Institute for Portfolio Alternatives

Via electronic submission to:
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Re: Proposed Amendments to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "Proposal")

Dear Section Members and Project Group Members:

The Institute for Portfolio Alternatives (the "IPA") welcomes the opportunity to comment on the Proposal. The IPA represents sponsors and distributors of alternative investment products, including non-listed REITs, business development companies ("BDCs"), interval funds, and tender-offer funds.[1]

NASAA adopted the Statement of Policy nearly 30 years ago. Since then, it has never been modernized to reflect the operation, structure, or regulatory oversight of today's non-listed REITs.[2] Even as proposed to be amended, the Statement of Policy remains fundamentally misaligned with the investment products it purports to regulate.

In 2022, NASAA issued proposed amendments to the Statement of Policy. The IPA submitted a detailed and substantive comment letter sharing our concerns with the

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1 For 40 years, the IPA has advocated for increased investor access to alternative investment strategies with low correlation to equity markets as part of a diversified portfolio and subject to effective investor protections. These strategies include real estate, public and private credit, and other real assets through investment vehicles such as REITs, BDCs, closed end funds, interval funds and private placements. With over $500 billion in capital investments, these portfolio diversifying investments are a critical component of an effectively balanced investment portfolio and serve an essential capital formation function for our national, state, and local economies.

2 NASAA adopted the Statement of Policy in 1996 and last updated it in 2007 only to change the dollar amounts for the suitability standard, years before net asset value ("NAV") REITs became the predominate form of non-listed REIT in distribution. NASAA justifies the Proposal because of the "lack of liquidity in these investments." Proposal at 3. NAV REITs provide liquidity through robust redemption programs, thus obviating this perceived need for the Statement of Policy.

Proposal during that official comment period. In the years that followed, the IPA submitted two additional letters, dated July 22, 2024, and December 23, 2024, in anticipation of a revised proposal. In those letters, we expressed a continued willingness to work collaboratively with NASAA and its member states to ensure that any future guidelines accurately reflect the structure and operation of non-listed REITs and BDCs, the needs of investors, and the regulatory obligations of financial professionals. Despite this strong urging, NASAA has not adopted a more transparent and collaborative rulemaking process, which is in stark contrast to the model followed by state insurance commissioners that includes public meetings and proactive engagement with industry stakeholders.

In our most recent letter, we urged NASAA not to move forward with the Proposal, citing the lack of supporting data, the continued absence of economic analysis, and the growing regulatory misalignment the Proposal would create. The reproposed guidelines fundamentally contradict the operation of the federal securities laws. Non-listed REITs and BDCs are publicly registered with the Securities and Exchange Commission (SEC) and are subject to rigorous disclosure obligations, ongoing reporting requirements, and strict liability standards under the Securities Act. A foundational principle of the federal securities regime is that, once an offering is registered, the registered securities may be offered to any investor, in any amount, without artificial restrictions—because investors are protected through full and fair disclosure, Regulation Best Interest ("Reg BI") and fiduciary conduct standards, as applicable, and the enforcement mechanisms built into the regulatory system.

Ironically, the Proposal criticizes the length and complexity of offering documents for these public products, even as NASAA has consistently, over many years, raised concerns about the lack of transparency and disclosure in private offerings. This contradiction reflects a fundamental misunderstanding of the purpose of the federal disclosure regime, which is designed to equip investors—and their financial professionals—with the information needed to make informed decisions. Instead of penalizing this transparency, policy should support it—and trust both the regulated financial intermediary to guide each investor appropriately and the investor to make informed choices based on full and fair disclosure.

By overlaying concentration limits and imposing net worth and income thresholds on purchasers in publicly registered offerings, the Proposal undermines this core principle. Such restrictions are inappropriate for publicly offered, SEC registered products that are subject to federal registration, disclosure, and liability standards. Imposing these limitations on registered offerings ignores the investor protections already in place and introduces a fragmented and inconsistent regulatory framework.

