OMB APPROVAL	
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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2005 - 114
Amendment No. 5

Proposed Rule Change by National Association of Securities Dealers

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial	Amendment	Withdrawal	Section 19(b)(2)	Section 19(b)(3)(A)	Section 19(b)(3)(B)
☐	☑	☐	☑	☐	☐

Pilot ☐

Extension of Time Period for Commission Action ☐

Date Expires

Rule

- ☐ 19b-4(f)(1)
- ☐ 19b-4(f)(2)
- ☐ 19b-4(f)(3)
- ☐ 19b-4(f)(4)
- ☐ 19b-4(f)(5)
- ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name	Adam	Last Name	Arkel
Title	Assistant General Counsel		
E-mail	adam.arkel@finra.org		
Telephone	(202) 728-6961	Fax	(202) 728-8264

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 04/11/2008

By Gary L. Goldsholle
(Name)

Vice President and Associate General Counsel
(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Gary Goldsholle,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

Re: **File No. SR-NASD-2005-114**
Relating to the Regulation of Compensation, Fees and Expenses in Public Offerings of Real Estate Investment Trusts and Direct Participation Programs: Partial Amendment No. 5

Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) is submitting this Partial Amendment No. 5 in response to comments received by the Securities and Exchange Commission ("SEC") from publication in the *Federal Register* of Amendment No. 4[1] of the above-referenced rule filing.[2] With this Partial Amendment No. 5, FINRA is including: (1) Exhibit 4, which shows changes to the text of the proposed rule change as proposed in Amendment No. 4; and, (2) Exhibit 5, which shows the changes to current NASD Rule 2810 that are proposed in SR-NASD-2005-114, as amended by this Partial Amendment No. 5.

A. Registered Representatives Engaged in *De Minimis* and Incidental Sales Activities

In Amendment No. 4, Proposed Rule 2810(b)(4)(C)(ii)c. would have excluded from the underwriting compensation limit[3] payments to registered representatives – including dual employees – engaged in the solicitation, marketing, distribution or sales of

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1 Securities Exchange Act Release No. 57199 (January 25, 2008), 73 FR 5885 (January 31, 2008) (Notice of Filing of Amendment Nos. 1, 2, 3 and 4; File No. SR-NASD-2005-114).

2 The SEC received five comment letters: Letter to Nancy M. Morris ("Morris") from the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law ("ABA Committee") dated February 22, 2008; Letter to Morris from David Lerner Associates, Inc. ("Lerner") dated February 21, 2008; Letter to Morris from Snyder Kearney LLC dated February 21, 2008 ("Snyder"); Letter to Morris from the Investment Program Association ("IPA") dated February 21, 2008; and E-mail from ASG Securities, Inc. dated February 24, 2008.

3 The underwriting compensation payable to underwriters, broker-dealers, or affiliates may not exceed ten percent of the gross proceeds of the offering, regardless of the source from which the compensation is derived. *See* current Rule 2810(b)(4)(B)(i) and *Notice to Members 82-51*. As explained in Amendment No. 4, the ten percent figure currently is FINRA policy; Proposed Rule 2810(b)(4)(B)(ii) would expressly state that all items of compensation shall not exceed ten percent of the gross proceeds of the offering. *See* Exhibit 5.

the offering[4] whose functions in connection with that offering are solely and exclusively clerical and ministerial. IPA suggested that this should be revised to permit a *de minimis* exception for payments to registered representatives whose functions in respect of an offering are predominantly – *i.e.*, at least 95% of the employee's time – clerical or ministerial but who on rare occasions may go beyond performing solely clerical and ministerial functions, such as answering questions.[5]

In Amendment No. 4, the FINRA staff explained that Proposed Rule 2810(b)(4)(C)(ii) was intended to achieve clarity and ease of administration by excluding only those registered representatives whose functions did not require them to be registered. FINRA staff understands that the modifier "solely and exclusively" to "clerical and ministerial" limits the exception substantially, and believes that it is consistent with the purposes of the proposed rule change to allow an individual to engage in sales activities provided those activities are *de minimis* and incidental to his or her clerical or ministerial functions. The staff does not intend to adopt a particular metric with respect to this exception, such as percentage of time spent, as it could serve as a tool to evade the purpose and spirit of the rule. FINRA staff expects the "*de minimis* and incidental" exception to be a very narrow one for registered persons whose sales activities are truly incidental to their job functions.[6] We note that the exemption in Proposed Rule 2810(b)(4)(D) for firms with ten or fewer registered representatives engaged in wholesaling is intended to apply more broadly to those firms that are most likely to have a need for personnel performing multiple functions.[7]

