Simpson Thacher & Bartlett LLP

425 LEXINGTON AVENUE
NEW YORK, NY 10017-3954

TELEPHONE: +1-212-455-2000
FACSIMILE: +1-212-455-2502

VIA ELECTRONIC MAIL May 28, 2025

Faith Anderson, Project Group Chair
Bill Beatty, Section Co-Chair
Erin Houston, Section Co-Chair
North American Securities Administrators Association
750 First Street NE, Suite 1140
Washington, DC 20002

RE: Proposed Revisions to NASAA Statement on Policy Regarding Real Estate Investment Trusts (March 25, 2025)

Dear Mses. Anderson and Houston and Mr. Beatty:

We welcome the opportunity to comment on the proposed amendments (the "Proposal") to the North American Securities Administrators Association ("NASAA") Statement on Policy Regarding Real Estate Investment Trusts (the "NASAA REIT Guidelines"), dated March 25, 2025, as modified from the previous proposal dated July 12, 2022 (the "Prior Proposal"). We sincerely appreciate NASAA's thoughtful consideration of the comments submitted in response to the Prior Proposal, and the meaningful revisions made to the Proposal in response thereto. Simpson Thacher & Bartlett LLP has significant experience representing sponsors and issuers of investment products, including non-traded real estate investment trusts ("non-traded REITs") and non-traded business development companies ("non-traded BDCs"). We submit the following comments on our own behalf and the views contained herein do not necessarily reflect the views of any of our clients.

Overview

We are the market leading firm that assists sponsors in developing investment products that are offered to ordinary Americans, sometimes referred to as "retail investors," including advising during the initial concept stage, negotiating with investors and intermediaries, and ultimately, launching the product. We wish to note that we strongly agree with NASAA's vision to "protect investors from fraud and abuse, educate investors, support responsible capital formation, and help ensure the integrity and efficiency of financial markets."[1] However, the concentration limit set forth in the Proposal, as drafted, will arbitrarily limit retail investors from accessing investment opportunities that can diversify their portfolios, and

[1] *Welcome to NASAA – NASAA Vision*, available at https://www.nasaa.org/about/.

will continue to result in more sponsors seeking alternative structures[2] that are not subject to state regulation to ensure their products are available to suitable retail investors that seek such diversification. We do not believe that this type of "regulatory arbitrage" serves the interests of retail investors.

For the reasons set forth below, we encourage NASAA to consider removing, or in the alternative, modifying, the restrictions in the Proposal – especially, the concentration limit.

Concerns Related to the Proposed Concentration Limit

The Proposal requires a sponsor to establish a concentration limit, subject to approval of each state administrator. However, the Proposal, if adopted, also would impose a default concentration limit that a person's aggregate investment in the applicable non-traded REIT and other non-traded direct participation programs may not exceed 10% of the investor's liquid net worth. The Proposal would also permit a state administrator to determine, in its discretion, whether to allow an exemption from the concentration limit for "accredited investors," as such term is defined in Regulation D of the Securities Act. For the reasons set forth below, we respectfully submit that the concentration limit should be removed or modified.

1. Prescriptive Concentration Limits Are Inconsistent with Regulation Regarding the Practices of Intermediaries.

We acknowledge that the Proposal has made certain positive modifications to the previously proposed concentration limit, including removing the reference to "affiliates" and modifying the definition of "direct participation programs" to exclude covered securities. However, we maintain the position outlined in our response to the Prior Proposal, and respectfully reiterate that any prescriptive concentration limit would be inappropriate.

Today, NAV REITs, i.e., those non-traded REITs that continuously offer and redeem at a price computed at the net asset value ("NAV") based on the values of the underlying investments they own, are largely distributed through the nation's largest broker-dealers and investment advisers. These broker-dealers and investment advisers and their financial professionals are subject to Regulation Best Interest ("Reg BI"), promulgated by the Securities and Exchange Commission (the "SEC"), or the fiduciary standard under the Advisers Act of 1940, as amended (the "Advisers Act"). Reg BI imposes heightened standard of care,

---

[2] We note the increasingly burdensome regulatory environment at the state level, the expense of which is largely borne by retail investors, has led to many sponsors using alternative structures to raise capital, including through private offerings in reliance on Regulation D promulgated under the Securities Act of 1933, as amended (the "Securities Act"), that are outside of the purview of state regulators. In fact, since 2023, nearly 80% of new REITs marketed to the "retail" market have been structured as "private offerings" rather than traditional non-traded REITs that are subject to the NASAA REIT Guidelines.

disclosure and conflict mitigation, while the Advisers Act imposes a duty of care and a duty of loyalty to ensure that financial recommendations are in the best interest of retail investors.