Moreover, broker-dealers and registered investment advisers are already subject to comprehensive conduct standards under Reg BI and the federal Investment Advisers

Act. These standards are product-agnostic and require financial professionals to consider the specific needs, objectives, and risk profiles of each investor. The Proposal's rigid, one-size-fits-all investment restrictions are not only duplicative—they conflict with the principles-based, investor-focused framework of federal law.

While we acknowledge that NASAA made some positive changes to the 2022 proposal, the latest proposal fails to address the key concerns raised across all three of our prior submissions and should not be adopted.

These unresolved issues include:

- NASAA has failed to modernize the Statement of Policy to align with the current structure and operation of today's non-listed REITs.
- We continue to question the evidentiary basis for NASAA's claim that heightened regulation is warranted. Notably, NASAA's own Enforcement Reports over the past decade contain no reference to REIT- or BDC-related enforcement actions.[3]
- Unlike standard regulatory practice at the federal and state levels, there is no estimate of compliance costs or evaluation of the Proposal's impact on investor access or market dynamics. Moreover, NASAA continues to mischaracterize Financial Industry Regulatory Authority (FINRA) arbitration data to suggest disproportionate investor harm, without providing appropriate context or accurate interpretation.
- Although framed as targeting REITs, the Proposal would apply more broadly, restricting how much investors may allocate to non-listed BDCs and other direct participation programs. BDCs and these other programs are structurally and operationally distinct from REITs and should not be subject to identical standards.
- We continue to express concern about NASAA's repeated pejorative and unfair characterization of non-listed REITs and BDCs. Even this Proposal refers to the "myriad of risks" posed by these products and claims they are a disproportionate source of investor complaints, without offering any supporting state-level data.
- Without adequate explanation or justification, the Proposal includes a concentration limit that is impractical. Sponsors cannot monitor investor-level limits, which are only accessible to the broker-dealer or investment adviser, who has a direct client relationship.
- Replacing a financial professional's best interest judgment with a rigid, one-size-fits-all concentration limit undermines principles-based regulatory frameworks

[3] There is no mention of a "REIT" or "real estate investment trust" in any NASAA Enforcement Report since 2016, which was reporting on 2015 data (i.e., over a decade ago). See https://www.nasaa.org/policy/enforcement-statistics/.

like Reg BI and the fiduciary duty applicable to investment advisers. Both standards are product-agnostic, requiring financial professionals to evaluate the individual needs and circumstances of each investor—regardless of asset class or product type. NASAA's proposed limits are incompatible with these federal standards.

- Importantly, as a result of NASAA's recent proposals, many industry participants are reconsidering the use of state-regulated investment vehicles in favor of structures that fall outside NASAA's jurisdiction to reduce the potential regulatory complexity created by this proposal.
- Finally, the Proposal conflicts with federal law in several respects. For example, it attempts to regulate federally registered investment advisers in contravention of Section 203A of the Investment Advisers Act of 1940, and it imposes books and records requirements on broker-dealers in violation of Section 15(i) of the Securities Exchange Act of 1934.[4] Any state that adopts the Statement of Policy into its rules as currently proposed would be acting in conflict with federal law.

The IPA's specific comments on the Proposal are as follows:

1. *There is No Justification for a Concentration Limit.*

NASAA has omitted the proposed application of a concentration limit to affiliates, which is an improvement from the 2022 proposal. That said, the majority of states do not impose a concentration limit, and NASAA has provided no justification or economic analysis in support of adopting one. It has not explained why a 10% limit is appropriate as opposed to any other threshold. NASAA's own publications demonstrate that non-listed REITs have not presented a significant investor protection concern. As noted above, no NASAA Enforcement Report since the report covering 2015 data has even mentioned non-listed REITs or BDCs. According to its 2024 report, the products and schemes most frequently cited in state investigations include digital assets, Ponzi schemes, affinity fraud, social media fraud, and equities trading—none of which involve non-listed REITs.

