



April 11, 2012

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

NATIONAL
ASSOCIATION
OF
REAL ESTATE
INVESTMENT
TRUSTS®
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REITS:
BUILDING
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AND
DIVERSIFICATION®

Re: Regulatory Notice 12-14: FINRA Requests Comment on Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts

Dear Ms. Asquith:

This letter is submitted in response to FINRA Regulatory Notice 12-14 (Notice 12-14) in which FINRA requests comment on proposed changes to NASD Rule 2340 (Customer Account Statements) with respect to how per share estimated values of unlisted Direct Participation Programs and unlisted Real Estate Investment Trusts (REITs) are reported on customer account statements.

The National Association of Real Estate Investment Trusts (NAREIT) is the worldwide voice for REITs and publicly traded real estate companies with interests in U.S. real estate and capital markets. NAREIT's members are REITs and other real estate businesses throughout the world that own, operate and finance commercial and residential real estate.

REITs in the United States may be public companies whose securities are registered with the Securities and Exchange Commission (SEC) and listed on an established stock exchange (so-called, Listed REITs); public companies whose securities are registered with the SEC, but which are not listed on an established stock exchange (so-called, Public Non-Listed REITs or PNLRs); or private companies.

As of January 1, 2012, there were a total of 208 "public" REITs in the United States, 159 of which were Listed REITs and 48 of which were PNLRs. PNLRs own approximately \$80 billion worth of properties throughout the United States, and the investments by listed REITs and PNLRs represent approximately 15-20% of the investment-grade U.S. commercial real estate market.

PNLRs participate at NAREIT through the Public Non-Listed REIT Council, which consists of all 38 NAREIT PNLR corporate members (the PNLR Council). The mission of the PNLR Council is to advise NAREIT's Executive Board on matters of interest and importance to PNLRs.



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On November 11, 2011, the PNLR Council submitted comments in response FINRA Regulatory Notice 11-44 (Notice 11-44) concerning the disclosure of per share estimated values of unlisted DPPs and REITs on customer account statements. The PNLR Council appreciates FINRA's continued efforts in conducting a rulemaking process that is open and responsive to industry concerns while being focused on furthering investor protections.

The PNLR Council has carefully reviewed Notice 12-14, and has developed the attached comment letter for submission and consideration by FINRA. Notice 12-14 addresses an important part of the REIT community at a critical moment, and we look forward to working with FINRA as it ensures that it provides sound industry guidance and thoughtful investor protection.

Please feel free to contact me if you would like to discuss our positions in greater detail.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S.A. Wechsler", is written over a thin horizontal line.

Steven A. Wechsler

President & CEO



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Re: Regulatory Notice 12-14 (Notice 12-14): FINRA Requests Comment on Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts (hereinafter, together referred to as DPPs)

Dear Ms. Asquith:

This comment letter regarding Notice 12-14 is submitted on behalf of the Public Non-Listed Real Estate Investment Trust (PNLR) Council of the National Association of Real Estate Investment Trusts (NAREIT), and is signed by its Executive Committee, each of whom represents an established sponsor in the PNLR industry. Together, the members of the PNLR Council play a vital role in helping to provide a substantial portion of the overall transaction volume for the alternative asset and real estate markets. PNLR sponsors and their products are a critical part of hundreds of thousands of investors' portfolio diversification and income strategies, and have distributed tens of billions of dollars to shareholders since their inception nearly thirty years ago.

We thank you for your careful consideration of our comment response letter dated November 11, 2011 regarding Regulatory Notice 11-44 (Notice 11-44) as well as the opportunity to provide our comments on Notice 12-14 prior to the submission of proposed revisions to NASD Rule 2340 to the Securities and Exchange Commission (SEC). In particular, we appreciate your thoughtful modifications in Notice 12-14 to the method for determination of the net offering price of a DPP offering.

As an outcome of submitting these comments, the PNLR Council seeks to have additional clarification from FINRA regarding the following provisions of Notice 12-14:

Transition: We support a July 1, 2014 effective date without "grandfathering."

In our comment response letter regarding Notice 11-44, the PNLR Council noted that a transition rule would be necessary to ensure that unnecessary difficulties are not created for issuers, broker-dealers and their customers. The non-listed REIT and DPP industries, as well as FINRA member firms, have operated under the existing customer statement paradigm for well over a decade. The consequences of a sudden change to this paradigm could unfairly impact non-listed REITs and DPPs currently in their offering phase, and could result in unwarranted investor confusion. Other unintended consequences of implementation could include issues with existing advisor agreements and compensation, syndicate related selling agreement revisions, cost basis and tax treatment issues, transfer

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agent programming costs, costs associated with the reprinting of thousands of offering related documents for investors, dividend reinvestment program pricing issues, and historical investor statement concerns.

