

**ASSOCIATION YEAR 2011-2012
CHAIR**

Linda J. Rusch
P.O. Box 3528
721 North Cincinnati Street
Spokane, WA 99220

CHAIR-ELECT

Martin E. Lybecker
607 Fourteenth Street NW
Washington, DC 20005

VICE CHAIR

Dixie Johnson
Suite 800
1001 Pennsylvania Avenue, NW
Washington, DC 20004

SECRETARY

Paul "Chip" Lazard Lion, III
755 Page Mill Road
Palo Alto, CA 94304

BUDGET OFFICER

Renie Yoshida Grohl
8300 Fox Hound Run, NE
Warren, OH 44484

CONTENT OFFICER

Jonathan C. Lipson
975 Bascom Mall
Madison, WI 53706

IMMEDIATE PAST CHAIR

Lynne B. Barr
Exchange Place
53 State Street
Boston, MA 02109

SECTION DELEGATES TO

THE ABA HOUSE OF DELEGATES

Lynne B. Barr
Boston, MA

Mary Beth Clary
Naples, FL

Maury B. Poscover
St. Louis, MO

Steven O. Weise
Los Angeles, CA

COUNCIL

Margaret M. Foran
Newark, NJ

Lawrence A. Homermesh
Wilmington, DE

Myles V. Lynk
Tempe, AZ

Christopher J. Rockers
Kansas City, MO

Jolene A. Yee
Modesto, CA

Doneene Keemer Damon
Wilmington, DE

Jean K. FitzSimon
Philadelphia, PA

Lawrence A. Goldman
Newark, NJ

Joel I. Greenberg
New York, NY

Donald C. Lampe
Greensboro, NC

Warren E. Agin
Boston, MA

Patrick T. Clendenen
Boston, MA

Frances Gauthier
Geneva, Switzerland

Samantha Horn
Toronto, ON

Peter J. Walsh, Jr.
Wilmington, DE

Michael St. Patrick Baxter
Washington, DC

Carol Hansell
Toronto, ON

Ben F. Tennille
Winston Salem, NC

April 9, 2012

Submitted via pubcom@finra.org

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, D.C. 20006-1506

Re: FINRA Regulatory Notice 12-14

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA"), in response to the request for comments published by the Financial Industry Regulatory Authority, Inc. ("FINRA") in Regulatory Notice 12-14 (March 2012) (the "Proposing Notice"). Pursuant to the Proposing Notice, FINRA is proposing to amend National Association of Securities Dealers, Inc. ("NASD") Rule 2340 (to be renumbered FINRA Rule 2231) (Customer Account Statements) to revise the per share estimated value reported by FINRA members on customer account statements with respect to the securities of public non-traded direct participation program ("DPP") and real estate investment trust ("REIT") securities (the "Revised Proposal"). FINRA previously published for comment an initial proposal of the proposed amendments in FINRA Regulatory Notice 11-44 (September 2011) (the "Original Proposal") and the Committee submitted a comment letter to FINRA with respect thereto dated November 16, 2011 (the "Prior ABA Comment Letter").

This letter was prepared by members of the Subcommittee on FINRA Corporate Financing Rules of the Committee.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

I. General Comments

We thank FINRA for taking the extra step of publishing the Revised Proposal for further comment in light of the comments received with respect to the Original Proposal. As indicated in the Prior ABA Comment Letter, we support FINRA's efforts to enhance disclosure on customer account statements regarding the illiquidity and valuation of non-traded DPP and REIT securities. We agree with FINRA that the protections provided by NASD Rule 2340(c) would be enhanced by prohibiting FINRA members from continuing to disclose the offering price of the securities of a DPP or REIT program (together, the "Program") as the per share estimated value on customer account statements after the initial offering period, as the Program sponsors will then be in a position to develop a more relevant per share estimated value based on an analysis of Program assets, liabilities, operations and other relevant factors.