NASAA also fails to explain why the proposed standard should be based on liquid net worth, rather than the size of the investor's overall investment portfolio. There is no

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[4] The Proposal would require that sponsors and each person "selling shares on behalf of the sponsor or REIT . . . maintain records of the information used to determine that an investment in shares is suitable and appropriate for a shareholder." They would have to maintain these records for six years. Proposal, III.C.4. Section 15(i) of the Securities Exchange Act of 1934 states, "No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish . . . making and keeping records . . . requirements for brokers [or] dealers . . . that differ from, or are in addition to, the requirements in those areas established under this title."

definition or recognized concept of "liquid net worth" in federal securities law, which introduces ambiguity, legal uncertainty, and potential compliance challenges for issuers and financial professionals. An investor might own a $500 million operating business or a sizable inherited real estate portfolio, yet none of that would count toward the concentration limit under NASAA's proposal. NASAA would substitute its own judgment about what is in the best interest of that investor, and all other investors, without any factual, legal, or economic basis for doing so.

The Proposal would impose the concentration limit through the offering registration process, but neither the REIT nor its sponsor could apply the concentration limit. Only the investor's broker-dealer or investment adviser, who already must act in the investor's best interest under federal law, could ensure that the investor meets a state-mandated concentration limit. Yet such a concentration limit would conflict with the broker-dealer or investment adviser's federal obligation. These professionals are subject to principles-based regulatory frameworks, such as Reg BI and the fiduciary duty under the Investment Advisers Act, which require a tailored evaluation of each investor's unique financial situation, goals, and risk tolerance. In effect, NASAA would override these individualized, fiduciary, and best-interest determinations with a one-size-fits-all rule that conflicts with the very foundation of the existing federal regulatory system.

The Proposal also lacks specificity regarding when and how to assess compliance with the concentration limit. The Proposal simply says that an investor's aggregate investment "shall not exceed" the concentration limit. It does not state when the limit would apply. Could an investor comply with the concentration limit at the initial purchase but later exceed it due to participation in a distribution reinvestment program? Could an investor unintentionally violate the limit if the value of the non-listed REIT increases, or if other assets in her portfolio decline, even without making a new purchase?

Moreover, the Proposal includes no grandfathering provision or implementation period. An investor who owns shares before a state adopts a concentration limit could inadvertently find themselves in violation of the rule.

For these reasons, the IPA continues to strongly oppose the concentration limit.

2. *Including DPPs in the Concentration Limit is Unwarranted and Conflicts with Federal Law*.

The Proposal would apply the concentration limit to an investor's aggregate investment in a non-listed REIT and other non-listed direct participation programs ("DPPs"). It would define DPPs broadly 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 thereof.[5]

As a result, even if an investor purchased only one share of a non-listed REIT, they would be barred from holding non-listed BDCs and these other products in amounts exceeding the concentration limit. Alternatively, if an investor owns only one share of a non-listed BDC, they would be limited in their holding of non-listed REITs.

However, the Statement of Policy does not regulate BDCs, oil and gas programs, equipment leasing programs, or commodity pools. It is titled the "Statement of Policy Regarding Real Estate Investment Trusts." By imposing the concentration limit so broadly, NASAA would restrict investors from allocating to BDCs and other securities in accordance with recommendations made by their financial professional, who, under federal law, must act in the investor's best interest. NASAA has conducted no analysis, provided no justification, and offered no explanation for imposing restrictions on securities that are entirely outside the scope of the REIT-focused Statement of Policy.

By including BDCs and other products under a single concentration limit with non-listed REITs, NASAA incorrectly presumes that these securities are materially equivalent. In reality, they differ significantly in structure, regulation, purpose, and risk profile.

For example:

- Non-listed REITs are subject to specific requirements under the Internal Revenue Code, including the obligation to distribute at least 90% of taxable income annually. They primarily invest in real estate assets with distinct income and risk characteristics.