As detailed in our prior response letter, and as briefly noted in the Proposal, Reg BI imposes an enhanced standard of care, disclosure and conflict of interest obligations on broker-dealers and their associated persons. A broker-dealer and its associated persons must act in the "best interest" of retail customers when making any recommendation of any securities transaction or investment strategy, without putting the financial or other interests of the broker-dealer (or its associated persons) ahead of the retail customer. To form a reasonable basis that a product would be suitable for a retail customer, broker-dealers must consider important factors such as the security's or investment strategy's investment objective, characteristics (including any special or unusual features), liquidity, volatility and likely performance in a variety of market and economic conditions.[3] Furthermore, broker-dealers and their associated persons must consider a variety of factors specific to each retail customer when making a recommendation of a specific product, including, but not limited to, the retail customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the retail customer may disclose to the broker-dealer and/or the associated person.[4]

Similarly, the fiduciary standard under the Advisers Act imposes a duty of care and a duty of loyalty, which requires the investment adviser to, at all times, serve the best interests of its clients and not subordinate a client's interests to its own.[5] The duty of care requires, among other things, that the investment adviser not place its own interest ahead of its client's interests. A client's interest is understood based on a reasonable understanding of the client's investor profile. Accordingly, an adviser must make a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience and financial goals. To fulfill its duty of loyalty, an adviser must (i) make full and fair disclosure to its clients of all material facts relating to the advisory relationship and of all conflicts of interest that might incline an adviser – consciously or unconsciously – to render advice that is not disinterested and (ii) obtain a client's informed consent to such facts and conflicts. This combination of loyalty and care obligations has been characterized as requiring an investment adviser to act in its client's best interest at all times.[6]

Reg BI and the Advisers Act's fiduciary standard impose strict obligations on broker-dealers and investment advisers recommending securities to retail customers. These obligations require that financial professionals consider an individual client's circumstances rather than

---

[3] *See Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Exchange Act Release No. 34-86031; File No. S7-07-18 [84 FR 33669] (June 5, 2019) at 262.

[4] *See Id.* at 273.

[5] *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Advisers Act Release No. 5248; File No. S7-07-18 [84 FR 33669] (June 5, 2019) at 2.

[6] *See Id.* at 13.

apply a "one size fits all" approach and therefore provide better protection for retail investors. Among other things, these obligations require broker-dealers and investment advisers to tailor securities recommendations to each retail investor consistent with their individual profile and specific circumstances. Further, these obligations require investment advisers and broker-dealers to adopt and implement policies and procedures reasonably designed to prevent violations by the broker-dealer or investment adviser (and their associated persons) of Reg BI or the Advisers Act's fiduciary standard, as applicable. Such policies and procedures are subject to rigorous review through examination by the SEC and Financial Industry Regulatory Authority, Inc. These policies and procedures also require training to ensure financial professionals have the structure and guidance to understand how to form an adequate basis to make recommendations to, and investments for, retail customers that are consistent with customer investment objectives and risk profiles. On an individual level, certain investment adviser representatives and all registered representatives (of broker-dealers) are required to demonstrate their qualification by sitting for series examinations, or other professional licenses.

