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

The Securities Industry and Financial Markets Association ("SIFMA")[1] and the Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG")[2] welcome the opportunity to comment on the Proposed Amendments to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "Proposal").

SIFMA and SIFMA AMG oppose the current proposal, which, if adopted by NASAA and states, would dramatically expand state regulation of non-listed real estate investment trusts ("REITs") and disrupt the important uniformity and consistency between federal and state securities regulatory regimes. Please see below for an explanation of our key concerns with the Proposal as well as recommended changes to be incorporated in a revised proposal. We welcome the opportunity to discuss these or other elements of the Proposal as NASAA considers it and reviews comments.

Summary of our Comments

SIFMA and SIFMA AMG oppose the current Proposal for several reasons:

- *The Proposal's Inflation Adjustments to the Net Income and Net Worth Thresholds Would Create Regulatory Complexity and the Potential for Arbitrary Outcomes.* Adjusting the net income and net

1. SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. For more information, visit http://www.sifma.org.
2. SIFMA AMG brings the asset management community together to provide views on policy matters and to create industry best practices. SIFMA AMG's members represent U.S. and multinational asset management firms whose combined global assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

worth thresholds every five years would create significant variance from the U.S. Securities and Exchange Commission ("SEC") regulations, which are not subject to automatic inflation updates. As a result, investors and financial professionals would face a patchwork of eligibility criteria that differ not only between state and federal regimes, but also potentially from state to state, depending on how and when each jurisdiction implements inflation updates based on NASAA's addendums to the Proposal. This fragmentation would increase the complexity of compliance, raise the risk of inadvertent violations, and create confusion for both investors and those offering REIT products.

- *The Proposal's New Conduct Standards for Non-Traded REIT Sales and Recommendations Create Unnecessary Uncertainty and Additional Requirements Not Contemplated Under Regulation Best Interest.* The Proposal seeks to incorporate new conduct standards for selling, recommending, and providing investment advice relating to non-traded REIT products, including incorporating SEC Regulation Best Interest ("Reg BI"). However, the language incorporating Reg BI is unclear and could be interpreted to apply the obligations under Reg BI in instances not anticipated by the SEC. In some instances, the Proposal also appears to apply additional requirements beyond the obligations under Reg BI. Further, the new standards of conduct under the Proposal would separately implement a heightened suitability standard for recommendations to non-retail customers. Implementing such a standard is not necessary to achieve NASAA's objective of incorporating Reg BI.

- *The Proposal's Concentration Limits Would Create Regulatory Uncertainty, Operational Burdens, and Unnecessary Limits on Investor Choice.* The proposed concentration limits for non-traded REITs, as outlined in the proposed NASAA amendments, are likely to result in significant regulatory uncertainty, increased operational burdens, and unnecessary restrictions on investor choice. The framework grants excessive discretion to state securities administrators, allowing for wide variation in standards and inconsistent application across jurisdictions and even between investors in the same jurisdiction. This lack of uniformity undermines the goal of consistent investor protection. It would also create substantial compliance challenges for sponsors and broker-dealers, who may be forced to default to the most restrictive state requirements to avoid inadvertent violations and could therefore lead to one state setting policy for all fifty states.

The ambiguity surrounding key terms - such as minimum concentration limit, the sponsor's role in setting limits, and the definition of direct participation programs ("DPPs") - further complicates compliance and increases the risk of inconsistent application. The requirement to aggregate all DPPs under a single 10% cap is overly broad and operationally challenging, as it fails to account for the diverse risk profiles and investment characteristics of different DPP products. This approach may also require firms to build complex systems to track and aggregate holdings across product types and issuers, which would be particularly challenging for legacy assets or those held away from the firm.

Additionally, the lack of a uniform and automatic accredited investor exemption introduces further complexity, as state-by-state discretion could result in some investors being subject to arbitrary restrictions despite their financial sophistication. The Proposal also fails to clarify whether the concentration limit is a point-of-sale test or an ongoing requirement, adding to operational uncertainty.

Overall, the proposed concentration limits are overly prescriptive, do not adequately consider individual investor circumstances or portfolio strategies, and may unduly limit access to alternative investments. The resulting regulatory fragmentation, compliance burdens, and lack of clarity could ultimately restrict investor choice and drive investors toward less regulated products, contrary to the intended goals of investor protection.

1. The Proposal's Inflation Adjustments to the Net Income and Net Worth Thresholds Would Create Regulatory Complexity and Potential for Arbitrary Outcomes

While SIFMA and SIFMA AMG understand the impetus to adjust the investor net worth and income thresholds to account for substantial inflation since 2007, adjusting the net income and net worth thresholds every five years may lead to significant variance with SEC regulations, which are not subject to automatic inflation updates.[3] NASAA should continue to periodically review and adjust the net worth and income thresholds of the REIT Statement of Policy, working with the SEC to seek streamlined definitions, to ensure the net worth and income thresholds are consistent with the SEC's accredited investor standard and align with actual investor needs and market realities at any given time.