- Non-listed BDCs, by contrast, are governed by the Investment Company Act of 1940, which imposes core protections related to conflicts of interest, asset coverage, and leverage. BDCs invest primarily in private credit and other securities issued by emerging companies.

These products are materially distinct from each other—and from oil and gas programs, equipment leasing programs, commodity pools, and the other securities NASAA proposes to include under a single, arbitrary 10% limit. Including all of these unrelated securities under one concentration cap would not enhance investor protection. It would, however, create unnecessary compliance burdens for broker-dealers and

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[5] The definition would exclude exempt private offerings and any investment company registered pursuant to the Investment Company Act of 1940.

investment advisers, who would be forced to navigate overlapping product categories and track concentration exposure to fundamentally different securities.

Moreover, the Proposal's definition of "direct participation program" lacks a legal basis and directly conflicts with federal law. Under FINRA Rule 2310, REITs are *explicitly excluded* from the definition of DPPs. That rule also excludes tax-qualified pension and profit-sharing plans under Sections 401 and 403(a) of the Internal Revenue Code, individual retirement plans under Section 408, and tax-sheltered annuities under Section 403(b). FINRA's definition has been long established and is embedded in compliance systems, offering documents, and operational practices across the industry. Introducing a conflicting definition would create unnecessary regulatory confusion and compliance risk, especially for firms operating in multiple jurisdictions.

For these reasons, if NASAA chooses to move forward with the Proposal and retain a concentration limit, the IPA strongly urges NASAA to limit its application solely to non-listed REITs—the only securities that the Statement of Policy was intended to address.

> *3.* *<u>The Accredited Investor Carveout to the Concentration Limit Would Be Confusing and Ineffective</u>.*

In response to industry feedback since the 2022 proposal, NASAA attempts to address commenters' concerns by introducing a carveout from the concentration limit for "accredited investors," as defined under Rule 501(a) of Regulation D. However, the proposed language fails to establish a workable or reliable exception.

The Proposal provides:

> An ADMINISTRATOR *may* determine to exclude from the concentration limit any PERSON that is an accredited investor under Rule 501(a) of Regulation D.[6]

This carveout is **entirely discretionary**. Each state securities administrator would be free to adopt, or disregard, the accredited investor exception on an individual investor basis. Making the carveout optional results in a fragmented, subjective system that is likely to produce inconsistent treatment across jurisdictions.

Even if a state were to incorporate the proposed exception, the provision would still create uncertainty for sponsors, distributors, and investors. As written, it implies that a state's review staff could grant or deny the accredited investor exception on a case-by-

[6] III. D.4. (emphasis added).

case basis for each individual offering.[7] Neither the industry nor investors could reliably predict whether the exception would apply to a particular product.

The provision, as drafted, provides no regulatory certainty. Some states might adopt the carveout, others might decline to do so, and still others might delegate discretion to staff reviewers. This patchwork approach would undermine the very objective the exception is intended to achieve, namely, to provide relief from non-uniform state-level review standards. It would also require broker-dealers to maintain separate books and records to ensure compliance with varying state concentration limits, which would be in conflict with Section 15(j) of the Securities Exchange Act of 1934.

Non-listed REITs are national products. Sponsors and distributors cannot tailor their sales and administrative practices to comply with a different set of rules in every state. In practice, they must structure distribution according to the requirements of the most restrictive state. If even one state declines to adopt the accredited investor exception, sponsors would be compelled to treat the exception as unavailable in all states, rendering it meaningless.

More fundamentally, a uniform, mandatory carveout is consistent with federal policy for good reason: accredited investors are presumed to have the financial sophistication, resources, and access to advice necessary to evaluate investment risks independently. Under federal law, accredited investors are permitted to participate in private placements, where disclosure may be far more limited, without any investment concentration restriction. It would be illogical and inconsistent for states to impose stricter limitations on those same investors when purchasing publicly registered securities subject to comprehensive SEC oversight and disclosure requirements.