Net Offering Price Disclosure Is Optional: We support FINRA's determination to permit a FINRA member to refrain from including the net offering price on customer account statements during the initial offering period, and to list the securities as "not priced." Thus, the Revised Proposal would only mandate that FINRA members that "hold" (or elect to provide a per share estimated value in respect of) Program securities in customer accounts provide a per share estimated value for such securities on the account statement when the issuer publishes such a value in a current or periodic report filed with the Securities and Exchange Commission ("SEC").

Reliance on Disclosure in Any Issuer Periodic or Current Report/Scope of Exception to Mandatory Valuation Disclosure: We appreciate the revisions reflected in the Revised Proposal in response to the Prior ABA Comment Letter that would allow FINRA members to rely on the issuer's disclosure of a per share estimated value in any SEC periodic or current report filing, rather than solely in the issuer's annual report. Moreover, although FINRA has not revised the proposal as the Committee recommended to permit a FINRA member to refrain from including a per share estimated value only in the case where the member determines that the value is "materially" unreliable, we concur with FINRA's determination to delete the proposal that a FINRA member be obligated to refrain from using an estimated value based on information that the member only "has reason to know."

Absence of Disclosure Requirement When Valuation Not Provided/Age of Data Underlying the Issuer's Valuation: The Committee is also in favor of FINRA's determination to no longer mandate that a FINRA member include specific disclosures on customer account statements where the member does not include a value for Program securities because the FINRA member: (1) has determined not to provide the net offering price; (2) has determined that the issuer's disclosed per share estimated value or per share estimated NAV is unreliable; or (3) does not "hold" Program securities in the customer's account. In addition, we agree with FINRA's determination that the Revised Rule need no longer impose a requirement on the age of the data that is used by the issuer to develop the per share estimated value in light of the SEC's policy to require detailed disclosure by the issuer of its methodology for calculation of a per share estimated value or daily NAV.

Implementation of Proposed Rule Change: We are concerned that FINRA has not provided guidance, as the Committee requested in the Prior ABA Comment Letter, on the intended implementation of the Revised Proposal with respect to current offerings of Program securities and to those Programs that are no longer conducting offerings. We urge FINRA to do so in its final rulemaking or supplementary material in order that the sponsors of such Programs and the FINRA members that sell or have sold such Programs will be in a better position to comply with the revised rule when approved by the SEC.

Clarification of Transitions: Although the Revised Proposal would provide for a transition to the disclosure of a per share estimated value until an appraised value appears in the issuer's periodic or current SEC reports, but not later than the second quarterly public filing after the initial offering period, FINRA has not addressed the need for transitions from the net offering price to a per share estimated value during the initial offering period and from one per share estimated value to another after the initial offering period, as discussed at page 9 of the Prior ABA Comment Letter. We recognize that such clarifications may best be provided in supplementary material to the rule.

Other Specific Comments: We recommend other changes to the Revised Proposal, as discussed below.

II. The Introduction to the Proposed Rule

Proposed Subsection 2340(c)(1) is an introduction to the proposed requirements that would regulate the inclusion of a value for Program securities on customer account statements. This provision states that:

“A general securities member that holds in a customer's account a direct participation program (DPP) or real estate investment trust (REIT), or any other member that elects to provide per share estimated net asset value (NAV) on an account statement must publish a per share estimated NAV and accompanying disclosures as provided herein.”

The introduction would expand the rule to members that do not hold a DPP or REIT in a customer's account, but nonetheless “elect” to provide a value on their customer account statements for such securities. We recommend that a comma be inserted after the words “account statement” in order to avoid any implication that a general securities member that holds a DPP or REIT security in a customer's account may also elect to refrain from including the issuer's published per share estimated value in the absence of the member's determination that the value is unreliable.

The introduction and subsequent provisions use the term “publish” in connection with the requirement that a FINRA member shall include a value on an account statement in compliance with the proposed rule. We believe that this term is not appropriate in the context and that the value is more clearly described as being “provided” to customers on the account statement (as set forth in the Original Proposal) or “included” on the account statement (as set forth in the current

rule). In comparison, it is the issuer that would “publish” a per share estimated value in its current or periodic report.

