April 11, 2012

Via PDF email: pubcom@finra.org
Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW Washington, DC 20006-1506

Re: FINRA Regulatory Notice 12-14

Dear Ms. Asquith,

The Investment Program Association (the "IPA") appreciates the opportunity to comment on Regulatory Notice 12-14 ("RN 12-14") published by the Financial Industry Regulatory Authority, Inc. ("FINRA"). RN 12-14 seeks comments to FINRA's revised proposal to modify NASD Rule 2340 (the "Proposed Amendment") which governs reporting of per share estimated values on customer account statements. We endorse and support the substance of FINRA's proposals. The IPA is a national trade association comprised of members engaged in sponsoring, selling or providing services relating to alternative investments including, among other things, non-listed REITs and other types of direct participation programs ("DPPs") including business development companies or "BDCs" that offer their securities through a public registration with the Securities and Exchange Commission (the "SEC") and the various states.

The Proposal

The Proposed Amendment as described in RN 12-14 and Attachment A thereto reflects, among other things, revisions made by FINRA to its original proposal to amend Rule 2340 as originally described in FINRA Regulatory Notice 11-44 ("RN 11-44"). Rule 2340 generally requires each general securities member firm to send account statements to customers at least quarterly. NASD Rule 2340(c), in particular, requires the member firm to include an estimated value for any non-listed REIT or DPP security held in a customer's account developed from information that is as of a date no more than 18 months prior to the date that the statement is issued. FINRA Regulatory Notice 09-09 ("RN 09-09") states that during the offering period, member firms may report an estimated value based on the offering price of the shares until 18 months after the conclusion of the offering.

P.O. Box 480
Ellicott City, MD 21041-0480
(212) 812-9799
www.ipa.com

Pursuant to RN 12-14, FINRA is proposing:

- to eliminate the requirement that a member firm include a per share estimated value for a non-listed REIT or DPP security held in a customer's account whenever any value appears in the issuer's annual report;
- to permit a member firm to present a "net offering price" until an "appraised value" appears in the issuer's periodic or current reports, but in no event after the second quarterly public filing following the initial offering period;
- to require member firms to provide a per share estimated value based upon an appraisal from the issuer's most recent periodic or current report; and
- to permit a member firm to indicate that the security is "not priced" in its customer account statements if the issuer has not included an appraised value in its periodic or current reports.

Discussion

The IPA shares and supports FINRA's interest in any disclosure that furthers investor understanding and knowledge. We appreciate FINRA's effort to address the various comments made to RN 11-44. Any changes to account statement reporting must not, even though motivated by good intentions, burden an important capital source for real estate related assets and other types of alternative investment asset types, including the financing provided by BDCs to small and mid-sized U.S. businesses. Further, any rule changes must be very sensitive to the fierce competition faced, on a global basis, for capital formation. This is especially the case for investments in non-listed REITs or DPPs, the business plan for which contemplates a steady build-up of assets and income over time. Investments in these vehicles are based on a fund model and, like any fund, generally are not designed to be continually valued or traded. We were concerned that the concepts set forth in RN 11-44 could have had many unintended consequences. We think that RN 12-14 has proposed some very productive changes that are consistent with fostering investor knowledge and we support the substance of RN 12-14.

We appreciate FINRA's efforts to respond to the concerns the IPA expressed in its earlier letter regarding the use of a "net offering price" in RN 11-44 as a suitable alternative for estimating the value of a security during the offering period. We applaud the important step that FINRA took in RN 12-14 by not requiring a member to subtract issuer costs, due diligence expenses or trail fees and post-offering expenses from the gross offering price in arriving at an offering period net offering price. We propose further refining the definition of "net offering price" as the gross offering price less only the initial point-of-

P.O. Box 480
Ellicott City, MD 21041-0480
(212) 812-9799
www.ipa.com

sale commissions. We believe this approach, of netting only point-of-sale commissions, would be more consistent with that used by the mutual fund industry. We are also concerned that the "modified net offering price" concept proposed in RN 12-14 may still be confusing. We suggest using a term such as "net proceeds to the issuer" or "net investment in issuer." We think this description will avoid the potential for an investor to confuse a "net offering price" as a proxy for value. We also believe that by avoiding references to value, this approach will address our concern regarding the pricing of shares purchased through distribution reinvestment plans.

We support FINRA's efforts to bring enhanced disclosure to this segment of the capital markets. Consistent with the proposals made in RN 12-14, we suggest amending FINRA Rule 2310(b)(5) to prohibit a member from participating in the offering unless the general partner or sponsor of the non-listed REIT or DPP (or the issuer itself) agrees to provide an estimated value per share no later than the filing of the second regular quarterly or, if applicable, annual report (e.g., the Forms 10-Q or 10-K) following termination of the initial public offering. The non-listed REIT or DPP could always choose to provide the estimated value earlier than the period we suggest.