In the aftermath of submitting its response to Notice 11-44, the PNL Council spent considerable time analyzing implementation issues and it currently believes that the revisions contemplated by Notice 12-14 should apply to all existing DPPs simultaneously to avoid investor confusion, mainly because the PNL Council has reached the conclusion that a “grandfathering” rule would be unrealistic and unworkable. However, to ensure fairness, to minimize investor confusion and to avoid market disruption, the PNL Council recommends that significant lead time be afforded to market participants to ensure that sponsors, broker-dealers, due diligence specialists, legal and accounting advisors, banking and trust companies and other industry participants will be able to amend existing, or adopt new, internal systems and procedures to address a revised NASD Rule 2340. As a result, the PNL Council proposes that the revisions to NASD Rule 2340 be effective no earlier than July 1, 2014.

Determination of Per Share Estimated Value: We request eliminating references to “appraisal” and “net asset value.”

The PNL Council generally supports those sections in Notice 12-14 that only require a member firm to provide per share estimated values based on the per share estimates disclosed in the DPP’s most recent periodic or current report filed with the SEC. However, we believe that the optimal “per share estimated value” may be determined using many different and widely accepted methodologies, depending on the business judgment of the PNL’s board of directors, the majority of which must be independent directors. The PNL Council notes that, for example, while most PNLs provide valuation disclosures in their SEC reports based on net asset value, some PNLs have chosen to use enterprise value. In addition, PNLs apply different valuation methodologies, including the income approach, the comparable sales approach and the replacement cost approach. This is appropriate and consistent with the obligation of the Board of Directors of the DPP to exercise its fiduciary duty to determine the valuation method that is in the best interests of its shareholders.

However, Notice 12-14 specifically states that the per share estimated value must be “based on an appraisal of assets and liabilities.” The PNL Council believes that the use of the term “appraisal” in this requirement is ambiguous, and potentially implies a mandatory approach that is inconsistent with the range of alternatives included in filings reviewed by the SEC. For many people, the term “appraisals” is wrongly thought to be synonymous with “MAI appraisals,” which are appraisals performed by an independent third party that is a member of the Appraisal Institute, a trade organization which monitors appraisers. While some DPPs have chosen to use independent third party appraisals of individual properties to determine per share estimated value, other DPPs have chosen to use in-house appraisals that are either reviewed by an independent third party valuation expert to ensure that the methodologies and assumptions used are

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appropriate or based on valuation assumptions and methodologies reviewed by independent third parties. Disclosures by DPPs that have used this latter approach have been reviewed and approved by the SEC, which has not mandated any particular methodology of determining value, emphasizing instead that an issuer fully and accurately disclose its chosen methodology to investors.

Accordingly, the PNL Council requests that all references in NASD 2340 to “net asset value” and per share estimated value “based on an appraisal of assets and liabilities” be eliminated.

Option to Use Net Offering Price: We generally support the approach, but prefer certainty on the definition of net offering price; we also ask that the net offering price not be equated with value on customer account statements.

As stated earlier, the PNL Council generally agrees with and supports the proposed modifications to the definition of net offering price. The PNL Council agrees with FINRA’s definition of net offering price as gross offering price less point of sale or front-end underwriting commissions. The PNL Council also agrees with FINRA that other offering expenses and non-point of sale commissions, such as trail commissions, should not be deducted from the gross offering price. However, as amended, NASD Rule 2340(c)(1)(A)(ii) states that “a member may publish on account statements a net offering price that, *at a minimum*, deducts any front-end underwriting compensation...” (emphasis added). The PNL Council is concerned that permitting member firms this discretion will cause significant confusion among investors, because the net offering price for a DPP security displayed on a customer account statement may vary among different firms’ customer account statements depending on the member firm that is providing the customer account statement. The PNL Council strongly believes that the definition of net offering price should not be subject to discretion and therefore, there should only be one net offering price for each DPP security.

Further, it would be helpful if the preamble to the final rule clarifies that the revised definition of net offering price enables sponsors of DPPs to choose whether to: i) continue the existing practice of a \$10 offering price, which amount would be reduced on customer account statements during the initial offering period to approximately \$9 per share; ii) offer DPP securities for new programs at a higher price (*e.g.*, \$11 per share), which amount would be reduced on customer account statements during the initial offering period to a lower price (*e.g.*, \$10 per share); or, iii) establish any offering price (*e.g.* \$50 per share), so long as the amount on customer account statements deducts the mandatory expenses under Rule 2340. In each case, the point of sale or front-end underwriting commissions are clearly identified and deducted on the customer account statement.

Finally, although Notice 12-44 does not state explicitly that the net offering price is to be deemed a “per share estimated value,” we are concerned that the inclusion of the net offering price on the customer account statement may signal to investors that the member

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firm believes the “value” of the DPP security is equivalent to the net offering price. Accordingly, the PNLR Council recommends that, if used, the net offering price be clearly labeled as only a net offering price, and not the “per share estimated value” or any other estimation of value.

Time Period for Use of Net Offering Price: We ask for clarification by referral to Rule 415(a)(5).