Because broker-dealers and investment advisers are required to understand the customer investment profile and characteristics of any investment recommendation, broker-dealers and investment advisers are in the best position to determine the appropriate level of exposure for each individual client. The Proposal's implication that a single concentration limit is appropriate for all investors, regardless of an investor's circumstances, is flawed and runs contrary to the fundamental principles of Reg BI and the Advisers Act. In other words, the Proposal would interfere with the relationship between retail investors and their chosen financial professionals to the detriment of the retail investor. Further still, breaches of duties under Reg BI or the Advisers Act on the part of a broker-dealer or investment adviser are subject to regulatory review, scrutiny and enforcement. In effect, the Proposal would set aside the considered judgment of the SEC regarding the relationship of a financial intermediary with his or her client, and substitute NASAA's judgment for that of the SEC (regarding the relationship between an intermediary and his or her client), individual financial professionals and the ordinary Americans they serve. The Proposal provides the theoretical opportunity to allow for a higher concentration limit when appropriate, but in the discretion of the state administrator rather than the investor's financial professional.[7] A state administrator is not in

[7] Importantly, even if a state administrator determined that a particular non-traded REIT merited a higher concentration limit, this would have limited practical effect because the Proposal applies the concentration limit to all non-traded direct participation programs. For example, if an investor invested 6% of his/her liquid net worth in "Non-Traded REIT A" for which the applicable state administrator allowed a 20% concentration limit, the investor would still be prohibited from investing an additional 6% in "Non-Traded REIT B" if "Non-Traded REIT B" were subject to the default 10% concentration limit. The fact that "Non-Traded REIT A" was permitted a higher concentration limit by such state makes no difference in what amount the investor is permitted to invest into "Non-Traded REIT B." Further, an unintended consequence of the aforementioned fact pattern is that such investor would be limited in diversifying its portfolio, as it would be unable to purchase additional interests in "Non-Traded REIT B" (which may have distinct investment risks and attributes from "Non-Traded

a position to make an informed decision about what level of investment is in the best interests of an individual retail investor because the state administrator necessarily does not have insight into, and does not consider, the investor's individual financial circumstances and goals. The investor's financial professional by nature of his or her role and statutory obligations is required to obtain the information related to, and has the responsibility to consider, an investor's individual circumstances. Further, an investor also chooses his or her financial professional and thus elects a certain investment style, a decision that is significantly personal and not taken lightly for most retail investors. Accordingly, the investor's financial professional is better suited to determine any concentration limits that should apply to that individual investor.

Ultimately, we remain convinced that a systematic substitution of judgment by state administrators in place of the judgment of the individuals the Proposal purports to protect is not a wise policy decision. We have significantly greater doubts that it is appropriate for the several states to regulate an area with this level of prescription when the SEC has promulgated standards applicable throughout the nation designed to regulate the same investment recommendations.

2. If Any Concentration Limit is Applied, then:

    a. The Concentration Limit Should Not Include Other Non-Traded Direct Participation Programs.

Should NASAA adopt a concentration limit, we strongly recommend that "other non-traded direct participation programs" be removed from the concentration limit.

We acknowledge that while the Proposal no longer limits a person's investment in affiliates of the issuer, it continues to restrict a person's investment in other direct participation programs. We further acknowledge that "direct participation programs" has been defined to exclude any federal and state exempt private offerings and any companies registered under the Investment Company Act of 1940, but respectfully submit that the definition is imprecise and inadequately limits the scope of other direct participation programs that are materially different from non-listed REITs.

The definition of "direct participation programs" provided in the Proposal encompasses a wide range of program types, including non-traded BDCs, oil and gas programs, equipment leasing programs, commodity pools and other programs of a similar nature providing flow through tax benefits, each with distinct risk profiles and business models as compared to non-traded REITs. For example, a non-traded REIT focused on real property has dramatically different investment exposures than a non-traded BDC that invests primarily in corporate credit, or from an oil and gas direct participation program that provides exposure to the energy sector.

REIT A") or may be forced to over-allocate to "Non-Traded REIT A" to achieve desired alternative allocation. This also illustrates that the state administrator would not have knowledge of what investments are in the investor's portfolio, whereas the investor's financial professional would, and is therefore better suited to make investment recommendations.

Furthermore, the reference to "other programs of a similar nature providing flow through tax benefits" is overly broad and risks capturing a wide range of direct participation programs that may offer flow-through tax treatment but operate under distinct regulatory and economic frameworks. An investor seeking diversification across multiple sectors through non-correlated direct participation programs would be unfairly restricted by putting these very different investment strategies under the same low concentration limit. For example, an investor allocating 3% of their liquid net worth to a non-traded REIT, 4% of their liquid net worth to a private credit fund and 4% of their liquid net worth to an equipment leasing program would exceed the proposed limit despite maintaining a low concentration in each distinct asset class. By implementing a concentration limit on direct participation programs with such varying investment objectives and asset classes, NASAA would be detrimentally limiting an investor's ability to diversify his or her portfolio, and again, substituting the judgment of state administrators for the judgment of individual financial professionals and their clients.