We appreciate the alternative approach described by FINRA in RN 12-14 under which, until the issuer publishes an estimated value, a member firm could report the securities as "not priced." As a technical matter, please note that the draft rule set forth in Attachment A to RN 12-14 does not expressly provide the "not priced" alternative. From a substantive perspective, we do not believe that a "not priced" alternative will be acceptable to broker-dealers, as we understand their customers will require them to provide more information on the account statements. We understand that the "not priced" option may be particularly difficult for transfer agents and custodians who must satisfy requirements under Rule 15c3-3 and would be unworkable under new systems currently being implemented for the industry by the Depository Trust & Clearing Corporation ("DTCC") that would create more efficient processing of securities of non-listed REITs and DPPs, permitting electronic transfer of information regarding those securities and allowing those securities to be held in street name. As to the latter, please see Rule 53 of the National Securities Clearing Corporation ("NSCC") recently approved by the SEC which permits the broker dealer to serve as a good custody location for those securities under this new DTCC system.

In our comments to RN 11-44, we acknowledged the merit in shortening the present 18 month post-offering time frame for disclosing estimates of share value. We support the timeframe advocated by FINRA in RN 12-14 even though a new timeframe may impact "follow-on" offerings and liquidity strategies in ways that we cannot predict. We do, however, believe that the following items should be considered:

P.O. Box 480
Ellicott City, MD 21041-0480
(212) 812-9799
www.ipa.com

- As noted above, the second quarterly filing may be the issuer's annual report. Thus, the existing rules should be modified to provide for disclosure in the issuer's next report on Form 10-Q or 10-K, as applicable.

- If the non-listed REIT or DPP uses the estimated value to price a follow-on offering, it should not be required to provide a new estimated value until the second report on Forms 10-Q or 10-K filed by the non-listed REIT after the follow-on offering concludes.

- The rule should not dictate that the estimate be based on an "appraisal" of the issuer's assets and liabilities. Many non-listed REITs and DPPs use very common and highly accepted methodologies to estimate value. For example, many issuers (whether within the non-listed REIT and DPP industry or outside of it, for example, institutional funds) have estimated value by first estimating the value of their assets by projecting and discounting cash flow for ten years and then adding a residual estimate calculated by capitalizing year ten cash flows. Few, if any, issuers have also performed a market or replacement cost analysis as traditionally done in an appraisal. Many issuers have engaged third parties to estimate value while others have engaged third parties to merely analyze the methods and reasonableness of the assumptions used and conclusion arrived at in estimating value. We do not know, however, whether the process used by any issuer would in fact be equivalent to an "appraisal." We believe that the rule should not dictate the type of process used to estimate value. As you know, the IPA is developing uniform valuation guidelines.

- The proposed rule addresses "daily NAV" type products but should be flexible enough to allow for the development of other types of products that offer and sell their shares at NAV. Further, FINRA should clarify that BDCs or similar investment program vehicles which disclose NAV on a quarterly basis as required by the Investment Company Act of 1940, as amended, but which do not price their shares in the offering at NAV (as well as any similar issuers with these characteristics) will be treated in the same manner as traditional DPPs and not under the rules applicable to daily NAV priced offerings.

- The notion of replacing the terms "illiquid" and "liquidity" may or may not make sense. We would like to know what FINRA is proposing in the

P.O. Box 480
Ellicott City, MD 21041-0480
(212) 812-9799
www.ipa.com

alternative. The IPA is also not sure of who or what FINRA classifies as an "ordinary investor."

Finally, we are concerned about the lack of transition or grandfathering provisions in RN 12-14. The non-listed REIT and DPP industry and member firms have operated under the existing paradigm for many years. The consequences of suddenly changing the existing paradigm may unfairly impact non-listed REITs and DPPs in offering and their investors and may result in other unintended consequences. In addition, member firms will need time to establish new compliance systems. On a merely operational basis, the IPA has been made aware that the transfer agents that service the industry would need a meaningful period of time to reprogram their statements and applicable related systems to adapt to any new rules. We propose an effective date of July 1, 2014, which will give member firms and industry participants an ample transition period to create compliant systems and to prepare customers for the effect of the new rules. We also would be pleased to form a working group to consult with FINRA on a set of transition rules that would best implement the substantive changes proposed by FINRA on RN 12-14. Thank you for your consideration. We look forward to further discussion with you.

Respectfully submitted,

Martel Day
Chairman

P.O. Box 480
Ellicott City, MD 21041-0480
(212) 812-9799
www.ipa.com