B. Calculating Items of Underwriting Compensation

The ABA Committee and IPA stated that the wording of Rules 2810(b)(4)(C)(ii)a. through c. as proposed in Amendment No. 4 could result in double counting certain items for purposes of the underwriting compensation limit.[8] For example, the ABA Committee and IPA stated that payments received by a member that would be counted as underwriting compensation under Proposed Rule 2810(b)(4)(C)(ii)a. would have to be counted again for purposes of Proposed Rules 2810(b)(4)(C)(ii)b. and c. where the member re-allows the payments to its registered representatives.[9] FINRA

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4 That is, a public offering of a real estate investment trust ("REIT," as defined in current Rule 2340(d)(4)) or of a direct participation program (as defined in current Rule 2810(a)(4)) (collectively, "Investment Programs").

5 IPA at 2.

6 *See* Exhibit 5.

7 *See* Exhibit 5. *See also* Section D.1.

8 ABA Committee at 7; IPA at 3. *See* footnote 3.

9 ABA Committee at 7; IPA at 3.

staff does not intend that items of compensation already required to be counted under Proposed Rule 2810(b)(4)(C)(ii)a. be double-counted for purposes of the underwriting compensation limit. Proposed Rules 2801(b)(4)(C)(ii)b. and c. have been revised accordingly.[10]

C. Allocation of Compensation to Dual Employees in Connection With More Than One Offering

The ABA Committee and IPA raised concerns regarding proposed guidance with respect to allocation of payments to dual employees for purposes of the underwriting compensation limit[11] where the dual employees receive payments for services in connection with more than one offering.[12] Specifically, in Amendment No. 4, FINRA provided guidance (the "Guidance")[13] that if a dual employee receives compensation for services provided in connection with more than one public offering, or for private placements in addition to offerings of Investment Programs, payments to such employees may be reasonably allocated between the offerings based on the time periods in which the employee was engaged in the offerings, if they are distinct, or based on the relative size of the offerings. The ABA Committee and IPA sought clarification as to whether the Guidance would apply only to dual employees to whom the exceptions from the underwriting compensation set forth in Proposed Rules 2810(b)(4)(D) are available.[14] The Corporate Financing Department (the "Department") will allocate compensation among multiple offerings with regard to all relevant payments and expenses, not just those for dual employees.

IPA believed that the concepts addressed in the Guidance should be incorporated into the text of Proposed Rule 2810 with general application to payments to dual employees among multiple offerings, not just the exceptions in Proposed Rule 2810(b)(4)(D).[15] The ABA Committee believed that the Guidance should allow the allocation of the salary of any registered representative.[16]

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10 *See* Exhibit 5. The ABA Committee also requested that the language in Proposed Rule 2810(b)(4)(B)(ii) be modified slightly to rearrange some commas and clarify that trail commissions are not paid with offering proceeds. *See* ABA Committee at 6. We have revised the text accordingly.

11 *See* footnote 3.

12 ABA Committee at 3-4; IPA at 3-4.

13 *See* footnote 36 at 73 FR 5890.

14 ABA Committee at 3-4; IPA at 3-4.

15 IPA at 3-4.

16 ABA Committee at 4.

As noted in the Guidance, FINRA staff will continue its longstanding practice, with respect to a registered representative receiving compensation for services provided in connection with more than one public offering, or for private placements in addition to offerings of Investment Programs, of allowing payments to such registered representatives to be allocated between the offerings on a reasonable basis taking into account relevant factors, including the time periods spent on particular offerings, the relative sizes of the offerings and the number of investors in each. In the course of its review of particular offerings, information and representations by members with respect to such factors will vary. We therefore have determined not to codify those factors and their respective weights, but rather will continue our current review practices that permit reasonable basis allocations.

D. Analysis of Employee Compensation

1. Per Employee Analysis In All Investment Programs

In Amendment No. 4, Proposed Rule 2810(b)(4)(D) would have excepted from the underwriting compensation limit,[17] subject to the Department's determination, some portion of the non-transaction-based payments to a registered representative dual employee of an Investment Program with fewer than ten people engaged in wholesaling. The ABA Committee stated that in order to avoid inclusion of unregistered persons in the calculation this exception should instead be available to smaller members that have fewer than ten registered representatives engaged in wholesaling with respect to the Investment Program.[18] IPA believes that FINRA should further make clear that only those engaged in wholesaling for the particular program or REIT will be counted.[19] Under the proposed rule change, only payments to those employees who are registered representatives engaged in wholesaling would be included in the underwriting compensation limit.