Moreover, we believe that the use of the term “per share estimated net asset value (NAV)” is inappropriate in the introduction, as the subsequent provisions set forth standards for providing an appraised per share estimated net asset value (“NAV”), a net offering price and a per share estimated daily NAV on customer account statements, *i.e.*, not only a per share estimated NAV. Moreover, as discussed in detail below, we believe that FINRA should not mandate that the value provided on account statements for illiquid Program securities must be based solely on an appraisal of the assets and liabilities of a Program.

Therefore, we recommend that the introduction be revised to be similar to that contained in the Original Proposal, as follows:

“A general securities member that holds in a customer’s account a direct participation program (DPP) or real estate investment trust (REIT) security, or any other member that elects to provide a per share estimated [net asset] value [(NAV)] for such security on an account statement, must [publish] provide a per share estimated [NAV] value for such security and accompanying disclosures on the customer’s account statement as provided herein.”

III. Revised Calculation of the Net Offering Price

In response to the commenters’ significant concerns regarding the proposed calculation of the net offering price in the Original Proposal to exclude total “organization and offering expenses,”¹ the Revised Proposal would calculate the “net offering price” to only require deduction of front-end underwriting compensation expenses that are reimbursed or paid for from offering proceeds. We recognize that the revised calculation of the net offering price will permit FINRA members to develop independently the calculation based on disclosure in the offering document, which responds to one of the concerns expressed in the Prior ABA Comment Letter. Nonetheless, we urge FINRA to reconsider its determination to amend its current policy of permitting FINRA members to provide the offering price or “par value” on customer account statements during the initial offering period for the reasons set forth at pages 5 – 8 of the Prior ABA Comment Letter to which we refer you.²

¹ In particular, the Prior ABA Comment Letter stated that the deduction of organization and offering expenses from the offering price would result in an artificially low valuation that would be inconsistent with prospectus disclosure and would be difficult for FINRA members to calculate based on disclosure in the prospectus.

² The Prior ABA Comment Letter pointed that: (1) account statement valuations are inherently imperfect as they can only include a point-in-time valuation that provides some guidance to investors; (2) a net offering price does not necessarily represent a “closer approximation to the intrinsic value” of the Program securities, as stated by FINRA in the Original Proposal; and (3) the customer account statement is not an appropriate vehicle to provide post-investment supplemental disclosure regarding O&O expenses (nor front-end underwriting compensation).

Moreover, the text of proposed FINRA Rule 2340(c)(1)(A)(ii) states that a member may use a net offering price that “at a minimum” deducts front-end underwriting compensation expenses. The inclusion of the phrase “at a minimum” might suggest that if a FINRA member provides on an account statement a net offering price that based solely on a deduction of front-end underwriting compensation expenses, FINRA might require justification from the member as to why other items of expenses were not deducted. We do not believe that this interpretation was necessarily intended under the Proposing Notice. As such, we suggest that FINRA remove the phrase “at a minimum,” which change is reflected below in our recommended changes to the text of the proposed rule.

IV. The Per Share Estimated NAV

The Original Proposal would have required that, after the “Initial Offering Period,” a member must include on customer account statements “a per share estimated value based on an appraisal of the assets, liabilities and operations of the DPP or REIT” In reviewing the Original Proposal, the Committee did not object to or otherwise comment on the term “appraisal” because we believed that FINRA was not proposing a requirement that issuers pay for a formal appraisal of Program properties conducted by an independent appraiser, and we assumed that FINRA would continue its policy under the current rule to permit the issuer to develop a per share estimated value based upon its own analysis. Moreover, the ability of the “appraisal” to consider the operations of the DPP or REIT appeared to indicate that FINRA was proposing that issuers would also be permitted to continue the current practice of developing the per share estimated value based on the broader concept of the issuer’s calculation of the value of the company or Program – not just the value of the Program’s properties and other assets less the Program’s liabilities, *i.e.*, the NAV.

