ("IPA") survey of its members, approximately 63% of non-listed REIT investment in multifamily housing supports workforce housing, defined as multifamily housing with rent less than 25% of mean family income in the surrounding area. Multifamily housing made up 17.3% of non-listed REIT holdings as of June 30, 2020.

The Proposal also would limit investment in business development companies that help capitalize small business. NASAA would stifle access to capital by small and mid-sized U.S. companies, including minority-owned, women-owned and veteran-owned businesses that may not have access to traditional sources of capital. Alternative investment strategies allow these businesses to grow with terms more flexible than those offered by bank loans.

In short, by arbitrarily limiting investment in NAV REITs, any state that adopts the Proposal will impede the flow of capital to local business.

3. Regulation Should Preserve Investor Choice.

The concentration limits and the increase in the income and net worth requirements would restrict investment choice. As the world emerges from the worst of the pandemic, gas prices have been at their all-time high and food prices rose the fastest in 42 years. Inflation and interest rates are on everyone's mind. Economists predict stagflation and recession. With these critical economic headwinds along with recent geopolitical events from lockdowns in China and Russia's invasion of Ukraine many investors need portfolio diversification, protection from inflation, and a source of income. Investors have found that NAV REITs are part of the solution. Yet the Proposal would discourage investment in a diversifying asset when macroeconomic events make diversification, consistent with the basic tenets of modern portfolio theory, so important.

A. The Proposal Would Disadvantage Retail Investors.

State public employee pension plans and other institutions invest in real estate to achieve diversification and reduce their portfolio risk. The Ohio Public Employees Retirement System Defined Benefit Plan, for example, targets over 23% of its assets to alternative investments, with 10% to real estate. The nation's largest pension fund, the California Public Employees' Retirement System, reportedly experienced a 24.1% return on real estate for the 12 months ending March 31, 2022. In contrast, other smaller pension plans that were concentrated in the stock and bond market suffered their worst year since 2009.

The concentration limits would provide no carve-out for accredited investors. It would impede even wealthy investors, advised by their federally-regulated broker or investment adviser, from following portfolio diversification strategies like those employed by big 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 net worth in an NAV REIT. The REIT might be one in which she has a long history of successful investing. The Proposal would nullify the fiduciary's recommendation. On what basis should a state regulator override a recommendation that is in the investor's best interest?

This barrier to a well-regulated investment might divert investors toward other, less regulated ones. These would include securities for which (in the words of NASAA's President) "state securities regulators dedicate significant resources to respond to fraud and other violations." The Proposal would not advance investor protection. It would undermine it.

B. The Proposal Would Perpetuate a Multitude of Standards.

The Proposal says,

> In light of . . . a proliferation of non-uniform concentration limit standards within the membership, NASAA is renewing advancement of a uniform concentration limit to the NASAA REIT Guidelines.

The Proposal would not, however, establish a uniform concentration limit. It would require the sponsor to propose a concentration limit *particular to its own REIT*, and each state administrator could accept or adjust the limit based upon a list of 14 wide-ranging factors. These factors would include "the REIT's use of leverage," "balloon payment financing," "potential variances in cash distributions," "prior performance," and "any other relevant factors."

The state administrator could adopt the sponsor's proposed limit or demand that the sponsor accept a higher or lower limit. The sponsor might not be afforded notice of the factors considered or the process followed in reaching a determination. The state administrator also could establish a limit that applies to all NAV REITs that apply for registration in the state. The 10% concentration limit would apply only if the state does not establish its own concentration limit.

Any state would be free to choose a different concentration limit. Any limit, whether 10% or another, would be a subjective condition that fails to consider the needs of an individual investor, and would interfere with the judgment of their financial professional on factors including age, risk tolerance, financial objectives and other life circumstances. As a practical matter, sponsors would comply with the most restrictive standard, rather than trying to conform with a multitude of state requirements. Any state that does not adopt the strictest standard would find its own limits to be ignored.