Amendment No. 4 explained that the Department would engage in the same detailed job function analysis with respect to certain compensation associated with smaller Investment Programs as it would with respect to certain compensation of the ten highest paid executives in any Investment Program. Accordingly, a member could provide detailed per-employee information to the Department from which the Department could conclude that certain salary and other non-transaction-based compensation provided to the employee could be allocated to issuer expenses.

We have amended the exception to clarify that for every program or REIT filed with the Department for review, the staff will engage in the detailed per-employee

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17 *See* footnote 3.

18 ABA Committee at 4.

19 IPA at 4.

analysis. Under our amended proposal, this would apply to up to ten registered representatives engaged in wholesaling if they are dual employees in a smaller Investment Program and to the ten highest paid executives in any Investment Program.[20]

The ABA Committee also suggested that the calculation of the number of persons engaged in wholesaling should only include those registered representatives directly contacting other members to solicit new selling agreements with respect to the specific Investment Program.[21] FINRA staff disagrees. As discussed in Amendment No. 4, the Department will conduct accurate and efficient reviews of the individuals' job functions to determine whether the exceptions in Proposed Rule 2810(b)(4)(D) would be available. FINRA staff does not believe it is useful or appropriate to conduct a two step analysis of each registered representative's functions (that is, first to analyze every registered representative's activities to determine whether ten or fewer were engaged in wholesaling with regard to a specific Investment Program, and then second to analyze the job functions of up to ten registered representatives to determine what portion of payments to them should be included in the underwriting compensation calculation).

2. Top Ten Executives

Proposed Rule 2810(b)(4)(D) would except from the underwriting compensation limit,[22] subject to the Department's determination, some portion of the non-transaction-based payments to a registered representative dual employee who is one the top ten highest paid executives based on non-transaction-based compensation in any program or REIT. The ABA Committee sought clarification as to whether the executives to whom this exception would be available must be registered representative dual employees.[23] As discussed above, we have amended the exception to make this clarification.

Both the ABA Committee and IPA believed that the exception should not require that the dual employees must be executives or have executive titles.[24] Further, both commenters suggested that the top-ten calculation should be based on non-transaction-based compensation "in connection with" an Investment Program.[25]

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20 *See* Exhibit 5. Note that in Amendment No. 4, the wholesaling exception would have been available to an Investment Program with fewer than ten people engaged in wholesaling. The staff believes that allowing the exception for up to ten registered representatives rather than "fewer than ten" is consistent with the goal of clarity and ease of administration.

21 ABA Committee at 5.

22 *See* footnote 3.

23 ABA Committee at 5.

24 ABA Committee at 5-6; IPA at 4.

25 ABA Committee at 5-6; IPA at 4-5.

FINRA staff notes that the term "executive" is not intended as a formal job designation or title, but rather as a characterization of the registered representative dual employee's role in the Investment Program. As explained in Amendment No. 4, the Department believes that it can identify and evaluate a small group of individuals performing executive job functions within an Investment Program. However, the FINRA staff disagrees with the suggestion of incorporating into the rule text language that would base the top ten executive calculation on non-transaction-based compensation "in connection with" a particular Investment Program. As with the case of firms with up to ten registered representatives engaged in wholesaling, FINRA staff does not believe it is useful or appropriate to conduct a two step analysis for each executive (that is, first to determine the extent to which each executive's compensation varies and is attributable to particular programs in order to identify the relevant executives eligible for the exception, and then second to determine what portion of payments to them should be included in the underwriting compensation calculation).

E. Issuer Expenses

1. Overhead Expenses

Both the ABA Committee and IPA stated that Proposed Rule 2810(b)(4)(C)(i), as set forth in Amendment No. 4, should be revised to clarify that issuer expenses, not just overhead expenses, that are reimbursed or paid for with offering proceeds must be included for purposes of the cap on organization and offering expenses.[26] FINRA staff agrees and has revised Proposed Rule 2810(b)(4)(C)(i) accordingly.[27]

2. Services for the Issuer

The ABA Committee expressed concern that Proposed Rule 2810(b)(4)(C)(i)c., as set forth in Amendment No. 4, should clearly specify the scope of services provided by employees or agents of the sponsor or issuer that must be included for purposes of the cap on organization and offering expenses.[28] When proceeds of an offering are used to pay issuer expenses, these payments or reimbursements must be identified in filings with the Department. FINRA staff believes that if the rule limited the scope of payments that

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[26] ABA Committee at 6-7; IPA at 5. Total organization and offering expenses for programs in which the member is affiliated with the program sponsor may not exceed fifteen percent of the offering proceeds, including any compensation and due diligence expenses. *See* current Rule 2810(b)(4)(B)(ii) and *Notice to Members 82-51*. In Amendment No. 4, FINRA staff proposed a number of clarifying amendments with respect to the fifteen percent cap.