If NASAA does not remove "direct participation programs" from the concentration limit, we recommend that NASAA revise the definition of "direct participation programs" to clarify that this limit would only apply to direct participation programs with similar investment strategies to those of non-traded REITs.

NASAA primarily cites the liquidity risks inherent in these direct participation programs as a reason to impose a concentration limit. While NAV REITs provide enhanced liquidity compared to lifecycle REITs,[8] we acknowledge that NAV REIT securities have more limited liquidity compared to listed securities with an active secondary trading market.[9] While it is

[8] Before 2016, the non-traded REIT industry was predominately lifecycle REITs. These lifecycle REITs were designed as finite-life vehicles with a life of 5 to 9 years at which time they would seek a liquidity event. Redemptions were generally limited to up to 5% of the weighted average number of shares outstanding during the prior 12-month period and often reflected either arbitrary or penalizing valuations to discourage redemption request except for hardship situations. In contrast, NAV REITs have an enhanced opportunity for liquidity through regular repurchases at NAV per share at a time chosen by investors subject to certain limitations.

[9] We note, however, that NASAA does not acknowledge that listed securities are historically more volatile than non-traded securities. As a basis for imposing a concentration limit, the Proposal cites the risks of investing in non-traded REITs, and, in particular, their "limits on liquidity," noting where certain non-traded REITs did not fully satisfy repurchase requests from investors in recent years. However, the Proposal fails to acknowledge that even while such issuers prorated repurchase requests (which, we further note was in accordance with the issuer's share repurchase plans, as disclosed to investors at the outset of their investment), such non-traded REITs have provided over $33.5 billion in liquidity to investors since 2023 at NAV. Source: Robert A. Stanger & Co., Inc. We'd also note that, in comparison to NAV REITs that repurchase shares at NAV, which is based on the values of its underlying investments, publicly traded REITs have generally traded at discounts to NAV. For example, "publicly listed US equity REITs ended March 31, 2025, at a median 16.5% discount to their consensus NAV per share estimates." See S&P Global, "NAV Monitor: US equity REITs

always prudent for an investor to have sufficient liquidity, a rational investor may seek to have a portion of his or her portfolio in investments that are less liquid (particularly when holding investments for the longer term) if such investments historically have less volatility and/or offer different return profiles (including lower correlation to the broader listed securities markets, i.e., a means to diversify investment allocation). How much of an investor's investment portfolio should be in less liquid investments is a decision best left to the investor and his or her financial professional who, unlike a state regulator, are aware of the investor's financial circumstances and goals.

In the Prior Proposal, NASAA notes, in particular, that less liquid investments may be less appropriate for elderly investors.[10] We do not disagree that many elderly investors will have more need for short term liquidity than younger investors. However, the Proposal makes no differentiation by age; investors whether young or old and regardless of circumstances would be subject to the same proposed 10% limit. Further, under the NASAA REIT Guidelines

---

trade at higher discount at March-end" available at https://www.spglobal.com/market-intelligence/en/news-insights/articles/2025/4/nav-monitor-us-equity-reits-trade-at-higher-discount-at-marchend-88342428. In addition, during volatile market events publicly traded REITs have traded significantly below their NAV. For example, certain publicly traded mortgage REITs traded down over 80% in a one-month period between February 2020 and March 2020 as a result of Covid-19. See Wolf Street, "Four Mortgage REITs Collapse After Chaos Hit Markets for Residential & Commercial Mortgage-Backed Securities" available at https://wolfstreet.com/2020/03/24/four-mortgage-reits-collapse-after-chaos-hit-16-trillion-market-for-residential-commercial-mortgage-backed-securities/. The Proposal does not acknowledge that while publicly traded REITs may offer a secondary market on which shares may be traded, such liquidity is subject to a discount, which may be significant and is borne entirely by investors. The Proposal suggest that liquidity, no matter at what cost, is the primary objective for *all* investors, which we, respectfully, disagree. For example, during certain of these periods where NAV REITs did not fully satisfy repurchase requests in accordance with their share repurchase plans, certain third-party entities launched mini-tender offers to provide additional liquidity, but at steep discounts to the REITs' NAV. We suggest these third-party tender offers are similar to the liquidity provided by active trading markets during market volatility, whereby investors bear the cost. See, e.g., U.S. Securities and Exchange Commission, "Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers," available at https://www.sec.gov/rules-regulations/2000/07/commission-guidance-mini-tender-offers-limited-partnership-tender-offers; see also, e.g., "InPoint Commercial REIT Tells Stockholders to Reject Third Party's Mini-Tender Offer" at https://altswire.com/inpoint-commercial-reit-tells-stockholders-to-reject-third-partys-mini-tender-offer/ (noting that West 4 Capital LP offered to purchase at a *53.6% discount* to NAV, which is similar to discounts that existed for publicly traded REITs during market volatility events).

