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CLIENT ALERT

NASAA Reproposes Changes to the REIT Guidelines

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AUTHOR

Martin R. Miller

On March 25, 2025, the North American Securities Administrators Association, Inc. ("NASAA") announced it is seeking public comment on a revised set of proposed changes to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "REIT Guidelines"). NASAA previously requested public comment on proposed revisions to the REIT Guidelines in July 2022 that were not subsequently adopted.[1] NASAA is a membership organization of securities regulators of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, the 13 provinces and territories of Canada, and the country of Mexico that represents those regulators' interests and works to coordinate state regulation of broker-dealers, investment advisers and securities offerings. NASAA's Sections and Project Groups[2], made up primarily of employees of the member regulators, propose Statements of Policy and other guidance to be adopted by the NASAA membership for use by state regulators, including the REIT Guidelines.

[1] *See* "NASAA Proposes Changes to the REIT Guidelines" Willkie Farr & Gallagher LLP Client Alert (July 22, 2022), available here.

[2] The Corporation Finance Section ("Section") and the Direct Participation Programs Project Group ("Project Group") of NASAA have proposed these changes to the REIT Guidelines. *See* the Request For Public Comment here.

Since 1996, the Securities Act of 1933, as amended, has provided a preemption of the substantive state securities law requirements for a number of types of securities and offerings. However, certain securities offerings, including publicly offered real estate investment trusts that do not list their securities on a stock exchange ("non-traded REITs"), remain subject to state securities law registration requirements and to review by state securities regulators in addition to review by the Securities and Exchange Commission (the "SEC"). The REIT Guidelines have been adopted by a number of state securities regulators or used by their staff in reviewing such offerings.[3]

The REIT Guidelines were last amended in 2007 and set out requirements for REIT sponsors and advisers, and persons selling REITs, including provisions dealing with suitability of investors, conflicts of interest, investment restrictions, and rights of shareholders as well as disclosure and marketing.

Proposed Changes

In this revised request for comment NASAA has proposed revisions to the REIT Guidelines in three areas:

(1) Adding a new Conduct Standard definition applicable to persons sponsoring or selling shares of non-traded REITs, and specifically including the SEC's Regulation Best Interest ("Reg BI") which already requires broker-dealers and associated persons recommending securities to retail customers as defined in that regulation to act in the best interest of such customers, and other standards that may be adopted by self-regulatory organizations or under federal or state law;[4]

(2) Increasing the investor net income and net worth suitability thresholds. Currently, an investor would be required to have $70,000 of annual gross income and net worth of $70,000 or net worth of $250,000 to purchase non-traded REIT securities. The proposal would increase those thresholds to $100,000 of annual gross income and net worth of $100,000 or net worth of $350,000, to account for inflation since the last adjustment.[5] The proposal would now also include a provision to require a periodic inflation update to those threshold amounts every five years; and

(3) Adding a new standardized concentration limit for investments in a REIT, or other non-traded direct participation programs[6] of no more than 10% of the investor's liquid net worth to the suitability section.[7] Unlike the 2022 proposal,

3 The REIT Guidelines are currently used by the securities regulators in Alabama, Arizona, Arkansas, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming.

4 Unlike the 2022 proposal, the new proposed revisions to the REIT Guidelines will not also add persons providing investment advice on non-traded REIT shares to those required to comply with investor suitability requirements. However, like the 2022 proposal, the new proposal would add a prohibition of indemnification to associated persons, investment advisers or investment adviser representatives for violations of conduct standards in addition to violations of federal or state laws, and add items such as "tax status," "investment time horizon," "liquidity needs," and "risk tolerance" to the items of information that a financial professional should obtain for determining the suitability of the investor.

5 The 2022 proposal was to raise the amounts to $95,000, $95,000 and $340,000, respectively.

6 The new proposal would also include a definition of "direct participation program" that specifically excludes federal and state exempt private offerings and investment companies registered under the Investment Company Act of 1940.

7 Unless the state securities administrator determines that risks and other factors associated with the REIT would require a higher or lower standard. Currently a number of states impose their state-specific concentration limits which are similar but vary from state to state and in a number of cases are less restrictive than this new proposed limit. Non-traded REIT prospectuses include a section listing those for each state that imposes them.

the limit would not include affiliates of the issuer and would allow for investors that qualify as accredited investors as defined under Rule 501(a) of Regulation D to be excluded from the limit. Liquid net worth is to be defined as net worth consisting of cash, cash equivalents, and readily marketable securities.

In contrast to the 2022 proposal, the current proposal will not include a prohibition against using gross offering proceeds to make distributions.

The revisions to the REIT Guidelines, if adopted, have the potential to influence updates to other Guidelines, including those for Asset-Backed Securities, Commodity Pools, Equipment Leasing, Mortgage Programs and Real Estate Programs (other than REITs) and the Omnibus Guidelines.

The deadline for public comment is May 28, 2025. After reviewing the comments, the Section and Project Group will consider whether to present the proposed revisions to the REIT Guidelines, in their current or revised form, to the NASAA Board of Directors for potential adoption by vote of the NASAA membership.

If you have any questions regarding this client alert, please contact the following attorney or the Willkie attorney with whom you regularly work.

Martin R. Miller

212 728-8690
mmiller@willkie.com