[27] *See* Exhibit 5.

[28] ABA Committee at 7. *See* footnote 26.

could be made to employees or agents of the sponsor or issuer for performing services for the issuer to only those activities specifically described in the rule, some otherwise legitimate payments or reimbursements using offering proceeds would be prohibited. Accordingly, we have not revised Proposed Rule 2810(b)(4)(C)(i)c., other than to clarify that it refers to services for the issuer.[29]

F. Liquidity and Marketability Disclosure

IPA expressed concern that Proposed Rule 2810(b)(3)(D), as set forth in Amendment No. 4, would impose upon members a burdensome due diligence review requirement with respect to the pertinent facts relating to the liquidity and marketability of the Investment Program.[30] FINRA staff recognizes the burdens that members may face for purposes of compliance with the liquidity and marketability disclosure requirements. With this consideration in mind, it is the view of FINRA staff that Proposed Rule 2810(b)(3)(D) is intended to permit members to rely upon the liquidity and marketability information as provided to the member by the sponsor or general partner of the Investment Program, provided that the member does not know or have reason to know that the information is inaccurate. Accordingly, Proposed Rule 2810(b)(3)(D) is submitted herein without revision.[31]

G. Reinvested Dividends

One commenter expressed concern regarding the prohibition set forth in Proposed Rule 2810(b)(4)(B)(vi) against sales loads on reinvested dividends for Investment Programs, which would apply after the proposed rule's effective date.[32] FINRA is maintaining the prohibition on sales loads on reinvested dividends. We noted in Amendment No. 4 that the proposal enjoys regulatory support;[33] further, we had noted in Amendment No. 1 of this rule filing that the proposal would conform Rule 2810 to similar changes made to Rule 2830 with respect to sales loads on reinvested dividends for sales of mutual funds.[34] Accordingly, Proposed Rule 2810(b)(4)(B)(vi) is submitted herein without revision.

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29 *See* Exhibit 5.

30 IPA at 5-6.

31 *See* Exhibit 5.

32 Lerner at 1-3.

33 *See* footnote 56 and accompanying text at 73 FR 5891.

34 *See* Securities Exchange Act Release No. 54118 (July 10, 2006), 71 FR 40569 (July 17, 2006) (Notice of Filing of Proposed Rule Change; File No. SR-NASD-2005-114). *See also* Rule 2830(d)(6)(B).

Further, so as to avoid the indirect payment of sales loads on reinvested dividends for Investment Programs, we have amended Proposed Rule 2810(b)(4)(B)(ii) to clarify that the calculation of "ten percent of the gross proceeds of the offering" excludes securities purchased through the reinvestment of dividends.[35]

H. Due Diligence Services

One commenter sought guidance as to what levels of detail and itemization are appropriate for an invoice prepared by a law firm conducting on behalf of a member due diligence services that are intended to be reimbursed as issuer expenses.[36] FINRA staff believes that industry best practices may be effective in establishing a threshold for itemization and will defer a rule-based articulation at this time. The commenter also sought guidance as to whether it is permissible for the issuer or sponsor to reimburse the law firm directly, so that the member need not go through the extra step of first itself paying the law firm and then seeking reimbursement from the issuer or sponsor.[37] We believe that a law firm could not provide *bona fide* due diligence in an offering if its client was the issuer or sponsor rather than the broker-dealer. The method of reimbursement for due diligence services should be irrelevant so long as it does not undermine the law firm's duties to its client, the broker-dealer.

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35 *See* Exhibit 5.

36 Snyder at 2.

37 Snyder at 2.

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EXHIBIT 4

Full text of proposed rule change marking changes from Amendment No. 4 to Partial Amendment No. 5. The changes proposed in Amendment No. 4 are shown as if adopted, and the new changes as proposed in Partial Amendment No. 5 are marked with additions underlined and deletions in brackets.

* * * * *

2810. Direct Participation Programs

(a) No Change.

(b) Requirements

(1) through (3) No Change.

(4) Organization and Offering Expenses

(A) No Change.