[10] In the Proposal, NASAA states non-traded REITs are "heavily marketed" to elderly investors, perhaps suggesting that elderly investors (more than other investors) are a target for non-traded REITs. However, NASAA does not provide any data substantiating this suggestion other than anecdotal advice for elderly investors to consider the risks of these products.

persons selling non-traded REIT securities must already consider the investor's age in determining whether the investment is suitable for the investor. As previously noted, Reg BI and the Advisers Act also require that an investor's age be considered when recommending an investment product or securities strategy.

b. NASAA Should Require a Categorical Exemption for Accredited Investors.

Should NASAA adopt a concentration limit, we strongly recommend an exemption for "accredited investors," as defined in Regulation D under the Securities Act, or alternatively another standard. We respectfully note that, in its 2016 proposed revisions to the NASAA REIT Guidelines, NASAA proposed a similar concentration limit but would have included an exemption for investors that meet the definition of an "accredited investor" as defined in Regulation D under the Securities Act, and therefore, our recommendation is not without precedent.

As drafted, the Proposal allows a state administrator to determine whether to exclude from the concentration limit any investor that meets the definition of an "accredited investor" based on the same factors considered when determining the appropriate concentration limit for a given offering. This allows the state administrator to apply the exclusion selectively across different offerings, even though the accredited investor definition is broadly "intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investments or fend for themselves render the protections of the Securities Act's registration process unnecessary."[11]

We do not believe it is in the purview of a state administrator to assess the appropriateness of an investment for an accredited investor when the SEC has determined these investors do not require such protection. Granting a state administrator the discretion to determine whether to exempt accredited investors from the concentration limit undermines the SEC's established accredited investor framework, which recognizes that such investors are sufficiently sophisticated and do not require this type of protection, even when there is greater investor risk. Sophisticated investors are capable of making their own investment decisions and wealthier investors, simply by virtue of having greater overall resources, are able to tolerate a greater percentage of limited liquidity in their portfolio than are less wealthy investors. By not requiring a categorical exemption for accredited investors from concentration limits, the Proposal substitutes the judgement of the SEC with the that of an individual state administrator. Moreover, the inconsistent application of the exemption across jurisdictions and individual products could result in unnecessary regulatory variability and inequity in the market.[12]

---

[11] *See Regulation D Revisions; Exemption for Certain Employee Benefit Plans*, Securities Act Release No. 33-6683 [52 FR 3015] (Jan. 16, 1987).

[12] In particular, we note that many broker dealers will apply the most restrictive standard of the states across all clients regardless of state of residence, as it is unduly burdensome from an operational standpoint to bifurcate product availability on a state-by-state basis.

Finally, it is logical to require the exclusion of accredited investors from any concentration limit since these accredited investors would also be eligible to invest without limit in private securities offerings that are not subject to state regulation. Indeed, a non-traded REIT that is identical in all respects to one offered to retail investors can be limited to accredited investors and sold privately. Such private REITs have less transparency, less oversight by both the SEC and states, and are not subject to the investor protections included in the NASAA REIT Guidelines (e.g., independent director requirements and related transactions subject to independent director approval, among other things). This is precisely the type of regulatory arbitrage that the states should want to avoid.

c. The Concentration Limit Should Apply Only to Non-Traded REITs that Do Not Provide Liquidity At Least on a Quarterly Basis.