However, the Revised Proposal appears to require that FINRA members provide on account statements a NAV based solely on an appraisal of Program assets and liabilities unless the Program publishes a daily NAV. An appraisal of every property in a portfolio would be expensive and very time-consuming. We understand that it may take as long as 18 months for appraisals to be developed for all properties in a portfolio by those Programs that have not, from inception, calculated a daily NAV. We believe that FINRA should not mandate that Program issuers obtain an independent appraisal of program assets. We also believe that FINRA should not mandate that FINRA members may only provide a value on account statements for illiquid Program securities that is solely a NAV calculation, *i.e.*, derived solely from an appraisal of the assets and liabilities of the Program. Instead, we believe that NASD Rule 2340 should continue to allow the account statement value to be a “per share estimated value” for the Program securities, without mandating a specific methodology for the development of that value or that an appraisal be conducted by an independent third party.

A “per share estimated value” is a different concept than that of NAV. The NAV concept is drawn from the daily calculation of the value of mutual fund shares. The NAV for a mutual fund is the dollar value of a single mutual fund share derived from the end-of-day value of a fund’s securities, cash held, liabilities, and the number of shares outstanding. Independent end-of-day last sale and closing prices for each publicly traded security in a mutual fund portfolio are

available for the calculation based on information in the public markets. Therefore, the proposed requirement in Subsection 2340(c)(1)(A)(i) that the NAV be based on “an appraisal of assets and liabilities” is consistent with the technical definition of the term “NAV.” However, the NAV concept works quite differently in the context of an illiquid DPP or REIT, which does not have easily identifiable daily values for the properties in the Program’s portfolio.

While certain REITs have moved to the structure of calculating a value identified as the “daily NAV” and have developed procedures for that purpose, the daily NAV calculated by such REITs is not technically a “net asset value” because the calculation reflects factors in addition to the value of the assets and liabilities of the Program. As recognized by FINRA in footnote 9 of the Original Proposal, the daily NAV developed by such Programs reflects factors such as portfolio income interest expense and unrealized gains or losses on assets and accrued fees and expenses. An example is provided in footnote 3 herein of one Program’s disclosure of the calculation of its daily NAV.³ We understand that the REITs that publish a daily NAV generally appraise 25% of the portfolio quarterly. However, there is no indication that the daily NAV calculation by such Programs is required to be based an appraisal of Program properties by a third-party appraiser.

³ Excerpt from Amendment No. 2, Clarion Property Trust Inc.: Changes in our daily NAV will reflect factors including, but not limited to, our portfolio income, interest expense, unrealized/realized gains (losses) on assets, and accruals for the advisory fee and dealer manager fee. The portfolio income will be calculated and accrued on the basis of data extracted from (1) the prior month’s actual realized income and expenses for each property and at the fund level, including organization and offering expenses incurred following the escrow period and certain operating expenses, (2) material, unbudgeted non-recurring income and expense events such as capital expenditures, prepayment penalties, assumption fees, tenant buyouts, lease termination fees and tenant turnover with respect to our properties when our advisor becomes aware of such events and the relevant information is available and (3) material property acquisitions and dispositions occurring during the month. For the first month following a property acquisition, we will calculate and accrue portfolio income with respect to such property based on the performance of the property before the acquisition and the contractual arrangements in place at the time of the acquisition, as identified and reviewed through our due diligence and underwriting process in connection with the acquisition. As soon as practicable after the end of each month, our advisor will adjust the accruals to reflect actual operating results and to appropriately reflect the outstanding receivable, payable and other account balances resulting from the accumulation of daily accruals for which financial information is available. The daily accrual of portfolio income will also include the reimbursements to our advisor and dealer manager for organization, offering and operating expenses incurred prior to the end of the escrow period and paid on our behalf. If we recognized all of the organization, offering and operating expenses immediately after the end of the escrow period, the entire burden of these costs incurred prior to the end of the escrow period would inequitably fall on investors who subscribe for shares during the escrow period. To equitably allocate the burden of these costs among all of our investors, solely for the purpose of calculating NAV, we will deduct the organization, offering and operating expenses incurred prior to the end of the escrow period, without interest, ratably over the period that begins 12 months following the end of the escrow period and ends 60 months following the end of the escrow period. The temporary inflation in our NAV caused by the capitalization and amortization of these costs will be gradually eliminated over such period. For the purpose of calculating our NAV, all organization, offering and operating costs incurred following the escrow period will be recognized as expenses when incurred.