(B) In determining the fairness and reasonableness of organization and offering expenses that are deemed to be in connection with or related to the distribution of the public offering for purposes of subparagraph (A) hereof, the arrangements shall be presumed to be unfair and unreasonable if:

(i) organization and offering expenses, as defined in subparagraph (b)(4)(C), in which a member or an affiliate of a member is a sponsor, exceed an amount that equals fifteen percent of the gross proceeds of the offering;

(ii) the total amount of all items of compensation from whatever source, including compensation paid from offering proceeds and in the form of "trail commissions," payable to

underwriters, broker/dealers, or affiliates thereof[,] exceeds an amount that equals ten percent of the gross proceeds of the offering (excluding securities purchased through the reinvestment of dividends);

(iii) through (vii) No Change.

(C) The organization and offering expenses subject to the limitations in subparagraph (b)(4)(B)(i) above include the following:

(i) issuer expenses[, including overhead expenses] that are reimbursed or paid for with offering proceeds, including overhead expenses, which issuer expenses include, but are not limited to, expenses for:

a. through b. No Change.

c. salaries and non-transaction-based compensation paid to employees or agents of the sponsor or issuer for performing services for the [sponsor or] issuer;

d. transfer agents, escrow holders depositories, engineers and other experts[,]; and

e. No Change.

(ii) underwriting compensation, which includes but is not limited to items of compensation listed in Rule 2710(c)(3) including payments:

a. No Change.

b. to any registered representative of a member

who receives transaction-based compensation in connection with the offering, except to the extent that such compensation has been included in a. above;

c. to any registered representative who is engaged in the solicitation, marketing, distribution or sales of the program or REIT securities, [other than one] except:

1. to the extent that such compensation has been included in a. above;

2. for a registered representative whose functions in connection with the offering are solely and exclusively clerical or ministerial; and

3. for a registered representative whose sales activities are *de minimis* and incidental to his or her clerical or ministerial job functions; or

d. No Change.

(iii) No Change.

(D) Notwithstanding subparagraphs (b)(4)(C)(ii)b. and c. above, [information may be provided to NASD from which] for every program or REIT filed with the Corporate Financing Department [can readily determine that] (the "Department") for review, the Department shall, based upon the information provided, make a determination as to whether some portion of a registered representative's non-transaction-based compensation should not be deemed to be underwriting compensation if

the registered representative is either:

(i) a dual employee of a member and the sponsor, issuer or other affiliate with respect to a program or REIT with ten or fewer [than ten people] registered representatives engaged in wholesaling, in which instance the Department may make such determination with respect to the ten or fewer registered representatives engaged in wholesaling; or

(ii) a dual employee of a member and the sponsor, issuer or other affiliate who is one of the top ten highest paid executives based on non-transaction-based compensation in any program or REIT.

(E) through (G) No Change.

(5) Valuation for Customer Account Statements

No member may participate in a public offering of direct participation program or REIT securities unless the general partner or sponsor of the program or REIT will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Act a per share estimated value of the direct participation program securities, the method by which it was developed, and the date of the data used to develop the estimated value.

(6) No Change.

(c) through (d) No Change.

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EXHIBIT 5

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

2810. Direct Participation Programs

(a) No Change.

(b) Requirements

(1) Application

No member or person associated with a member shall participate in a public offering of a direct participation program, [or] a limited partnership rollup transaction or, where expressly provided below, a real estate investment trust as defined in Rule 2340(d)(4) ("REIT"), except in accordance with this paragraph (b), provided however, this paragraph (b) shall not apply to an initial or secondary public offering of or a secondary market transaction in a unit, depositary receipt or other interest in a direct participation program that complies with subparagraph (2)(D).

(2) No Change.

(3) Disclosure

(A) Prior to participating in a public offering of a direct participation program or REIT, a member or person associated with a member shall have reasonable grounds to believe, based on information made available to him by the sponsor through a prospectus or other materials, that all material facts are adequately and accurately disclosed and provide a basis for evaluating the program.

(B) through (C) No Change.

(D) Prior to executing a purchase transaction in a direct participation program or a REIT, a member or person associated with a member shall inform the prospective participant of all pertinent facts relating to the liquidity and marketability of the program or REIT during the term of the investment[;]. Included in the pertinent facts shall be information regarding whether the sponsor has offered prior programs or REITs in which disclosed in the offering materials was a date or time period at which the program or REIT might be liquidated, and whether the prior program(s) or REIT(s) in fact liquidated on or around that date or during the time period [provided, however, that paragraph (b) shall not apply to an initial or secondary public offering of a secondary market transaction in a unit, depositary receipt or other interest in a direct participation program which complies with subparagraph (2)(D)].