Should NASAA adopt a concentration limit, we strongly recommend that such limitation only apply to non-traded REITs and other public direct participation programs that do not provide liquidity based on NAV at least on a quarterly basis.

NAV REITs, unlike legacy lifecycle REITs, provide routine liquidity to investors through monthly and/or quarterly repurchase programs that are subject to certain limitations. Many states have required NAV REITs to revise their share repurchase plans to remove language related to the ability of the board of directors to terminate the repurchase program, an amendment with which we generally do not disagree. However, the Proposal cites the limitation and suspension of some repurchase programs as evidence of liquidity risks in non-traded REITs and as justification for a concentration limit. In the Proposal, NASAA fails to cite the numerous non-listed NAV REITs that have consistently satisfied repurchase requests, even through periods of market volatility. Significantly, we note that NAV REITs have provided more than $33.5 billion of liquidity to investors through their share repurchase plans from 2023 through March 31, 2025, and in each case, have provided such liquidity at NAV.[13] Furthermore, although certain NAV REITs limited repurchases in the past few years due to elevated repurchase requests and amid interest rate volatility, it is important to note that repurchases were generally within the disclosed 2%/5% limits, investors continued to receive partial liquidity, the programs remained active and transparent and provided protection to investors who did not request liquidity (through preventing "fire sales" of assets to ensure liquidity for some, but at the expense of other REIT investors). The performance of non-traded

---

Accordingly, for such broker dealers, the inclusion by one state of a concentration limit (or lower limit than others) would essentially gut the Proposal's intent of allowing states to determine the appropriate standard, if any.

[13] See Footnote 9 for a discussion of liquidity considerations for NAV REITs and publicly traded REITs. Further, as of March 31, 2025, NAV REIT repurchase requests that remained unsatisfied represented less than 1% of the aggregate NAV of NAV REITs. Source: Robert A. Stanger & Co., Inc.

NAV REITs through the COVID-19 pandemic[14] and the more recent market dislocation shows that NAV REITs do not present the same level of liquidity risk as other direct participation programs that do not provide liquidity on at least a quarterly basis and therefore, should be exempt from any adopted concentration limit.

3. The Concentration Limit May Have Unintended Consequences and Diminish Investor Protections.

Should NASAA adopt a concentration limit, we respectfully submit that such concentration limit may lead to unintended consequences and diminish investor protections.

In response to a stricter concentration limit, many sponsors and distributors may continue to consider alternative avenues to raise capital, which may be outside of the purview of state regulators. For example, sponsors and distributors may increase private offerings pursuant to Regulation D under the Securities Act, register products as investment companies under the Investment Company Act or pursue other structures that are not subject to state review. Accordingly, NASAA's objectives to increase investor protections through the Proposal would likely inspire market participants to instead reach investors through products that are not regulated by the states at all.

Conclusion

We appreciate the opportunity to submit, and NASAA's consideration of, our comments to the Proposal. Should NASAA have any questions regarding these comments, please feel free to contact Rajib Chanda at 202-636-5543 or rajib.chanda@stblaw.com, Benjamin Wells at 212-455-2516 or bwells@stblaw.com, Daniel B. Honeycutt at 202-636-5924 or daniel.honeycutt@stblaw.com, or Evan Hudson at 212-455-7016 or Evan.Hudson@stblaw.com.

Sincerely,

Simpson Thacher & Bartlett LLP

SIMPSON THACHER & BARTLETT LLP

---

[14] *See NAV REITs Post Year-to-Date 2020 Gains and Far Superior Performance to Listed REITs Over the Last 36 Months Despite Real Estate Struggles Due to COVID-19*, Robert A. Stanger & Co., Inc., Press Release (Nov. 2, 2020), available at https://irei.com/wp-content/uploads/2021/01/Press-Release-11-2-2020-IPA-Stanger-Monitor-.pdf; *NAV REITs Continue to Outperform Their Traded Counterparts as Impact of COVID-19 Appears in the Rearview Mirror*, Robert A. Stanger & Co., Inc., Press Release (Apr. 28, 2021), available at https://irei.com/wp-content/uploads/2021/04/Press-Release-4-28-2021-IPA-Stanger-Monitor.pdf.