

May 28, 2025

Via Electronic Submission ([NASAAComments@nasaa.org](mailto:NASAAComments@nasaa.org), [faith.anderson@dfi.wa.gov](mailto:faith.anderson@dfi.wa.gov),  
[bill.beatty@dfi.wa.gov](mailto:bill.beatty@dfi.wa.gov) and [ehouston@sos.nv.gov](mailto:ehouston@sos.nv.gov))

Faith Anderson, Chair of the Project Group  
William Beatty and Erin Houston, Co-Chairs, Corporation Finance Section  
North American Securities Administrators Association, Inc. (NASAA)  
750 First Street, NE, Suite 990  
Washington, DC 20002

**Re: Proposed Amendments to the NASAA Statement of Policy Regarding Real Estate Investment Trusts**

Dear Ms. Anderson, Mr. Beatty, and Ms. Houston:

The Investment Adviser Association (IAA)<sup>1</sup> appreciates the opportunity to comment on NASAA's proposal to amend its *Statement of Policy Regarding Real Estate Investment Trusts* (**Proposal**).<sup>2</sup> The Proposal seeks to amend NASAA's existing policy (**Current Policy**) regarding the offer and sale of non-traded REITs to retail investors by amending the conduct standards to incorporate Regulation Best Interest (**Reg BI**),<sup>3</sup> adding a new concentration limit to the suitability section in the Current Policy, and adding a new category of investment products that would be subject to the concentration limit. The Proposal is a reproposal of NASAA's 2022

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<sup>1</sup> 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. Our members range from global asset managers to the medium- and small-sized firms that make up the majority of our industry. Together, 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](http://www.investmentadviser.org).

<sup>2</sup> NASAA Request for Public Comment, Proposed Amendments to the NASAA *Statement of Policy Regarding Real Estate Investment Trusts* (Mar. 25, 2025), available at [NASAA Proposal](#). We refer to the proposed Statement of Policy as the **Proposed Policy**.

<sup>3</sup> 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 [Reg BI Final Rule](#).

Proposed Revisions to the Current Policy,<sup>4</sup> which NASAA did not adopt after commenters, including the IAA,<sup>5</sup> raised concerns with the approach.

We appreciate NASAA's proposing to amend certain provisions to reflect the 2022 IAA letter. We recommend that it make further amendments to the Proposed Policy that we believe would be consistent with NASAA's investor protection concerns. Specifically, we recommend that NASAA: (1) exclude the proposed concentration limit from applying to purchases resulting from fiduciary investment advice provided by federal covered advisers; (2) confirm the concentration limit's mandatory exclusion for accredited investors; and (3) exclude business development companies (**BDCs**), commodity pools, and other federally regulated investment products and eliminate the overbroad and vague category of "other programs of a similar nature" from the definition of "direct participation programs." We discuss our comments below.

**1. NASAA should not apply the proposed concentration limit to transactions resulting from fiduciary investment advice provided by federal covered advisers**

The Proposal would apply a concentration limit to persons who purchase shares in a non-traded REIT.<sup>6</sup> A person's aggregate investment in the REIT and other non-traded direct participation programs<sup>7</sup> would generally not be permitted to exceed 10% of the person's liquid net worth. The 2022 Proposal would have applied suitability obligations and conduct standards to persons providing investment advice to a client with regard to shares of a REIT. The IAA strongly opposed such language in the 2022 IAA letter, noting that under NSMIA,<sup>8</sup> states do not have the authority to impose conduct standards on federal covered advisers.<sup>9</sup>

We appreciate that, in response to a "concern that jurisdictions may lack authority to impose these conduct standards on persons other than the sponsor or persons selling shares on behalf of the sponsor through the application of the [Proposed Policy],"<sup>10</sup> the Proposal removes

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<sup>4</sup> NASAA Request for Public Comment, *Proposed Revisions to NASAA Statement of Policy Regarding Real Estate Investment Trusts* (July 12, 2022) (**2022 Proposal**), available at [2022 Proposal](#).

<sup>5</sup> IAA letter to NASAA on Proposed Revisions to NASAA Statement of Policy Regarding Real Estate Investment Trusts (Sept. 13, 2022) (**2022 IAA letter**), available at [2022 IAA letter](#).

<sup>6</sup> See Section III.D.3. of the Proposed Policy (**proposed concentration limit**).

<sup>7</sup> The 2022 Proposal did not define "direct participation programs." We note that NASAA now includes a definition of "direct participation programs," which we believe to be overbroad, as discussed in our comments.

<sup>8</sup> National Securities Markets Improvement Act of 1996 (**NSMIA**). Title III of NSMIA amended the Investment Advisers Act of 1940 (**Advisers Act**) to broadly preempt state regulation of SEC-registered investment advisers.

<sup>9</sup> 2022 IAA letter at 2. We note that states are also preempted from applying suitability standards to federal covered advisers since suitability is a key component of an adviser's federal fiduciary duty. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. 33669 (July 12, 2019), available at [Fiduciary Interpretation](#).

<sup>10</sup> Proposal at 7.

the language from the 2022 Proposal that would have applied the conduct standards to persons providing investment advice.<sup>11</sup>

However, as we noted in the 2022 IAA letter, the concentration limit also should not apply to transactions that result from investment advice provided to clients by federal covered advisers.<sup>12</sup> This advice is subject to the robust, investor-protective fiduciary duty framework under the Advisers Act, and we believe that the states are preempted from applying the concentration limit to such advice. We thus respectfully urge NASAA to confirm that the proposed concentration limit will not apply to transactions resulting from advice provided by federal covered advisers.