Experience demonstrates that uniformity is impossible. Even today, up to 20 states have imposed concentration limits, including such variations as 10% of liquid net worth in a REIT and its affiliates, liquid net worth of $300,000, liquid net worth of $350,000, and total non-listed REIT investment of 10% of total net worth. Some states provide an exception for accredited investors, while others do not. NASAA cannot force these states to adopt a single percentage and the Proposal does not even attempt to do this. There is no reason to presume that those states would dramatically change their standards to 10% of liquidity or that they would apply precisely to those securities covered by the Proposal.

C. The Concentration Limits Are Unjustified.

NASAA provided no justification or economic analysis for a 10% limit and does not explain why the standard should be liquid net worth rather than the size of the investment portfolio. NASAA has not demonstrated that NAV REIT investment concentration has presented any liquidity problems for investors.

NASAA would impose the concentration limits through the offering registration, but they would be applied not by the REIT or its sponsor, but by the broker-dealers and investment advisers who are acting in their customers' best interest. NASAA thus would substitute its judgment for the best interests of each investor and his financial professional.

In doing so, the Proposal would rely on the concept of liquid net worth rather than total investment portfolio overall wealth. An investor might have a $500 million business or inherited real estate portfolio, but not $1 of that business or portfolio could be considered for purposes of the concentration limits. NASAA would impose its judgment about what is in the best interest of this investor and all other investors, without any basis for doing so.

NASAA asserts that the concentration provision will "limit investor risk." According to NASAA's most recent statistics, non-listed REITs are not a significant source of complaints related to senior investor fraud. According to NASAA's 2021 Enforcement Report, the "Top Investment Products/Sales Tactics in Senior-Related Enforcement Actions" are unregistered securities, traditional securities, commodities/precious metals, variable annuities and equity indexed annuities.

Moreover, SEC and FINRA rules already require that broker-dealers and investment advisers consider the portfolio concentration and liquidity needs of each investor, and the SEC and FINRA have emphasized the responsibilities of their regulated firms to supervise recommendations to senior investors. As NASAA itself notes, FINRA recently barred a registered representative for making unsuitable recommendations to senior customers concerning non-listed REITs. This case and the other seven listed in footnote 11 of the Proposal all concerned sales practice violations related to the distribution of lifecycle REITs. Moreover, none of them alleged any violation by a lifecycle or NAV REIT. The very existence of these cases demonstrates that the Proposal is unnecessary; securities regulators can address any sale practice concern under existing law. Administrators can continue to protect investors by enforcing their state laws governing financial professionals.

D. The Concentration Limits Would Inappropriately Apply to Other Securities.

The new concentration limits would apply not only to retail investment in non-listed REITs but to securities of an "affiliate" and "other non-traded direct participation programs," the latter term undefined by the Proposal. (NASAA does not define "direct participation program" and FINRA's definition excludes REITs.)

The Proposal would define "affiliate" to include "any person directly or indirectly controlling, controlled by, of [sic] under common control with such other person." The concentration limits would apply to securities issued or managed by an affiliate of the NAV REIT sponsor. If an investor held one share of a non-listed REIT, she would be unable to purchase any security issued or managed by an affiliate of the REIT in excess of 10% of her liquid net worth.

NASAA has not explained why the mere fact that securities are issued or managed by an affiliate warrants their subjugation to the concentration limits. By limiting the securities of affiliates, NASAA would discourage the continued entry of the types of sponsors who provide high-quality, transparent investments: large asset management companies with an established record and a platform of wide investment choices.

E. Application of the Concentration Limits is Incongruous.

The Proposal would provide no specificity in time for evaluating the concentration limits, for example, "at the time of recommendation" or "at the time of the transaction." Perhaps NASAA does not expect investment advisers and broker-dealers to monitor continued compliance with the concentration limits, but if it does, this feature would be unworkable.

For example, an investor might not exceed the concentration limit at the time of the initial subscription for primary shares, but over time, due to the investor's participation in the REIT's distribution reinvestment program, the investor could trip the concentration limit. Another investor might find that the listed stocks in her portfolio declined in value and she has exceeded the concentration limits without having purchased another REIT share.

