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Via electronic submission:
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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

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

Dear Section Members, Commissioner Seidt and Mr. Heuerman:

Thank you for this opportunity to comment on the Proposal and for the 30-day extension to do so. I am a partner with a global law firm, which has served as securities counsel for many publicly offered non-traded REITs, helping such issuers register over $182 billion of securities since 2008. As I regularly advise clients with respect to compliance with the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "REIT Guidelines"), I would like to share my views on the Proposal. Respectfully, I submit that the Proposal should be revised to address the concerns noted below.

Concentration Standard

The proposed concentration standard in Section III.D appears largely to be motivated by a desire to protect investors who may not be able to hold their investments for a long period of time. Admittedly, there are a number of investors in non-traded REITs over the years who have needed cash and were unable to sell their shares at prices consistent with the fair value of the REITs' underlying real estate. However, the market has already addressed this problem. Virtually all of the shares of non-traded REITs issued today are issued by "NAV REITs," which have robust share redemption programs based on current share net asset values as determined with the assistance of third-party appraisers.[1] Even during the onset of the COVID-19

[1] See data cited in the comment letters on the Proposal from the Institute for Portfolio Alternatives (the "IPA Letter") and Kevin T. Gannon of Robert A. Stanger & Co., Inc. (the "Stanger Letter").

pandemic, the vast majority[2] of NAV REIT investors who wanted to redeem their shares were able to do so, and they did so at prices based on the underlying value of the REIT's real estate rather than at the steep discounts to net asset values experienced by sellers of many traded REIT shares during that time.

The proposed concentration standard may also be in response to other concerns with respect to non-traded REITs (e.g., transparency and fees) that have similarly already been addressed by the evolution of NAV REITs. Whereas account statements for legacy non-traded REITs may have reported the issue price of the shares long after their sale, NAV REITs update share values regularly (usually monthly) based largely on appraisals from third parties. Moreover, NAV REITs pay lower fees than legacy non-traded REITs by (i) eliminating the payment of acquisition fees and disposition fees, (ii) basing asset management fees on net asset values as opposed to cost, (iii) subjecting the annual performance participation to a stockholder return "hurdle," (iv) subjecting the annual performance participation to the REIT Guidelines' limitation on "Total Operating Expenses" and (v) lowering fees to broker-dealers.

Not only is the proposed concentration standard of little benefit in light of the changes already implemented in the market by NAV REITs, it would inadvertently harm investors by limiting their ability to make investments that they and their broker-dealers and financial advisers believe to be in their best interest. NAV REITs have performed very well for investors. The Stanger NAV REIT Total Return Index reports annualized three- and five-year returns of 13.99% and 11.35%, respectively.[3] Any formulaic proscription will be unable to account for an investor's particular circumstances and will inevitably frustrate investors and their broker-dealers and financial advisers, who are in the best position to determine what is in the interest of individual investors.

As proposed, the concentration limit would place severe limitations on how even affluent investors can invest their own money. To set the limit on how much an investor can invest in a product based on a percentage of liquid net worth ignores the fact that wealthier investors can afford to have a greater percentage of their wealth in illiquid investments. For example, imagine an investor with a $5 million portfolio, $3 million of which is in cash and tradeable securities. To put all $5 million in a volatile stock market may seem imprudent to this investor. She may want to invest 20% of her assets in real estate outside of the stock market. The Proposal would limit her to only $300,000 in NAV REITs. An unintended consequence of the Proposal may be to encourage her to invest the remaining $700,000 in private programs, which are far more illiquid and far less transparent than NAV REITs.

Compare the hypothetical investor above with one who had $3.3 million to invest, all of which was in cash, treasuries and the stock market. This investor could also invest up to $300,000 in a non-traded REIT even though this investor had a substantially smaller net worth.

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[2] See data cited in the IPA Letter.

[3] See performance data included in the Stanger Letter.

