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Re: Proposed Amendments (the Proposal) to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (REIT Guidelines)

Dear Section Members and Project Group Members:

The undersigned organizations appreciate the opportunity to comment on NASAA's revised proposed amendments to its REIT Guidelines. Our organizations represent a broad cross-section of businesses, investment professionals and investor advocates across the financial services, real estate and retirement sectors.

Our shared priority is to ensure that both retirement savers and other investors receive investment advice and related financial services that serve their best interests and are able to access long-term private market investment opportunities across a diverse range of asset classes—including real estate, U.S. businesses and other sectors. We also value the important role of state securities regulators in protecting investors against fraudulent securities transactions and unlawful conduct and appreciate NASAA's revisions from the July 2022 Proposal, on which our coalition previously commented.[1]

[1] Real estate industry letter; financial services industry letter; retirement industry letter

We remain concerned, however, about several aspects of the current draft, specifically that the Proposal would limit investor choice, impose burdensome compliance obligations upon issuers and financial professionals, and conflict with existing state and federal regulations.[2] These concerns are outlined below.

(1) The Proposed 10% Concentration Limit Would Limit Investor Choice and Present Significant Compliance Challenges for Issuers and Financial Professionals

The Proposal would impose a uniform 10% concentration limit on any investor—regardless of circumstances—seeking to invest in nonlisted[3] SEC-registered products, even when working with a federally registered financial professional.[4] As a practical matter, such a concentration limit cannot be monitored or enforced by an issuer or its sponsor. Compliance would fall to the financial professional—typically a broker-dealer or investment adviser—who already has a duty to act in the customer's best interest. There is no reliable mechanism for tracking liquid[5] net worth, and monitoring concentration limits remains cumbersome and impractical—even today—and creates legal uncertainty for both issuers and financial professionals.

Additionally, the concentration limit is inconsistent with the Securities and Exchange Commission (SEC) and Financial Industry Regulatory Authority standards, which require individualized consideration of each investor's profile and the specific investment—rather than a one-size-fits-all rule. [6] Ultimately, this restriction would limit choices available to investors and their ability to access diversified investments recommended by their financial professionals.

We also note that, while the Proposal includes a carveout for "accredited investors," it does so at the Administrator's discretion. We appreciate that the carveout was included in the revised Proposal, recognizing that accredited investors—by definition—possess a level of financial sophistication that should exempt them from a concentration limit. Making the carveout discretionary, however, creates a subjective, case-by-case system that will likely lead to inconsistent treatment across jurisdictions.

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[2] The proposal also raises significant questions regarding potential preemption under the National Securities Markets Improvement Act of 1996 (NSMIA), which restricts states from imposing requirements—such as additional recordkeeping—on broker-dealers beyond those mandated by federal law.

[3] We refer to the products discussed herein as "nonlisted" rather than "non-traded" because their shares are not listed on a national securities exchange, they are continuously offered, they are registered under the Securities Act with the SEC and they provide liquidity through a regular redemption program. As a result, "nonlisted REIT" and "nonlisted BDC" are more accurate descriptions that are widely adopted by industry participants.

[4] The Proposal applies to nonlisted REITs, business development companies, oil and gas programs, equipment leasing programs, commodity pools, and other programs of a similar nature providing flow through tax benefits regardless of the industry represented or any combination.

[5] While "net worth" is used in several contexts under the federal securities laws, there is no specific concept for "liquid net worth", thus creating confusion and potential compliance and liability risk.

[6] As an example, the proposed numerical concentration limit is incompatible with the principles-based framework of Reg BI, which requires that a recommendation be "in the best interest of a particular retail customer based on that retail customer's investment profile." This standard obligates broker-dealers to consider the individual needs and circumstances of each client, rather than apply a fixed concentration threshold. Additionally, Reg BI is product-agnostic and does not impose limitations based on specific securities or asset types.

For products that are distributed nationally, a **mandatory** accredited investor carveout is essential to ensure consistency and workability.

Finally, the concentration limit appears to extend beyond REITs to include unrelated securities offerings and structures (e.g., nonlisted business development companies (BDC), oil and gas programs, leasing programs, commodity pools), which are not governed by the REIT Guidelines. Applying a uniform limit across such diverse asset classes would unreasonably restrict investor choice and limit access to professionally recommended strategies.

We note that these amorphous regulations at the state level, which differ from federal standards without clear benefit to the investor, is one reason we have seen BDCs (as well as REITs) move to be privately offered as opposed to nonlisted. Regulations should not artificially affect the flow of capital without any clear benefit, and any REIT-focused guidelines should be limited to nonlisted REITs, as there will be unintended and collateral impacts if nonlisted BDCs are forced to comply with a regulatory regime designed for nonlisted REITs.

(2) The Proposed Gross Income and Net Worth Limits are Inconsistent with Existing Regulation, Including the SEC's Regulation Best Interest

The Proposal would also revise existing income and net worth thresholds, indexing them for inflation (back to 2007) and requiring inflation updates every five years.

Publicly offered securities that are registered with the SEC are subject to robust disclosure requirements and strict liability standards under the Securities Act of 1933. Under the federal regime, these products are available to retail investors regardless of income or net worth. Imposing additional financial thresholds at the state level is inconsistent with the existing federal framework and the Regulation Best Interest (Reg BI) standard.

Moreover, indexing these thresholds could create an illogical outcome: investors may qualify under the accredited investor definition for unregistered private placements (with minimal disclosure requirements) but be excluded from investing in fully registered, transparent offerings. That result would be at odds with the goal of investor protection.

(3) The Proposal Inappropriately Places the Burden on Issuers to Enforce Conduct Standards

The Proposal introduces a new, undefined set of "conduct standards" for issuers—referencing Reg BI, ERISA, fiduciary obligations, and even anticipated state laws that have not yet been enacted.

This language is both unclear and misdirected. Issuers are not financial intermediaries and are not in a position to enforce conduct standards such as Reg BI or fiduciary duties—which are legal obligations that apply specifically to regulated broker-dealers and investment advisers, not to product sponsors. Financial professionals are already subject to rigorous regulatory oversight and must comply with well-established conduct standards under federal and state law.

Imposing ambiguous or duplicative conduct requirements on issuers creates legal uncertainty, lacks statutory foundation, and blurs the distinction between the responsibilities of product providers and financial intermediaries. This could lead to inconsistent enforcement and potential conflict with existing regulatory frameworks.

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We thank you for the opportunity to comment and urge NASAA to reconsider these provisions to ensure continued investor access to regulated and transparent investment options. We look forward to continued dialogue and welcome the opportunity to provide further input.

Sincerely,

American Investment Council
American Securities Association
Coalition for Business Development
Defined Contribution Real Estate Council
Financial Services Institute
ICSC
Institute for Portfolio Alternatives
Insured Retirement Institute
Investment Company Institute
Money Management Institute
Nareit
National Association of Insurance and Financial Advisors
SIFMA
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U.S. Chamber of Commerce