A. Automatic Inflation Adjustments Risks Regulatory Fragmentation and Investor Confusion

Automatic inflation adjustments by NASAA would cause the minimum net worth and income thresholds for non-traded REIT investments to diverge from the fixed SEC accredited investor standard, which, as set forth above, is not subject to automatic inflation updates. Under the Proposal, investors and financial professionals would face a patchwork of eligibility criteria that differ not only between state and federal regimes but also potentially from state to state, depending on how and when each jurisdiction may implement NASAA's updates. This fragmentation would increase the complexity of compliance, raise the risk of inadvertent violations, and create confusion for both investors and those offering REIT products.

3. Section 413(b)(2)(A) of Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to undertake a review of the accredited investor definition as it pertains to natural persons at least once every four years to determine whether the requirements of the definition should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy.

B. Automatic Inflation Adjustments Are Inconsistent with Investor Protections and Market Access

The SEC's accredited investor standard is widely recognized and serves as a national baseline for participation in private offerings, including many alternative investments. By automatically increasing NASAA's thresholds every five years, the gap between state and federal standards may widen or fluctuate unpredictably. This could result in some investors being eligible to participate in certain private offerings under federal law but ineligible for non-traded REITs under state law, or vice versa. Such inconsistencies undermine the goal of uniform investor protection and may arbitrarily restrict access for investors in certain states, regardless of their actual financial sophistication or risk tolerance.

C. Administrative Burden and Compliance Costs

Frequent, automatic changes to the NASAA thresholds would require ongoing updates to offering documents, compliance systems, and sales practices. Firms operating in multiple jurisdictions would need to track and implement different standards for each state, as well as monitor the timing and magnitude of NASAA's inflation adjustments. This would increase the administrative burden and compliance costs associated with offering non-traded REITs, particularly for smaller firms, and may discourage participation in non-traded REIT offerings or lead to inadvertent non-compliance.

D. Lack of Coordination with Federal Policy

The SEC's accredited investor definition is subject to periodic review by the SEC and Congress, and changes are made deliberately and with broad stakeholder input. By contrast, NASAA's proposed automatic inflation mechanism would operate independently of federal policy decisions, potentially leading to a growing disconnect between state and federal standards over time. This lack of coordination would frustrate efforts to harmonize investor protection frameworks.

E. Potential for Arbitrary Outcomes

Beyond creating inconsistencies with federal standards, the automatic inflation adjustments under the Proposal would not account for broader economic, market, or policy considerations that may affect the appropriateness of investor eligibility standards. For example, during periods of low inflation, the thresholds may remain relatively stable, but during periods of high inflation, the standards could increase rapidly, excluding investors who would otherwise be considered suitable under federal law. This mechanical approach may produce arbitrary outcomes that are not aligned with actual investor needs or market realities.

2. The Proposal's New Conduct Standards for Non-Traded REIT Sales and Recommendations Would Create Unnecessary Uncertainty and Additional Requirements Not Contemplated Under Regulation Best Interest

The Proposal seeks to incorporate new conduct standards for selling, recommending, and providing investment advice relating to non-traded REIT products. These conduct standards would include (but are not limited to) state suitability obligations, obligations under SEC Reg BI, requirements under ERISA, requirement under the Internal Revenue Code, and state or federal fiduciary duties.[4] As SIFMA AMG observed in its initial response to NASAA's 2022 Proposal, the proposed language establishing new conduct standards appears to incorporate "state standards not yet enacted," which would result in significant uncertainty as state administrators may adopt unique conduct standards in a manner inconsistent with obligations set by the SEC, FINRA, or other state regulators.[5]

In addition, the language under the Proposal incorporating Reg BI is unclear and could be interpreted to apply the obligations under Reg BI in instances not anticipated by the SEC. Under Reg BI, broker dealers and associated persons, when making recommendations regarding securities transactions to retail customers, are required to act in the best interest of the retail customer at the time the recommendation is made.[6] Importantly, the obligations under Reg BI are only intended to apply to recommendations made to retail customers. However, NASAA's intended incorporation of Reg BI appears to apply when non-traded REIT shares are "recommended, offered, or sold to retail customers".[7] While we are generally supportive of applying the principles of Reg BI to retail recommendations in the non-traded REIT market, NASAA's proposed conduct standards do not adequately distinguish between sales and recommendations and the appropriate standards that should apply in each context.