If NASAA elects to proceed with a concentration limit, the IPA strongly recommends that the accredited investor exception be made **mandatory** in every jurisdiction that adopts the Statement of Policy. To be effective, the exception must be uniformly applied and not left to the discretion of individual states or their staff reviewers.

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

The Proposal would index the existing gross income and net worth limits to inflation retroactively to 2007 and require updates every five years. These limits are

[7] Further complicating the framework, the proposal introduces a confusing and impractical process requiring each sponsor to propose a concentration limit for each offering. Each state administrator may approve or adjust that limit based on 14 broad and subjective factors. Despite this procedure, the default 10% limit would still apply unless expressly changed—introducing additional regulatory ambiguity and making consistency across states virtually impossible.

fundamentally incompatible with Reg BI and the broader federal securities regulatory framework.

Publicly offered securities registered under the Securities Act of 1933 are subject to full disclosure requirements, and issuers assume strict liability under Section 11 of the Act. Because of this disclosure regime, federal law permits retail investors to invest in these securities regardless of income or net worth.

Ironically, the Proposal criticizes the "voluminous" nature of offering documents for these public products, while simultaneously arguing elsewhere that retail investors lack sufficient information and protection when purchasing private offerings, where there is no mandated disclosure at all for accredited investors. This contradiction underscores a misunderstanding of the policy rationale underpinning the federal securities laws. For decades, the SEC has dictated what must be included in offering documents, whether for listed or non-listed products, precisely to empower investors to make informed decisions. We should be celebrating this robust disclosure regime, not penalizing it. Highly regulated financial intermediaries can evaluate these materials and make recommendations that are tailored to each investor's unique circumstances, as required by federal law.

For these reasons, if NASAA decides to adopt the Proposal, the IPA strongly recommends that NASAA delete the gross income and net worth limits from the Proposal.

5. *The Conduct Standards are Unwarranted, Confusing, and Inconsistent with Federal Law.*

The Proposal would impose a new, undefined set of "conduct standards" on issuers—referencing Reg BI, the Employee Retirement Income Security Act ("ERISA"), fiduciary obligations, and even anticipated state laws that have not yet been enacted. It further introduces a new term—"non-retail investors"—that is not defined in federal law, including Reg BI. This language is both vague 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 apply specifically to regulated broker-dealers and investment advisers—not to product sponsors. Financial professionals are already subject to rigorous oversight and must comply with well-established conduct obligations under both federal and state law.

Imposing ambiguous or duplicative conduct requirements on issuers introduces legal uncertainty, lacks statutory authority, and blurs the clear regulatory distinction between product providers and financial professionals. This would not enhance investor protection; instead, it risks inconsistent enforcement and unnecessary conflict with existing federal and state regulatory frameworks.

Moreover, while the Proposal seeks to incorporate Reg BI, it ultimately conflicts with it. For example, the imposition of a fixed numerical concentration limit is fundamentally at odds with Reg BI's principles-based approach, which requires that a recommendation be in the "best interest of a particular retail customer based on that retail customer's investment profile." A one-size-fits-all concentration limit is incompatible with a standard that explicitly demands individualized consideration of an investor's specific needs and circumstances.

Unlike the Proposal, which seeks to impose conduct standards tied to a specific product type (non-listed REITs), Reg BI is intentionally product-agnostic. It does not prescribe rules for any specific security. Likewise, the fiduciary standards under ERISA and the Investment Advisers Act do not vary based on the particular product being recommended. By attempting to selectively apply these conduct standards only to non-listed REITs at the state level, the Proposal would distort their intent and create confusion in the marketplace.

For these reasons, if NASAA chooses to move forward with the Proposal, the IPA urges NASAA to remove references to conduct standards.

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Thank you for the opportunity to comment on the Proposal. Please send questions about our comments to Jeff Evans, IPA's director of government affairs and policy, at jevans@ipa.com.

Sincerely,

Anya Coverman
President and CEO