



July 18, 2005

Ms. Katherine A. England
Assistant Director
Division of Market Regulation
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2001

**Re: File No. SR-NASD-2004-165 – Proposed Rule Change Relating to NASD
Rule 2790: Response to Comments**

Dear Ms. England:

NASD staff has reviewed the comment letters received by the Securities and Exchange Commission (“SEC” or “Commission”) in response to SR-NASD-2004-165.¹ The response to these comment letters is provided below.

I. Background

The proposed rule change seeks to make three amendments to NASD Rule 2790. First, it would amend subparagraph (i)(9) to exclude from the definition of “new issue” securities offerings of a business development company, a direct participation program (“DPP”), and a real estate investment trust (“REIT”). Second, it would make a technical change to subparagraph (c)(6)(A), to clarify the scope of the exemption for foreign investment companies as reflected in an NASD staff memorandum dated August 6, 2004. Third, it would add new paragraph (j) to codify the filing requirement for distribution information.² The SEC published the proposed rule change and Amendment Nos. 1 and 2

¹ See Securities Exchange Act Release No. 51735 (May 24, 2005), 70 FR 31554 (June 1, 2005) (Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to NASD Rule 2790).

² On February 1, 2005, NASD filed Amendment No. 1 to the proposed rule change, which included minor changes to the rule text of the proposed rule change. On April 18, 2005, NASD filed Amendment No. 2 to the proposed rule change, which included minor changes to the proposed rule change and a clarification that most REITs have invested assets at the time of their initial public offering.

for comment in the Federal Register on June 1, 2005, and received eight comment letters on the proposal.³

II. Response to Comments

Of the eight comment letters received, only two address the substance of the proposed rule change: Hines and the IPA. Hines supports the proposed rule change because it believes that it is highly unlikely for shares in a REIT to commence trading at a significant premium. Similarly, the IPA supports the proposed rule change because it believes that the inclusion of DPP and REIT securities within the definition of “new issue” does little to further the purpose of Rule 2790 and has a negative impact on the ability of DPPs and REITs to raise capital.

The other commenters raise issues that are not germane to the proposed rule change. More specifically, they address a separate requirement of the foreign investment company exemption in subparagraph (c)(6)(B), which provides that a foreign investment company is eligible for an exemption from the Rule if, among other things, no person owning more than 5% of the shares of the investment company is a restricted person. The proposed rule change filed by NASD and published by the SEC did not propose any change to subparagraph (c)(6)(B). The requirement in subparagraph (c)(6)(B) has been in place since 1998 (as part of the predecessor to Rule 2790, the Free-Riding and Withholding Interpretation (IM-2110-1)). NASD does not at the present time intend to amend subparagraph (c)(6)(B). Any future changes to subparagraph (c)(6)(B) will be in the context of a separate rulemaking proceeding.

³ Letter from Hines Real Estate Securities, Inc. to Jonathan G. Katz, SEC, dated June 14, 2005 (“Hines”); Letter from Investment Program Association to Jonathan G. Katz, SEC, dated June 22, 2005 (“IPA”); Letter from Hong Kong Investment Funds Association to Jonathan G. Katz, SEC, dated June 22, 2005; Letter from Investment Management Association to Jonathan G. Katz, SEC, dated June 22, 2005; Letter from Investment Company Institute to Jonathan G. Katz, SEC, dated June 22, 2005; Letter from Dechert LLP to Jonathan G. Katz, SEC, dated June 22, 2005; Letter from The Investment Trusts Association, Japan, to Jonathan G. Katz, SEC, dated June 22, 2005; and Letter from T. Rowe Price Associates, Inc. to Jonathan G. Katz, SEC, dated June 23, 2005.

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NASD believes that the foregoing fully responds to material issues raised by commenters to the rule filing. If you wish to discuss this matter further, please feel free to contact me, at (202) 728-8104.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gary Goldsholle", with a long horizontal flourish extending to the right.

Gary L. Goldsholle
Associate Vice President
and Associate General Counsel

cc: Bradley D. Owens, Attorney, Division of Market Regulation