The Proposal has no grandfather provision. An investor who owns shares at the time that his state adopts a concentration limit might inadvertently violate them.

What would NASAA require in all of these cases? Neither the REIT sponsor nor an investor's financial professional can force the investor to sell his shares.

F. The Concentration Limits Would Interfere With Corporate Governance.

The concentration limits would impose an impractical requirement on the corporate governance of NAV REITs. In particular, the Proposal would require that the concentration limits be added to the charter of an NAV REIT. Without a grandfathering provision, a NAV REIT would be forced to conduct a proxy solicitation for this change to its charter. This process would be costly and time consuming, and the costs would be passed along to the stockholders. Yet the process itself would serve little purpose.

G. The Gross Income/Net Worth Limits Would Unnecessarily Constrain Investor Choice.

The Proposal would index existing gross income and net worth limits to inflation, backwards to 2007. The existing gross income limits themselves are incompatible with the federal scheme of securities regulation. Publicly-offered securities registered under the Securities Act of 1933 must provide full disclosure to investors and issuers take strict liability under Section 11 of the Act. Because of this disclosure regime, retail investors may invest in these securities regardless of their income or net worth. Issuers of privately placed securities need not provide similar disclosure and for that reason the ability of investors to purchase these securities is limited. For example, the SEC's accredited investor standard applies only to some private placements under Regulation D.

Against this federal system of regulation, 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 Reg BI 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 that conflict with the structure and purpose of securities regulation, as well as the SEC's own policy determinations when reviewing individual thresholders under the accredited investor definition.

H. The Limit on Investor Choice Is Not Economically Justified.

The Proposal has not been supported by any economic analysis. NASAA has provided little data other than a few discredited sources.

For example, NASAA cites the work of litigation consultants who "found that [from June 1990 to December 2019] investors in non-traded REITs underperformed investors in traded REITs by approximately $75 billion." The study suffered from at least four fundamental errors. First, it erroneously compared the performance of NAV REITs to a mutual fund that is closed to new investors and tracks an index of publicly-listed REITs. The authors did not even acknowledge the vast differences in the structure and operations of NAV REITs and publicly-listed REITs. Second, it combined data about legacy lifecycle REITs that are rarely offered today and NAV REITs that are virtually the only non-listed REIT offered today. Third, its time period was conveniently fitted to end immediately before the pandemic, when NAV REITs outperformed publicly-listed REITs. Fourth, it arbitrarily, and without any justification, discounted the valuations of NAV REITs in order to make the performance of publicly-listed REITs appear superior.

NASAA also relies on its recent Regulation Best Interest report allegedly indicating that "many broker-dealer firms have not materially changed their policies, procedures, or practices regarding the sale of non-traded REITs or other complex, costly, and risky products to retail investors since the passage of Reg BI. . .." The IPA and 11 other organizations retained Greenwald Research, an independent, established expert in research and survey methodology, to analyze NASAA's report. Greenwald Research found that the report failed to meet eight well-accepted standards and codes of conduct for survey research. These insufficient practices included a focus on certain investment product types that NASAA apparently disfavored and arbitrarily deemed "complex, costly and risky", a failure to obtain accurate measurements of the impact of Reg BI on respondent firms, a failure to accurately measure compliance with Reg BI and asking instead about policies that Reg BI does *not* require, a failure to collect information on key actions that firms have taken pertinent to Reg BI, and mischaracterization of the survey results. Instead, NASAA simply repeats the conclusions in the Proposal.

NASAA also erroneously relies on FINRA arbitration claims. As Greenwald Research pointed out, reliance on this data is misguided because it wrongly assumes that each claim resulted in an award, or that each claim constituted a sales practice violation rather than another type of claim such as one for breach of contract. Multiple products are often the subject of a single claim and typically concern the distribution of a product, not its design or operation. In other words, while an arbitration may involve the registered representative's practices or the firm's supervision, it typically does not impugn the structure or operation of the underlying investment.

