FINANCIAL SERVICES INSTITUTE

VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

VIA ELECTRONIC MAIL
NASAAComments@NASAA.org

June 2, 2025

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

Re: FSI's Comments on NASAA's Proposed Revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts

Dear NASAA Members, Ms. Anderson, Director Beatty and Deputy Secretary Houston:

On March 25, 2025, the North American Securities Administrators Association, Inc. ("NASAA") published its request for public comment on the Proposed Revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts ("Proposal").[1] NASAA's stated goals for the Proposal are to: (i) Update the conduct standards for brokers that sell non-traded REITs to incorporate the Securities and Exchange Commission's Regulation Best Interest ("Reg. BI"); (ii) Update the net income and net worth thresholds in the suitability section to account for inflation since they were last updated in 2007; and (iii) Establish a uniform concentration limit in the suitability section. The proposal follows on a 2022 request for comment on proposed revisions to the Statement of Policy ("2022 Proposal").

The Financial Services Institute[2] ("FSI") appreciates the opportunity to comment on this important Proposal. FSI's members are strongly committed to working with regulators to help safeguard investors' retirement savings and choices. FSI provided comments on the 2022 Proposal ("2022 letter").[3] We remain concerned about the issues raised in the 2022 letter, namely that the updated standards of care may create duplicative, overlapping, and confusing regulatory requirements for brokers selling these products; that the 10% concentration limit is overly restrictive on investors; that the Proposal may include issuers in disclosure and regulatory requirements; and that the Proposal may result in unintended consequences for non-traded REITs ("NTR").

[1] NASAA Request for Public Comment
[2] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.
[3] Letter to Andrea Seidt and Mark Heuerman, September 12, 2022.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are more than 160,000 independent financial advisors, which account for approximately 52.7 percent of all producing registered representatives.[4] These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker Dealers (IBD).[5]

FSI's IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners and job creators with strong ties to their communities. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate $35.7 billion in economic activity. This activity, in turn, supports 408,743 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly $7.2 billion annually to federal, state, and local government taxes.[6]

Discussion

FSI appreciates the opportunity to comment on NASAA's Proposal with a focus on selected provisions. As we note below, we believe the financial services industry, including FSI and its members, share a common interest in safeguarding investors' retirement savings and furthering the goals of efficient capital markets. Our comments reiterate concerns expressed in our 2022 letter that remain unresolved in the Proposal.

I. NASAA Should Reconsider the Expansive Inclusion of Multiple Federal Standards of Care Applicable to Intermediaries in a State Level Statement of Policy Focused on a Specific Product.

A. Introduction

FSI members (whether firms or individual financial advisors) participate in the sale of and facilitate the investment in NTRs, direct participation programs ("DPP") as described in the Proposal,[7] and other investment opportunities as part of a balanced portfolio. We recognize that

[4] Cerulli Associates, Advisor Headcount 2016, on file with author.
[5] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.
[6] Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2020).
[7] References herein to NTRs should be read to cover any investments contemplated under the Proposal.

NTRs hold a unique position in the market as non-covered securities with registration requirements at the Federal, SRO, and State level. This multilevel registration regime has generated some confusion on issuer disclosure requirements and standards in offering documents. The intermediaries through which NTRs are made available to investors, however, are all regulated through the Securities and Exchange Commission's ("SEC") (for Broker Dealers and larger Investment Advisers), the Financial Industry Regulatory Authority ("FINRA")(for Broker Dealers), and state regulators (for Broker Dealers and smaller Investment Advisers). The standards applicable to these entities by their respective regulators should be applied without incorporation in this Statement of Policy.

B. Investment Advisers and Broker Dealers Are Already Subject to Federal and SRO Rules and Requirements.

FSI notes that the Proposal would apply the following conduct standards: [8]

- Compliance with the SEC Regulation Best Interest;
- Undefined Suitability Obligations under Federal and State law;
- Requirements under the Employment Retirement Income Security Act of 1974 or Internal Revenue Code of 1986 (referred to herein as "ERISA");
- Self-Regulatory Organization Standards; and
- Undefined Federal or State fiduciary duties.

As noted in our 2022 letter, by proposing to codify the conduct standards, NASAA is stating that each of these standards, or more adopted at the enacting jurisdiction's discretion, will apply to every REIT transaction. The Proposal does not address any potential conflicts in the application of each regulation (e.g. inapplicable, overlapping and/or conflicting rules from a state fiduciary rule to Reg BI, or from a state fiduciary rule to ERISA, or from one state fiduciary rule to another state fiduciary rule). Given many conflicts in rule text,[9] preemption of state authority, and uncertainty regarding applicable rules, confusion and lack of uniformity would be a likely outcome. Additionally, although it may not have been the intent of the Proposal, the broad language provides a jurisdiction with the unfettered authority to apply any of these overlapping, potentially conflicting, standards to any REIT or DPP sale.