Following the allocation of income and expenses as described above, NAV for each class is adjusted for contributions, redemptions, distribution reinvestments and class specific expense accruals, such as the distribution fee, to determine the current day’s NAV.

In comparison, a “per share estimated value” for Program securities may be developed using several methods. It may be based on the issuer’s calculation of the value of the Program as a whole to the investors, which takes into account a number of factors in addition to the value of the Program’s assets and liabilities. These include the existence of a portfolio premium (*i.e.*, the value of the portfolio of assets taken as a whole, rather than individually as in a NAV calculation), income flow, the trading value of publicly traded similar Programs, the operations of the Program, overhead expenses, costs of capital, experience and track record of management, and other factors that may affect the value of the security to investors.⁴

The Revised Proposal would establish a separate scheme of regulation for account statement valuations in the case of Programs that publish a daily NAV. We believe that the proposal that members be required to provide an appraised NAV for Programs that do not publish a “daily NAV” imposes an unfair competitive burden on such Programs and the FINRA members that sell such Programs. We note that the calculation of the “daily NAV” by those Programs that publish such information does not require an appraisal of assets and takes into account factors in addition to the assets and liabilities of the Program. We urge FINRA to treat the valuation of all Programs in the same manner regardless of whether the Program calculates a daily NAV, as that term is used by Programs that publish a daily NAV, or a yearly per share estimated value. We understand that SEC staff is requiring that Program issuers provide detailed disclosure of the issuer’s calculation of the annual per share estimated value or the daily NAV of Program securities, as applicable. This required disclosure should be sufficient to appropriately inform investors in both cases. Thus, we see no regulatory need, and we see unnecessary costs and burdens, for FINRA to mandate the methodology to be used by an issuer to calculate the per share estimated value that the proposed amendments to NASD Rule 2340 would impose on FINRA members.

Therefore, we recommend that the Revised Proposal be amended to replace the term “per share estimated NAV” with the term “per share estimated value” and delete the requirement that the value be based solely on an “appraisal of assets and liabilities.” The proposed revision to the term “per share estimated NAV” is reflected in the recommended amendments to the text of proposed Subsection 2340(c)(1), set forth above. Set forth below are our proposed amendments to the text of Subsections 2340(c)(1)(A)(i) – (iii) of the Revised Proposal, which reflect these recommendations, delete the words “at a minimum,” and make other changes to clarify the intent of the provisions and make the provisions internally consistent.

(A) Non-Daily NAV Securities

(i) [Appraised] Per Share Estimated Value

A member must [publish] provide on regularly scheduled account statements the

⁴ As described by FINRA in “Investor Alert on Public Non-Traded REITs,” dated October 4, 2011. FINRA stated therein that: “Many factors affect the pricing, including the portfolio of real estate assets owned, strength of the trust’s balance sheet (assets versus liabilities), overhead expenses, cost of capital and more.”

per share estimated [NAV] value [based upon an appraisal of assets and liabilities from] published by the issuer[’s] in its most recent periodic or current report filed with the SEC under the Act, unless the member reasonably believes that such per share estimated [NAV] value is unreliable.

(ii) Net Offering Price

A member may [publish] provide on regularly scheduled account statements a net offering price that[, at a minimum,] deducts any front-end underwriting compensation expenses as defined in Rule 2310(b)(4)(c)(ii) reimbursed or paid for with offering proceeds, until the sooner of the [presentation of an appraisal of the assets and liabilities in] publication of a per share estimated value by the issuer[’s] in a periodic or current report[,], or in the issuer’s [filing of its] second quarterly [filing] report filed with the SEC under the Act following the conclusion of the effective period of the first registration statement for the DPP or REIT securities.