On the other hand, the Proposal appears to apply additional requirements beyond the obligations under Reg BI for market participants recommending non-REIT products to investors. For instance, the Proposal's requirement that each person "selling *or recommending*" (italics added) a non-traded REIT ascertain that the prospective purchaser satisfies certain conditions (such as meeting income and net worth standards established for the REIT)[8] is not a requirement under SEC Reg BI. Accordingly, it could be viewed as requiring confirmation of suitability before even marketing the

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[4] Proposal Section I.A.3.

[5] See SIFMA AMG Letter Re: Proposed Revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts, (Sep. 12, 2022) https://www.sifma.org/wp-content/uploads/2022/09/SIFMA-AMG-on-NASAA-REIT-Proposal.pdf.

[6] SEC Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 F.R. 33318 (Jul. 12 2019), https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf.

[7] Proposal Section III.C.1.

[8] 7. Proposal Section III.C.2.

non-traded REIT, either by the sponsor or other person, even if no recommendation is made to a retail customer under Reg BI, and even if no sale is made. Given this uncertainty, the Proposal's requirements to ascertain the prescribed information about a prospective investor prior to recommending the non-traded REIT - without limiting such requirement to recommendations to retail customers covered by Reg BI - could require a meaningful operational change. If, however, NASAA's intent is for this section to apply to recommendations of non-traded REITs, then the Proposal should be revised to follow the Reg BI standard of care obligation rather than establish what appear to be entirely new set of obligations when making a recommendation.[9] In sum, NASAA should specify that the requirement to ascertain information about the prospective investor prior to recommending a non-traded REIT is specific to brokers or associated persons making recommendations to retail customers subject to Reg BI.[10]

Moreover, while the Request for Public Comment simply expresses an intent to update the conduct standards to incorporate Reg BI, the new standards of conduct would separately implement a heightened suitability standard for recommendations to non-retail customers. The Proposal would require broker-dealers or associated persons recommending non-traded REIT shares to a "non-retail customer" – a term not defined in the Proposal - to have a reasonable basis to believe that a purchase of share of a non-traded REIT is suitable *and appropriate* for such non-retail customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the non-retail customer's investment profile.[11] This clarification goes beyond the federal suitability standard applicable to customers not covered by Reg BI, by adding the term "appropriate" alongside "suitable," which suggests a heightened expectation than the standard under existing law. The addition of this heightened suitability standard is not necessary if NASAA simply intends to incorporate Reg BI.

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[9] See for example, Proposal III.C.2(b) and (c) which would require that each person selling or recommending a non-traded REIT to ascertain whether the retail customer (b) "can reasonably benefit from the REIT based on the prospective SHAREHOLDER'S overall investment objectives and portfolio structure" ; and (c) "is able to bear the economic risk of the investment based on the prospective SHAREHOLDER'S overall financial situation". Neither of these clauses appears in Regulation Best Interest's standard of care obligation which requires, among other things, that a broker dealer and its associated persons have "a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer". We would urge NASAA to revise the Proposal to adopt language that tracks this existing regulatory standard when a recommendation of a non-traded REIT is made.

[10] Compare to FINRA Rule 2011 (Suitability) ("A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile.") to the Proposal ("broker-dealers and associated persons must have a reasonable basis to believe that a purchase of SHARES of the REIT is suitable ***and appropriate*** for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile.")

[11] Proposal III.C.1.

3. The Proposal's Concentration Limits Would Create Regulatory Uncertainty, Operational Burdens, and Unnecessary Limits on Investor Choice

The proposed concentration limit framework is overly complex, seems designed to establish a national regulatory patchwork, lacks uniformity and clarity in both its application and definitions, imposes an unduly restrictive 10% cap that aggregates all DPPs, and fails to provide a standard accredited investor exemption—resulting in regulatory uncertainty, operational burdens, and unnecessary limits on investor choice. At a minimum, SIFMA and SIFMA AMG recommend that NASAA provide a clear accredited investor exemption to the concentration limits and stipulate that they not apply to direct participation programs, such as registered investment companies with a separate board of directors. Without these changes, the Proposal could redirect investors to less-regulated products.

A. Excessive Discretion Granted to State Securities Administrators

The proposed concentration limit framework would give significant discretionary authority to state securities administrators. Under Section III.D, for example, the sponsor must propose a "minimum concentration limit" that is "reasonable given the type of REIT and the risks associated with the purchase of shares," and the administrator evaluates and may adjust this limit.[12] This structure allows for potentially wide variation in standards, both in the initial proposal and in subsequent state-level review. Such broad discretion could lead to regulatory uncertainty and inconsistent application across jurisdictions, undermining NASAA's goal of uniform investor protection, and also creating operational challenges for sponsors and broker-dealers. Because of these challenges, the Proposal is likely to lead to broker-dealers being required to maintain additional books and records, which is in direct contradiction with the National Securities Markets Improvement Act[13].