Instituting the Proposal as written creates the significant potential for state regulators and courts to interpret and apply federal statutes and SRO rules in an inconsistent manner, effectively creating a multiplicity of standards. This could be exacerbated by political and/or legislative differences across states enacting variations on the Proposal as drafted. In short, we remain very concerned that state application of the rules would create a patchwork of rulings and requirements that make NTR sales impracticable in many states.

C. Issuers Should Not Be Required to Provide Oversight of Financial Intermediaries.

[8] The Proposal also leaves open "any other updated conduct standards that are adopted by the NASAA jurisdictions as applied to brokers recommending securities." Proposal at 6.

[9] C*ompare, e.g.,* SEC Regulation Best Interest (requiring brokers to act in the best interest of their clients without placing their financial or other interest ahead of the interest of the retail customer). *versus* the Massachusetts Fiduciary Conduct Standard for Broker-Dealers and Agents (requiring brokers to act as fiduciaries and creating a standard of utmost care and loyalty).

In our 2022 letter we noted:

"[T]he Proposal could be read to extend the oversight of Investment Adviser and Broker Dealer sales practices to REIT issuers beyond what can be reasonably assured through contractual means. Issuers should not be put in the position of providing oversight over intermediaries. For investment advisers and broker dealers, this could create an additional supervisory aspect and compliance requirement for each NTR or DPP sponsor where the intermediary offers or sells their products. Complying with regulatory oversight and individual sponsor oversight will create significant, duplicative cost and reporting requirements for these intermediary firms.[10] It also places the burden on private entities to police the actions of upstream or downstream counterparts, and could apply liability for bad actors completely outside of the control of the issuer, broker-dealer, or investment adviser. Faced with such oversight, it is likely broker-dealers and investment advisers would choose to limit the products they offer to alleviate compliance costs or simply choose not to offer these products, to the detriment of investors."

We remain concerned that the Proposal would impose a layer of regulation on intermediaries and issuers. Issuers may need to review third-party books, records, and practices, and intermediaries may be faced with additional reporting and disclosure obligations. FSI feels that it is inappropriate to impose regulatory oversight requirements in general on private entities to ensure that third-party participants comply with federal and state regulations.

D. References to Federal Statutes and SRO Requirements Should Be Removed from the Proposal or Rewritten to Avoid Confusion.

For the foregoing reasons, FSI believes that the multiple, competing standards of care should be removed from the Proposal. Barring a complete removal, our 2022 letter proffered the following language which we believe would be more appropriate for entities covered by the Proposal and would mitigate the possibility of multiple interpretations of federal statutes on a state by state, or court-by-court, basis:

> CONDUCT STANDARDS: Any Investment Adviser Representative or Broker Dealer Agent selling, recommending, or providing investment advice relating to the SHARES of the REIT to the SHAREHOLDER or prospective SHAREHOLDER will abide by applicable federal and state law or standards set by self-regulatory organizations.

II. FSI Is Concerned That a 10% Limit is Too Restrictive Given the Nature of Non-Traded REITS, Movement of the Market, and Lack of an Accredited Investor Carve Out.

A. Introduction

The Proposal would amend NASAA's REIT Guidelines to create a "standardized concentration limit" for non-traded REITs and forge a path for future regulations and guidelines on similar terms. NASAA's apparent intent is to limit an investor's participation in what were

[10] Certain client information may be privileged or confidential, and PII could require additional disclosures or consents from the client to the financial intermediary. Any additional oversight requirements must account for these rules and accompanying additional compliance costs/concerns.

traditionally illiquid, risky investments to 10% of the investor's liquid net worth, or some other amount determined by the state's securities administrator. While FSI generally supports the investor protection intent of a measured concentration limit, like the 2022 Proposal we believe this Proposal fails to consider the application of federal standards and regulations, as noted above, and significant developments in the REIT industry including a shift to Net Asset Value ("NAV") REIT offerings. FSI is concerned that the unintended consequences of this change would unduly restrict investor choice and autonomy to invest in federally regulated products and could result in driving investors looking to diversify their portfolio into other, potentially more risky holdings.