(iii) Disclosures

A member must disclose in connection with any per share estimated [NAV] value or net offering price that:

- (a) the per share estimated [NAV] value is being reproduced from the issuer’s public filings with the SEC and is being presented without inquiry or investigation;
- (b) the methodology by which any net offering price is calculated;
- (c) no public market currently exists for the securities, and even if the customer is able to sell the securities, the value received may be less than the per share estimated [NAV] value or net offering price; and
- (d) additional information about redemption options and the per share estimated [NAV] value is available from the issuer.

V. Disparate Treatment of Daily NAV Securities

Value After the Initial Offering Period: As indicated above, we believe that the proposal that members be required to provide an appraised NAV for Programs that do not publish a daily NAV imposes an unfair competitive burden on such Programs and the FINRA members that sell such Programs because the methodology for the calculation of the daily NAV does not require an appraisal of assets and takes into account factors other than the assets and liabilities of the Program. We have recommended revisions that would address this concern.

Value During the Initial Offering Period: In addition, the Revised Proposal would require that FINRA members provide the daily NAV on customer account statements as of the end of the statement period during the initial offering period, but such valuation would be calculated without deduction of front-end underwriting compensation expenses, which is

contrary to the requirements for other Programs that do not calculate a daily NAV. Programs that calculate a daily NAV may or may not include front-end underwriting compensation expenses in the daily NAV calculation. Certain Programs do not include any front-end underwriting expenses in the calculation of the daily NAV. In other cases, although the commission charged by the selling agent may be separately paid by the investor, the Program will include a dealer manager fee and selling expenses in the daily NAV price.

Unless a Program's daily NAV is calculated without the any front-end underwriting compensation expenses during the initial offering period, we believe that the proposed different treatment of Programs that calculate a daily NAV imposes an unfair competitive burden on other Programs that do not calculate a daily NAV and the FINRA members that sell such programs. As described in Footnote 9 of the Original Proposal, FINRA initially would have required that FINRA members provide a net estimated value on customer account statements for Programs with a daily NAV that did not include any commissions or other organization and offering expenses associated with the offering.

We recommend that Subsection 2340(c)(1)(B) of the Revised Proposal be revised to indicate that the optional account statement value for daily NAV securities during the initial offering period must reflect a deduction of any front-end underwriting compensation similar to the requirement for the calculation of the net offering price for other Program securities. Thus, all Programs would be subject to the same customer account statement requirements during the initial offering period regardless of whether the Program offers its securities at a daily NAV or a fixed offering price. Set forth below are suggested amendments to Subsection 2340(c)(1)(B) that are intended to reflect these recommendations and make the provisions consistent with those in Subsection 2340(c)(1)(A).

(B) Daily NAV Securities

(1) Per Share Estimated Daily NAV

After the conclusion of the effective period of the first registration statement for the DPP or REIT securities, a [A]member must [publish]provide on regularly scheduled customer account statements the per share estimated daily net asset value (NAV) as of the end of the statement period, unless the member reasonably believes that such per share estimated daily NAV is unreliable.

(2) Net Daily NAV

During the effective period of the first registration statement for the DPP or REIT securities, a FINRA member may provide on regularly scheduled customer account statements a net daily NAV as of the end of the statement period that deducts any front-end underwriting compensation expenses as defined in Rule 2310(b)(4)(c)(ii) reimbursed or paid for with offering proceeds.

(3) Disclosures

A member must [and]disclose in connection with any per share estimated daily NAV or net daily NAV that:

(i) the per share estimated daily NAV is [provided by] being reproduced from the issuer's public filings with the SEC and is being presented without inquiry or investigation;

(ii) the methodology by which any net daily NAV is calculated;

(iii) notwithstanding the availability of a per share estimated daily NAV, no public market currently exists for the securities, and even if the customer is able to sell the securities, the value received may be less than the per share estimated daily NAV reflected on the statement; and

(iv) additional information about redemption options and the per share estimated daily NAV reflected on the statement is available from the issuer.

* * *

Once again, the Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with FINRA and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin

Jeffrey W. Rubin

Chair, Federal Regulation of Securities Committee

Drafting Committee:

David M. Katz

Suzanne Rothwell

Judith Fryer

Peter LaVigne