**2. NASAA should confirm the concentration limit’s mandatory exclusion for accredited investors**

The Proposal states that the concentration limit “would not apply to investments made by accredited investors as defined under Rule 501(a) of SEC Regulation D.”<sup>13</sup> We appreciate that NASAA intends to exclude accredited investors from the concentration limit. However, this exclusion is not reflected in the text of the Proposed Policy, which would give the administrator discretion to “determine to exclude from the concentration limit any person that is an accredited investor.”<sup>14</sup> We do not believe that state administrators should be subjectively deciding whether these investors – which have been deemed by definition to have sufficient financial sophistication – may choose to invest in specific investment products. We are also concerned that, as drafted, the Proposed Policy could create a patchwork of concentration limits, which would cause confusion and add to implementation challenges. Accordingly, the text of the Proposed Policy should be revised to reflect a mandatory carveout of accredited investors from the concentration limit.

**3. NASAA should exclude BDCs, commodity pools, and other federally regulated investment products, and eliminate the overbroad and vague category of “other programs of a similar nature” from the definition of “direct participation programs”**

As discussed above, we believe that states are preempted from applying any concentration limit to federal covered advisers. In addition, federal covered advisers should have flexibility as fiduciaries to consider the full range of available investment options in deciding

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<sup>11</sup> The Proposal removes the reference from the 2022 Proposal that the conduct standards in Section III.C.1. would apply to those providing investment advice to a shareholder or prospective shareholder with regard to shares of the REIT. Proposal at 7.

<sup>12</sup> The IAA strongly believes that policymakers should be strategy neutral and not restrict the types of strategies, products, or factors that advisers may consider in fulfilling their fiduciary duty to make decisions in their clients’ best interest.

<sup>13</sup> Proposal at 8.

<sup>14</sup> Section III.D.4. of the Proposed Policy.

what is in their clients' best interest. Should NASAA decline to follow our recommendation to exclude federal covered advisers from the concentration limit, at the very least it should make sure that any concentration limit does not capture federally regulated investment products or create overbroad and vague terms that only increase uncertainty.

The 2022 Proposal would have established a concentration limit that would have applied to the REIT, its affiliates, and other non-traded direct participation programs. The IAA opposed this provision, noting that the term "affiliate" was defined so broadly that it could be interpreted to include federal covered advisers and covered securities, such as interests in registered investment companies or private funds, which would be counter to NSMIA. We asked that the term "affiliate" exclude federal covered advisers and all covered securities.<sup>15</sup>

We appreciate that, in response to our concerns, NASAA deleted the term "affiliates" from the concentration limit in proposed Section III.D.3., acknowledging the concerns that the then-proposed concentration limit might restrict investments in registered investment companies or other covered securities. The current proposed concentration limit thus does not include shares of affiliates of the issuer,<sup>16</sup> and it also makes clear that federal and state exempt private offerings and registered investment companies are excluded.

While we strongly support the exclusion of these investment products from the definition of "direct participation programs,"<sup>17</sup> the newly proposed definition raises similar concerns. For the reasons discussed in the 2022 IAA letter, we recommend that NASAA also exclude BDCs, commodity pools, and any other federally regulated investment products. BDCs may elect to be treated as investment companies under the Investment Company Act, and should thus be treated the same way as other investment companies under the Proposal. Further, commodity pools and their operators are regulated by the federal Commodity Futures Trading Commission under the Commodity Exchange Act.

We also recommend that NASAA remove the category of "other programs of a similar nature" from the proposed definition of "direct participation programs" because it captures an undefined and potentially unlimited category of investment products without providing any meaningful context in which to apply the definition. The Proposal has not identified or analyzed

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<sup>15</sup> 2022 IAA letter at 2-3.

<sup>16</sup> Proposal at 8; Section III.D. of the Proposed Policy.

<sup>17</sup> As noted in the 2022 IAA letter, this term was not defined, creating uncertainty as to what types of products would be covered. "Direct participation programs" is now defined to include 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, but excluding federal and state exempt private offerings and any investment company registered pursuant to the Investment Company Act of 1940. Section III.D.6. of the Proposed Policy (proposed concentration limit). This new definition continues to create challenges.

Ms. Anderson, Mr. Beatty, and Ms. Houston  
NASAA  
May 28, 2025  
Page 5 of 5

any of the products that could be included, nor has it explained why they should be subject to the concentration limit.

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For the reasons discussed above, we urge NASAA to explicitly exempt investment advice by federal covered advisers and accredited investors from the proposed concentration limit. We also urge NASAA to exclude BDCs, commodity pools, and any other federally regulated investment products, and remove the category of “other programs of a similar nature” from the definition of “direct participation programs.”

We appreciate your consideration of our comments on this important issue. Please do not hesitate to 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 and Head of Public Policy

/s/ Monique S. Botkin

Monique S. Botkin  
Associate General Counsel

cc: The Honorable Paul S. Atkins, Chairman, 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  
Natasha Vij Greiner, Director, Division of Investment Management, Securities and Exchange Commission