B. The Proposed 10% Concentration Limit Would Create Significant Investor and Intermediary Compliance Concerns.

We continue to believe that the current regulatory framework adequately addresses NASAA's objectives regarding investor protection. As noted in the 2022 letter, FINRA imposed significantly increased disclosure and transparency requirements on REIT offerings in 2015 and continues to regulate these offerings through Rules 2111 (Suitability), 2310 (Direct Participation Programs), and 2231 (Customer Account Statements). The Proposal could interfere with the current regulatory framework by effectively making a presumption that more than 10% concentration is inherently unsuitable rather than deferring to the expertise of broker-dealers and investment advisers operating under existing rules and industry practice.

As discussed at length in our 2022 letter, the concentration limit imposes a "one-size-fits-all" methodology that is unduly restrictive and impinges on choice and lacks the flexibility that may be needed to best achieve an investors financial needs and goals.

Further, the Proposal has not clarified when an intermediary would apply the concentration limit to the investor. REITs tend to have a longer investment horizon and involve dividends and other payouts to investors. They also tend to be held for significant periods of time. As a result, due to market fluctuations or changes to an investor's lifestyle or activities, an investor that initially qualified at the 10% concentration limit may fall below this threshold over the life of their investment. If an issuer or intermediary is tasked with calculating or verifying net worth on an annual basis, this creates a series of issues for minimum investment amounts, minimum redemption amounts, and the REIT's investment profile as a whole. Alternatively, NAV REITs, the most popular NTR product on the market today, are offered on a continuous basis with generous redemption provisions for investors. Among other investor-facing benefits, NAV REITs offer dividend reinvestment programs ("DRIP") which allow the investor to rollover any dividend offerings back into the REIT. Based on the Proposal's terms, an investor may be barred from participating in a DRIP program and would lose the ability to increase their long-term growth potential by reinvesting.

Our 2022 letter suggested that, at a minimum, a grandfather clause should be added to allow existing investors to continue investments and participate in reinvestment opportunities. However, the preferred approach would be to amend the proposed term to state that the concentration limit "shall not exceed [X]% of the PERSON's NET WORTH at the time of initial investment."

C. If a Concentration Limit Is Imposed, the Accredited Investor Carve Out Should Be Part of the Proposal, Not Optional.

As discussed in our 2022 letter, FSI supports an Accredited Investor exemption for any concentration limits. We are pleased that the Proposal now includes such an exemption. However, we respectfully request the optionality language of the exemptive clause be removed.

The Accredited Investor exemption reads: "An ADMINISTRATOR may determine to exclude from the concentration limit any PERSON that is an accredited investor under Rule 501(a) of Regulation D."

The language of the exemption suggests a default position of *not* exempting accredited investors and burdens the administrator with affirmatively proposing and justifying such an exemption. As discussed in our 2022 letter, there are ample policy reasons to include an accredited investor exemption and we are concerned that the optionality of the current language will have the effect of undermining uniformity among jurisdictions.

III. FSI Wishes to Reiterate Concerns Relating to Net Worth Calculation.

A. Discussion

FSI's 2022 letter raised concerns with the Proposal using "liquid net worth" as opposed to an investor's net worth as described in the Accredited Investor standard for determining the concentration allowance. We noted that, "Many intermediaries already track their client's investments and net worth for compliance with the Accredited Investor standard. As written, the Proposal would require these firms to track both the investor's net worth and liquid net worth for any NTR or DPP investments, increasing the cost of compliance and decreasing returns to investors."

We respectfully request that the Project Group revisit these concerns and give further consideration to the additional burdens and confusion that would arise from requiring an additional and different calculation under the Proposal.

IV. Conclusion

As always, FSI appreciates the opportunity to comment on NASAA proposals. We support NASAA's goal of protecting investors, and we are committed to constructive engagement in the regulatory process. To summarize the foregoing, FSI supports the inclusion of applicable federal and state standards as interpreted by the SEC, DOL, or a self-regulatory entity. We share NASAA's desire for uniformity and goal of avoiding 54 differing state and federal compliance regimes. If the Proposal moves forward, we believe that at a minimum, as noted above, the references to federal statutes and SRO requirements should be removed to avoid confusion and that the Accredited Investor carve out should be included as a standard provision in the Statement of Policy. Finally, we recommend the additional "liquid net worth" calculation be deleted in favor of the existing net worth standard.

Thank you for considering FSI's comments. Should you have any questions, please contact my colleague, Dan Barry at (202) 517-6464 or dan.barry@financialservices.org.

Respectfully submitted,

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