The PNLR Council would also appreciate clarification on the time period during which the net offering price may be included in the customer account statement. On page 4 of Notice 12-14 under the heading “Revised Proposal,” FINRA states that member firms would not be able to use the net offering price on customer account statements “after the second quarterly public filing following the initial offering period.” Under Notice 11-44 and Notice 12-14, the “initial offering period” refers to the period of time set forth under Rule 415(a)(5) of the Securities Act of 1933, as amended (the “Securities Act”). Under Rule 415(a)(5), the initial offering period is three years from the effective date of the registration statement. However, that period is extended by 180 days in the event a new registration statement is filed prior to the end of the three-year period. As a result, the “initial offering period” can comprise as long as three and one half years.

However, in the text of the amendments to NASD 2340(c)(1)(A)(ii), rather than using the term “initial offering period,” FINRA used the term “effective period of the first registration statement.” While the PNLR Council believes that the time period of up to three and one half years applies whether the term “initial offering period” or “effective period of the first registration statement” is used, we suggest confusion would be avoided if the rule referred directly to Rule 415(a)(5).

NAV Securities: We ask that the daily NAV proposal also apply to any periodic NAV DPP.

The PNLR Council is generally in favor of FINRA’s decision to draw a distinction between NAV securities and non-NAV securities. Over the past few years, the PNLR Council has witnessed an evolution in the industry as a number of “open-ended” or “daily NAV” DPPs have been formed and are currently raising capital. For a number of reasons, including FINRA’s proposed revisions to NASD Rule 2340, we expect this evolution to continue.

However, the proposed amendments to NASD Rule 2340(c)(1)(B) would only apply to daily NAV DPPs. It is the view of the PNLR Council that a trend in the industry may result in the formation of other periodic NAV DPPs, such as those publishing weekly, monthly or quarterly NAV. As a result, the PNLR Council believes it would be more appropriate to expand NASD Rule 2340(c)(1)(B) to cover any periodic NAV DPP.

The PNLR Council welcomes this rulemaking as an opportunity to enhance investor understanding of the DPP industry and of the investment opportunities offered by

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alternative and real estate assets. To assist FINRA, please refer to Attachment A, which reflects our suggested changes to the revisions to NASD Rule 2340 proposed by FINRA in Notice 12-14. We remain committed to working with FINRA to make sure the future is free from unintended consequences and focused on constructive engagement in the regulatory process.

Thank you for your consideration of these important matters.

Respectfully submitted,

Executive Committee
NAREIT PNLR Council

Chair:

Daniel L. Goodwin, CEO
Inland Real Estate Group

Nicholas S. Schorsch, Chairman & CEO
American Realty Capital

Robert S. Aisner, President & CEO
Behringer Harvard Holdings

Thomas K. Sittema, CEO
CNL Financial Group

Marc Nemer, CEO
Cole Real Estate Investments

Charles N. Hazen, President & CEO
Hines REIT and Hines Global REIT

Charles J. Schreiber, CEO
KBS Realty Advisors

Attachment A

2340. Customer Account Statements

(a) General

No Change.

(b) Delivery Versus Payment/Receive Versus Payment (DVP/RVP) Accounts

No Change.

(c) Unlisted DPP/REIT Securities

(1) 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~~ NAV (for non-periodic NAV securities) or per share estimated net asset value (NAV) (for periodic NAV securities) on an account statement must publish a per share estimated value NAV or per share NAV, respectively, and accompanying disclosures as provided herein:

(A) Non-Periodic Daily NAV Securities

(i) Estimated Appraised Value

A member must publish on regularly scheduled account statements the per share estimated value NAV based upon a per share valuation appraisal of assets and liabilities from the issuer's most recent periodic or current report filed with the SEC under the Act, unless the member reasonably believes that such per share estimated value NAV is unreliable.

(ii) Net Offering Price

A member may publish on 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 a per share valuation an appraisal of the assets and liabilities in the issuer's periodic or current report filed with the SEC under the Act, or the issuer's filing with the SEC of its second quarterly periodic report filing following the period provided under SEC Rule 415(a)(5) since the initial effective date of the registration statement under which the DPP or REIT security was offered or sold 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 value NAV or net offering price that:

(a) the per share estimated value NAV 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) the net offering price is not a per share estimated value, nor is it any indication of the value of the security;

(d e) 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 value NAV or net offering price; and

(e) additional information about any redemption options and the per share estimated value NAV is available from the issuer.

(B) Periodic Daily NAV Securities

A member must publish the per share estimated periodic daily NAV as of the most recent date to the end of the statement period, unless the member reasonably believes that such per share estimated periodic daily NAV is unreliable, and disclose in connection with any per share estimated periodic NAV that:

(i) the per share estimated periodic daily NAV is provided by the issuer and is being presented without inquiry or investigation;

(ii) notwithstanding the availability of a per share estimated periodic 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 periodic daily NAV reflected on the statement; and

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

(d) Definitions

No Change.

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(e) Exemptions

No Change.

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