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via email to pubcom@finra.org

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K. St., NW
Washington, DC 20006-1506

Re: FINRA Notice 23-09 – Request for Comment on FINRA Rules Impacting Capital Formation

Dear Ms. Mitchell:

The Alternative and Direct Investment Securities Association (“ADISA”)¹ is writing to respond to The Financial Industry Regulatory Authority, Inc.’s (“FINRA”) request for comment on FINRA Rules impacting the capital formation process contained in FINRA Notice 23-09.

ADISA’s membership includes retail broker dealers as well as managing broker dealers involved in the marketing of alternative investments, including non-listed REITs and BDCs, interval funds, closed end funds, and private placements, among others. As such, the broad range investment products ADISA membership is involved with are particularly impacted by FINRA Rules 2210, 2310 and 5110. In anticipation of responding to Notice 23-09, ADISA surveyed its membership to identify the most important changes within these rules which would assist in the capital formation process. The comments below reflect the feedback from our survey.

FINRA Rule 2210 - Communications with the Public

FINRA Rule 2210 sets forth the requirements for broker dealer communications with the public, including retail and institutional communications and correspondence. Rule 2210(d)(1)(F) contains limited exemptions from the prohibition on providing performance projections. As stated in Notice 23-09, in Notice 17-06, FINRA requested comment on expanding the exemptions to include “(iv) A customized hypothetical investment planning illustration that projects performance of an asset allocation or other investment strategy and not an individual

¹ ADISA (Alternative & Direct Investment Securities Association), is the nation’s largest trade association for the non-traded alternative investment space (i.e., retail vs. institutional). Through its 4,500 financial industry members (close to 900 firms), ADISA reaches over 220,000 finance professionals, with sponsor members raising in excess of \$200 billion in 2021-2 alone, serving more than 1 million investors. ADISA is a non-profit organization (501c6), registered to lobby, and also hosts a related 501c3 charitable non-profit (ADISA Foundation) assisting with scholarships and educational efforts.

security, provided that: a. there is a reasonable basis for all assumptions, conclusions and recommendations; and b. the illustration clearly and prominently discloses: (I) that the illustration is hypothetical; (II) that there is no assurance that any described investment performance or event will occur; and (III) all material assumptions and limitations applicable to the illustration.” Within Notice 17-06, FINRA additionally inquired “[a]re there single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate?”

ADISA believes that real estate funds should be considered an investment product which operates like an asset allocation or other investment strategy. An investor typically invests in real estate funds to meet a specific asset allocation goal and provide diversification within the investor’s portfolio, with performance of the fund typically not correlated to public market volatility. There is ample historical real estate performance data which could be utilized and provided to investors which informs the performance projections of such investments, including by asset class, geography, market rents, occupancy, etc. Additionally, there is actual historical data for existing real estate assets, upon which to base projections, including rent rolls, occupancy, existing lease agreements and terminations. Of course, the projections would need to be accompanied by risk disclosures including that past performance does not indicate future returns, investment risks, economic forecast risks, that the disclosure is hypothetical and the projected performance may not materialize. Other types of investments which have similar historical data and anticipated performance should be considered as well, including credit/lending investment products, for which historical performance measures are available calculated based on industry, credit rating, default rates terms, market performance and transactions, public indices, etc.

Rule 2310 - Direct Participation Programs

FINRA Rule 2310 sets forth requirements surrounding investments which are publicly offered direct participation programs (DPPs) and with regard to certain requirements, publicly offered real estate investment trusts (REITs).

Rule 2310(b)(3) addresses due diligence required by the member firm prior to participation in a public offering of a DPP or REIT. Rule 2310(b)(3)(C) discusses the reliance by a member firm on due diligence conducted by another member firm, but does not address reliance by a member firm on due diligence conducted by a third-party due diligence firm.

Numerous FINRA member firms rely, in part, on third-party due diligence firms to review and report on numerous aspects of DPPs and REITs, including the disclosure contained in the offering materials. The utilization of third-party due diligence firms is contemplated elsewhere in FINRA guidance (ie: Notice 08-35, Footnote 6) and ADISA membership feels it would be beneficial to include guidance on how member firms can rely on third-party due diligence for purposes of complying with subsections (A) and (B) within Rule 2310(b)(3).

Rule 5110 - Corporate Financing Rule — Underwriting Terms and Arrangements

FINRA Rule 5110 sets forth filing, disclosure, valuation and other terms concerning underwriting compensation in public offerings.

Rule 5110 Supplementary Material .01 Underwriting Compensation categorizes all due diligence expenses as underwriting compensation.

ADISA membership expressed the need for guidance on what is considered a reasonable underwriting compensation limit. By not providing a limit, in the form of percent of offering proceeds or otherwise, this has the result of potentially lengthening the FINRA review process by way of additional comments and responses, increasing costs to the issuer and thus to investors, and lengthening the time it takes to go to market with offerings.

ADISA membership expressed that due diligence costs under Rule 5110 should not be considered underwriting compensation as those costs are operational in nature and associated with the member's obligations under Regulation BI and assessing adequate disclosure in offering documents, among others.

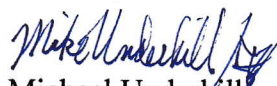
In the alternative, ADISA recommends that due diligence costs be bifurcated in a manner similar to Rule 2310. Rule 2310 bifurcates due diligence expense reimbursement to the member between issuer costs and underwriting compensation based on the presence of a detailed and itemized invoice – where costs based on a detailed and itemized invoice are considered issuer costs and other are included in non-accountable expense allowance.

ADISA membership also expressed that FINRA impose a time frame within which FINRA would provide comments/responses to Rule 5110 filings similar to that of the Securities and Exchange Commission (“SEC”). The SEC generally responds to a registration statement filings within 30 days. This would create additional certainty in timing of the FINRA review process and potentially shortening the time it takes an issuer to come to marketing with an offering.

General Comment – Not Tied to a Specific Existing FINRA Rule

ADISA membership expressed that it would be extremely helpful to have FINRA correspondence regarding offering materials required to be filed with FINRA be publicly available similar to SEC comment letters' availability on EDGAR. Having such correspondence publicly available would create a repository of guidance available to issuers during the investment product development phase to determine acceptability of compensation and other disclosures by required FINRA, creating more certainty in the product development and review process, thus streamlining the process of bringing investment products to market and streamlining the capital formation process.

Sincerely,



Michael Underhill
President

cc: Drafting committee--ADISA's Legislative & Regulatory Committee, Catherine Bowman and John H. Grady, Co-chairs