B. Ambiguity of "Minimum Concentration Limit" and Sponsor's Role

The term "minimum concentration limit" is unclear. As drafted, it suggests that the concentration limit could vary by investor, REIT type, or risk profile, but the guidelines do not define how these variations should be determined or applied. This ambiguity could result in inconsistent application and confusion for both investors and those responsible for compliance. Additionally, it is unusual and problematic for the sponsor to be tasked with proposing a concentration limit, as sponsors are not in the best position to set investor protection standards. This approach could create potential conflicts of interest or the perception thereof. Regulatory standards should be set by regulators, not by the parties with a direct financial interest in maximizing sales.

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[12] Proposal III.D.
[13] 41 15 U.S.C. § 78o(i)(1) ("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, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this chapter.").

C. Lack of Uniformity Across States and Resulting Compliance Burdens

The Proposal would explicitly allow state administrators to set higher or lower concentration limits than the 10% default, and to determine whether the accredited investor exemption applies. This means that the same REIT product could be subject to different concentration limits in different states (e.g., one state could approve a 10% limit, while another requires 5%). This lack of uniformity would create significant compliance burdens. Among these, broker-dealers and sponsors would need to track and apply different concentration limits for the same product depending on the investor's state of residence. In addition, there is no guidance on who is responsible for communicating state-specific concentration limits to broker-dealers or how such information should be disseminated and updated. Lastly, in practice, firms may be forced to default to the most stringent state standard to avoid inadvertent violations, which could unnecessarily restrict investor access in less restrictive states.

D. Unclear Timing: Point of Sale vs. Ongoing Monitoring

The Proposal does not specify whether the concentration limit is a point-of-sale test or an ongoing requirement. This lack of clarity creates operational uncertainty for broker-dealers and sponsors. If the limit is ongoing, firms would need to monitor investor portfolios for compliance over time, which is administratively burdensome and may not be feasible given the lack of visibility into investors' holdings outside the firm. In order to comply with the proposed concentration limit, firms will need to build new systems and processes to adequately supervise concentration limits. The Proposal does not include an implementation period, which would be needed in order to make the necessary changes for adequate compliance..

E. The 10% of Liquid Net Worth is Too Restrictive and Overly Prescriptive

Setting a uniform 10% cap on liquid net worth for all non-traded REIT investments is overly restrictive and does not account for individual investor circumstances, risk tolerances, or portfolio strategies. Portfolio composition should be determined by investors and their advisors, not dictated by a one-size-fits-all regulatory cap. This approach may unduly limit investor choice and access to alternative investments.

F. Overbroad Inclusion of All DPPs in the Concentration Test

The Proposal's requirement that the 10% limit applies to aggregate investments in the REIT and "other non-traded direct participation programs," or DPPs, is unclear and problematic. DPPs encompass a wide range of products (REITs, BDCs, oil and gas programs, equipment leasing, commodity pools, etc.), each with different risk profiles and investment characteristics. Aggregating all DPPs for concentration testing purposes would be both overbroad and operationally challenging:

- Broker-dealers would need to build systems to aggregate all DPP holdings across product types and issuers, which may not be feasible, especially for legacy holdings or assets held away from the firm.
- The definition of DPPs is not sufficiently clear, increasing the risk of inconsistent application and compliance errors.

G. Lack of Clarity on Holdings of "Similar Products"

The Proposal references "other non-traded direct participation programs" but does not clearly define what constitutes a "similar product." This lack of specificity creates compliance risk and uncertainty for broker-dealers, sponsors, and investors. Clear definitions are essential to ensure consistent application and to avoid inadvertent violations.

H. Accredited Investor Exemption Should Be Uniform and Automatic

The Proposal would allow state administrators to decide whether to exempt accredited investors from the concentration limit. This undermines the concept of a uniform national standard. The accredited investor exemption should be standard and automatic, not subject to state-by-state or investor-by-investor approval. Accredited investors, by definition, have the financial sophistication and resources to make their own portfolio allocation decisions and should not be subject to arbitrary concentration caps.

SIFMA and SIFMA AMG appreciate the opportunity to comment on the Proposal. We stand ready to work with NASAA members to ensure that any guidance accurately reflects the characteristics of non-traded REITs, the needs of investors, and the obligations of financial professionals to act in their best interest. Should any member of NASAA or its staff have any questions about our comments, please feel free to contact us at mgibson@sifma.org or lkeljo@sifma.org.

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