What if these hypothetical investors had each already invested $300,000 in private real estate programs? The proposed concentration standard includes "other non-traded direct participation programs" in the numerator. Does this mean that they have already used up their 10% allocation of liquid net worth and cannot invest any money at all in an NAV REIT? While the proposed concentration standard does not include direct real estate in the numerator, what is the policy rationale for distinguishing between two illiquid investments (direct real estate and equity interests in private entities that own direct real estate) when trying to decide an appropriate amount of money to invest in an NAV REIT?

Another problem with the numerator in the proposed concentration standard is that it includes "affiliates" of a non-traded REIT. Some sponsors achieve better returns than others. By including "affiliates" in the numerator, the Proposal would prevent investors from concentrating wealth with the best sponsors. Furthermore, some sponsors may be large organizations with a diverse group of affiliated investment products, such as money market funds, ETFs, mutual funds and BDCs. These affiliated products may be extremely liquid, unrelated to real estate and managed by different people than the non-traded REIT. The Proposal would include all such products in the concentration limit calculation if they are "affiliates" of the non-traded REIT, even if they are otherwise dissimilar, and could prevent investors from choosing their preferred sponsors.

A concentration standard is problematic because investors and their advisors are in the best position to know what is best for their portfolios. Nevertheless, if any concentration standard were to be included in the Proposal, the above examples demonstrate why the standard should (i) have a carve out for accredited investors, (ii) use "net worth" as opposed to "liquid net worth" as the denominator and (iii) omit "affiliates" and "direct participation programs" from the numerator.

Conduct Standards

The amendments to Section III.C.1, III.C.2 and III.C.3 impose requirements on "each Person selling, recommending or providing investment advice…." Presumably, this language refers to broker-dealers and financial advisers who actually recommend the shares and does not refer to the issuer or its personnel, who are in no position to assess suitability or an investor's financial situation. Should you decide to move forward with the Proposal, these sections should be revised to confirm this intent. Please consider language such as "each broker-dealer, associated person of a broker-dealer, investment adviser or investment adviser representative selling, recommending or providing investment advice directly to a prospective shareholder in connection with the purchase of securities…."

I also believe that proposed Section III.C.1 should not refer to conduct standards. The REIT Guidelines are not laws or regulations applicable to broker-dealers and financial advisors. Rather, they are guidelines for the evaluation of a proposed offering by securities administrators. If states wish to require certain conduct by broker-dealers and financial advisors, they should do so in an effective and straightforward manner, such as through legislation or licensing of broker-dealers or financial advisors.

Section III.C.5 as proposed to be revised would retain the current language of the REIT Guidelines by referring to the obligations of the "**Sponsor and/or** each person selling shares" (emphasis added). Just as reference to "Sponsor" was deleted in the proposed revisions to Section III.C.1, III.C.2 and III.C.3, reference to the "Sponsor" should be deleted here notwithstanding the "and/or" language on which issuers have taken comfort to date.

The proposed amendment to REIT Guidelines Section II.G.2 would prohibit indemnification to associated persons, investment advisers or investment adviser representatives for violations of federal or state laws or "Conduct Standards" by such persons. From my review of selected broker-dealer agreements, issuers do not indemnify such persons for violations of federal or state laws or conduct standards. If anything, agreements between issuers and these persons provide for the opposite, that is, issuers seek indemnification for violations by such persons. The proposed amendment to Section II.G.2 is unnecessary.

Gross Offering Proceeds Prohibited as a Distribution Source

NAV REITs have also already addressed your concern regarding the use of offering proceeds to pay distributions. NAV REITs update the net asset value of their shares monthly. If an NAV REIT is returning offering proceeds in the form of distributions, these distributions will result in a lower NAV per share. Investors cannot fail to understand a REIT's true performance when net asset values are updated monthly. Therefore, the proposed limitation on the funding of distributions is unnecessary.

I appreciate the opportunity to comment on the Proposal. Should any member of NASAA or its staff have any questions about my comments, please feel free to contact me at (919) 786-2002.

Sincerely,

Robert H. Bergdolt