Thus, according to FINRA, in 2021 customers asserted breach of contract claims in 1,110 cases, violation of blue sky laws in 355, errors in charges in 127, and execution error in 84. Other allegations might have been made in some cases, but NASAA did not distinguish the claims according to the level of sale practice concern or the product involved.

4. Compliance Departments Needs Clarity, Not Confusion.

The Proposal would create a panoply of state conduct standards that would interfere with broker-dealer compliance and undermine investor protection. NASAA claims that it is merely updating the Guidelines to account for Reg BI. The Proposal *would conflict* with Reg BI.

A. A National Product Deserves a National Standard.

NAV REITs are nationally offered and distributed investments. In 2021, NAV REITs raised over $36 billion and in the first half of 2022 the pace has quickened as NAV REITs raised over $21 billion. NAV REITs are sponsored and managed by some of the largest and most successful asset management companies in the country, and they are 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.

The Proposal would define "conduct standards" to include Reg BI, ERISA, and applicable fiduciary duties and anticipated state standards not even enacted yet. 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.

This best interest standard resembles *only* the Care Obligation under Reg BI, but it is set forth separately in the Proposal.

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."

NASAA provides no explanation about how these various conduct standards would interact with one another or about the contours of the state law requirements. The Proposal would offer state administrators the ability to impose the conduct standards however the administrator pleases, 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 sow chaos in the compliance departments of regulated firms. They would undermine, not advance investor protection.

B. Conduct Standards Should be Product Agnostic.

NASAA would impose conduct standards on a particular product, NAV REITs, but the Reg BI conduct standards are intentionally product agnostic. No provision of Reg BI addresses specific types of securities. The Department of Labor's interpretations of ERISA and the SEC's investment adviser fiduciary duty are also not altered according to the security being recommended. The Proposal would distort these conduct standards by applying them only to NAV REITs at the state level.

Broker-dealers and investment advisers are used to applying these standards in the product-agnostic manner in which they are written. By imposing these broad principles only to NAV REITs and other products, the Proposal would confuse the compliance departments of broker-dealers and investment advisers. They would be uncertain how these various standards would apply differently to NAV REITs from other products. The Proposal would complicate their efforts to ensure that financial professionals engage in proper sales practices.

C. Sponsors Cannot Supervise Independent Financial Intermediaries.

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. The Proposal also would require sponsors to disclose in the final prospectus:

> the responsibility of the sponsor and/or each person selling shares or providing a recommendation on behalf of the sponsor or REIT to make every reasonable effort to determine that the purchase of shares, recommendation or advice is a suitable and appropriate investment for each shareholder and/or/ in compliance with applicable conduct standards, based on information provided by the shareholder regarding the shareholder's financial situation and investment objectives.

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 is able to determine whether a purchase complied with the conduct standards of a broker-dealer, investment adviser or its representatives. The sponsor cannot be presumed to have expertise about Reg BI, ERISA or the investment adviser fiduciary duty.

Broker-dealers and investment advisers would find that their supervision of associated persons has been complicated by the intrusion of this sponsor oversight. 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.

D. Conduct Standards Cannot be Imposed Through Prospectus Disclosure.

Securities regulators should not use disclosure as a means to apply conduct standards to distributors. Any conduct standard should be framed according to the practices of those to whom it will apply and developed through public rulemaking. By indirectly enforcing conduct standards through issuer disclosure, the Proposal would not address the practices of investment advisers and broker-dealers to whom the standards would apply. Nor would a disclosure regime provide any avenue for an investment adviser or broker-dealer to seek a state's interpretation of the conduct standards.

The Proposal would add information that is of little use to investors, since every sponsor would have to give the same disclosure. State administrators complain about the length of NAV REIT prospectuses. The Proposal illustrates why they are so long.

5. Regulation Should Be Consistent.

The Proposal would impose an unwarranted prohibition on the use of proceeds – one that would conflict with federal regulation and state corporate law. The prohibition also could discriminate against new REITs entering the market.

The Proposal confines this sweeping prohibition to one sentence:

> The REIT may not have an investment objective or strategy to source regular distributions with gross offering proceeds from the sale of shares.

