

August 3, 2022

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

Dear Ms. Seidt and Mr. Heuerman:

The Investment Company Institute<sup>1</sup> (“Institute”) appreciates the opportunity to comment on NASAA’s *Proposed Revisions to NASAA Statement of Policy Regarding Real Estate Investment Trusts* (July 12, 2022) (the “Proposal”). If adopted, NASAA’s Proposal would revise NASAA’s existing Statement of Policy Regarding REITs to:

- Update conduct standards for brokers selling non-traded REITs;
- Update suitability requirements for these products;
- Add a concentration limit to the suitability section; and
- Prohibit using gross offering proceeds to make distributions.

Because the Institute’s members are not in the business of offering REIT products, we offer no comment on many of the Proposal’s substantive requirements directly impacting REITs or the sale of REITs. However, we are concerned with the broad scope of the proposed concentration

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<sup>1</sup> The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of \$29.6 trillion in the United States, serving more than 100 million investors, and an additional \$9.3 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](http://www.ici.org).

limit that potentially could impact registered investment companies. In particular, the Proposal would apply a 10 percent concentration limit on a person's aggregate investment in a REIT, its affiliates, and other non-traded direct participation programs.<sup>2</sup> The Proposal defines the term "affiliate" of another person to include persons that: (a) directly or indirectly own, control, or hold, with power to vote 10 percent or more of the outstanding voting securities of another person; or (b) that directly or indirectly control, are controlled by, or under common control with another person.<sup>3</sup> Because of the breadth of the term "affiliate," it is likely that states could deem certain Federally-registered investment companies and investment advisers to be "affiliates" of a REIT subject to the Proposal's concentration limit. Likewise, the reference to "non-traded direct participation programs" without a clear definition or description of such term potentially could result in states misapplying the concentration limit to Federally-registered investment companies.<sup>4</sup> And yet, applications to such entities would violate the provisions of the National Securities Markets Improvement Act of 1996 (NSMIA), which expressly preempts the states' authority to regulate such persons.<sup>5</sup>

To address these concerns, we strongly recommend that NASAA revise the definition of "affiliate" and clarify the term "non-traded direct participation programs" in the Proposal, consistent with NSMIA, to exclude any Federally-registered investment companies or investment advisers.

In addition, while the Institute does not represent the interests of broker-dealers, we note that many of the provisions in the Proposal would violate Section 15(i) of the Securities Exchange Act of 1934 as enacted by NSMIA. Section 15(i) provides as follows:

(i) **LIMITATIONS ON STATE LAW**

**(1) CAPITAL, MARGIN, BOOKS AND RECORDS, BONDING, AND REPORTS**

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, **making and keeping records**, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government

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<sup>2</sup> Section III.D.3. of the Proposal states that "Unless the ADMINISTRATOR determines that the risks or other factors in III.D. associated with the REIT would require lower or higher standards, a PERSON's aggregate investment in the REIT, its AFFILIATES, and other non-traded direct participation programs shall not exceed 10% of the PERSON's liquid NET WORTH."

<sup>3</sup> See Section I.B.5. of the Proposal (defining "affiliate" of another person).

<sup>4</sup> We note that FINRA Rule 2310 broadly defines a "direct participation program" as "a program which provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution." See FINRA Rule 2310(a)(4), available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2310>. FINRA's definition, however, includes a specific exception for "any company including separate accounts, registered pursuant to the Investment Company Act." *Id.*

<sup>5</sup> See Section 18 of the Securities Act of 1933 and Section 203A of the Investment Advisers Act of 1940 as amended by NSMIA.

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securities brokers, or government securities dealers **that differ from, or are in addition to, the requirements in those areas established under this chapter.** The Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this chapter. [Emphasis added.]

The Proposal would require a broker-dealer offering or selling REITs to create and maintain records to document its compliance with various provisions in it (*e.g.*, the suitability and conduct standards). And yet, Section 15(i) of the Exchange Act prohibits states from requiring Federally-registered broker-dealers to require the making and keeping of any records not required by the Securities Exchange Act or FINRA's rules under such Act. As such, these requirements in the Proposal would also violate NSMIA.<sup>6</sup> The Institute additionally strongly recommends that NASAA revise the Proposal to ensure that it does not run afoul of the limits NSMIA has imposed on the states' authority over Federally-registered broker-dealers.

The Institute appreciates the opportunity to share these brief comments with you and the Project Group on NASAA's Proposal. If you have any questions concerning these comments, please do not hesitate to let us know.

Regards,

/S/

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/S/

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Associate General Counsel

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<sup>6</sup> There may be provisions in the current version of the Statement of Policy Regarding REITs that violate Section 15(i) and are, therefore, unenforceable.