Under federal law, 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). The Proposal could jeopardize a REIT's federal tax status.

The Proposal would prohibit a practice that other state laws permit and that is an essential determination of a REIT's board of directors. Most NAV REITs are Maryland corporations and 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 ability to make determinations on how to fund distributions, through offering proceeds or otherwise, is an essential function of the board. 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.

The SEC does not prohibit the payment of distributions from offering proceeds, having explicitly addressed this question, provided that the REITs include appropriate disclosure in the prospectus. Moreover, the SEC has published disclosure guidance that requires non-listed REITs to present, on a quarterly basis, the source or sources used to fund distributions. 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. Broker-dealers and due diligence firms review the historical distribution coverage to determine if they should make an investment in the REIT available to their clients. They pay close attention to distribution coverage, and a failure to demonstrate full coverage or positive trends toward full future coverage could result in firms suspending or terminating selling agreements.

The NAV REITs raising capital today publish their net asset value on a daily or monthly basis. This practice is an improvement for investors, who receive regular disclosure regarding the value of their investment in the REIT and are no longer sent account statements for extended periods that show a "value" equal to the price they paid for the investment. Payment of distributions from offering proceeds reduces NAV (after inclusion of unrealized gains). The effect of this practice is thus apparent to investors and their financial advisors when they look at changes to the NAV.

6. Any State Adopting the Proposal Could Face Legal Challenge.

The Proposal could face legal challenge.

A. State Adoption Would Violate Federal Law.

The federal securities laws and ERISA would preempt the proposal. For example, because the Proposal would apply to federally-registered investment advisers, the Investment Advisers Act of 1940 would preempt it. The Proposal would retain the requirement that 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. This requirement violates the Securities Exchange Act. Moreover, the Proposal would impose a concentration limit not only for investment in non-listed REITs but other securities offered by the sponsor and its affiliates, some of which may be registered investment companies. The Securities Act of 1933 would preempt this provision. ERISA also would preempt the Proposal, since it would apply to investment advisers and broker-dealers who recommend REIT shares to employee benefit plans and would require that the sponsor make every reasonable effort to determine that the purchase complies with ERISA.

B. State Incorporation Would Violate State Law.

Routine incorporation of the Proposal into state rules would violate the statutes of many states that impose administrative rulemaking procedures. Moreover, operation of the Proposal could violate state registration-by-coordination provisions. NAV REITs are registered by coordination in most states. Registration by coordination occurs "at the moment" of SEC registration. The purpose of this procedure is to ensure that state registration is coordinated with the primary regulator of these offerings, the SEC. According to the official commentary to the Uniform Securities Act (1956), registration by coordination "is designed to achieve simultaneous effectiveness at the federal and state levels" and "limits the Administrator to requiring only such information as is filed with the SEC."

The Proposal would require state administrators to apply conditions on any offering that are different from those imposed by the SEC, such as disclosure requirements, concentration limits, and restrictions on the use of gross offering proceeds. It would be impossible for NAV REIT offerings to be registered simultaneous with SEC registration as state registration-by-coordination requires. The Proposal thus would violate state registration-by-coordination provisions.

The Proposal similarly could violate *state notice filing provisions*. It would impose a concentration limit not only for investment in NAV REITs but on other securities offered by the sponsor and its affiliates, including tender-offer and interval funds. The latter securities are covered securities that are exempt from state registration. They are only required to submit notice filing in the states with respect to the offer and sale of the securities in a state. The Proposal effectively would impose a condition on the offering of investment company shares in a state –

that no investor exceed the state's investment company concentration limits – in contravention of the notice filing provisions.

LaSalle appreciates the opportunity to comment on the Proposal. We stand ready to work with NASAA members on ensuring that any guidance that they provide reflects the characteristics of NAV REITs, the needs of investors, and the obligations of financial professionals to act in their best interest. In the meantime, should any member of NASAA or its staff have any questions about our comments, please feel free to contact me at (312) 897-4142.

Sincerely,

Gordon G. Repp
General Counsel