(4) Organization and Offering Expenses

(A) No member or person associated with a member shall underwrite or participate in a public offering of a direct participation program or REIT if the organization and offering expenses are not fair and reasonable, taking into consideration all relevant factors.

(B) In determining the fairness and reasonableness of organization and offering expenses that are deemed to be in connection with or related to the distribution of the public offering for purposes of subparagraph (A) hereof, the arrangements shall be presumed to be unfair and unreasonable

if:

(i) organization and offering expenses, as defined in subparagraph (b)(4)(C), in which a member or an affiliate of a member is a sponsor, exceed an amount that equals fifteen percent of the gross proceeds of the offering;

[(i)](ii) the total amount of all items of compensation from whatever source, including compensation paid from offering proceeds and in the form of "trail commissions," payable to underwriters, broker/dealers, or affiliates thereof[, which are deemed to be in connection with or related to the distribution of the public offering,] exceeds an amount that equals ten percent of the gross proceeds of the offering (excluding securities purchased through the reinvestment of dividends) [currently effective compensation guidelines for direct participation programs published by the Association];[*]

[(ii) organization and offering expenses paid by a program in which a member or an affiliate of a member is a sponsor exceed currently effective guidelines for such expenses published by the Association;**]

(iii) No Change.

(iv) commissions or other compensation are to be paid or awarded either directly or indirectly, to any person engaged by a potential investor for investment advice as an inducement to such

advisor to advise the purchaser of interests in a particular program or REIT, unless such person is a registered broker/dealer or a person associated with such a broker/dealer; [or]

(v) the program or REIT provides for compensation of an indeterminate nature to be paid to members or persons associated with members for sales of the program [units] or REIT, or for services of any kind rendered in connection with or related to the distribution thereof, including, but not necessarily limited to, the following: a percentage of the management fee, a profit sharing arrangement, brokerage commissions, an[d] over-riding royalty interest, a net profits interest, a percentage of revenues, a reversionary interest, a working interest, a security or right to acquire a security having an indeterminate value, or other similar incentive items; [provided however, that an arrangement which provides for continuing compensation to a member or person associated with a member in connection with a public offering shall not be presumed to be unfair and unreasonable if all of the following conditions are satisfied:]

[a. the continuing compensation is to be received only after each investor in the program has received cash distributions from the program aggregating an amount equal to his cash investment plus a six percent cumulative annual return on his adjusted investment;]

[b. the continuing compensation is to be calculated as a percentage of program cash distributions;]

[c. the amount of continuing compensation does not exceed three percent for each one percentage point that the total of all compensation pursuant to subparagraph (B)(i) received at the time of the offering and at the time any installment payment is made fall below nine percent; provided, however, that in no event shall the amount of continuing compensation exceed 12 percent of program cash distributions; and]

[d. if any portion of the continuing compensation is to be derived from the limited partners' interest in the program cash distributions, the percentage of the continuing compensation shall be no greater than the percentage of program cash distributions to which limited partners are entitled at the time of the payment.]

(vi) the program or REIT charges a sales load or commission on securities that are purchased through the reinvestment of dividends, unless the registration statement registering the securities under the Securities Act of 1933 became effective prior to [the effective date of this proposed rule change]; or

(vii) the member has received reimbursement for due

diligence expenses that are not included in a detailed and itemized invoice, unless the amount of the reimbursement is included in the calculation of underwriting compensation as a non-accountable expense allowance, which when aggregated with all other such non-accountable expenses, does not exceed three percent of offering proceeds.

(C) The organization and offering expenses subject to the limitations in subparagraph (b)(4)(B)(i) above include the following:

(i) issuer expenses that are reimbursed or paid for with offering proceeds, including overhead expenses, which issuer expenses include, but are not limited to, expenses for:

a. assembling, printing and mailing offering materials, processing subscription agreements, generating advertising and sales materials;

b. legal and accounting services provided to the sponsor or issuer;

c. salaries and non-transaction-based compensation paid to employees or agents of the sponsor or issuer for performing services for the issuer;

d. transfer agents, escrow holders depositories, engineers and other experts; and

e. registration and qualification of securities under federal and state law, including taxes and fees and NASD

fees;

(ii) underwriting compensation, which includes but is not limited to items of compensation listed in Rule 2710(c)(3) including payments:

a. to any wholesaling or retailing firm that is engaged in the solicitation, marketing, distribution or sales of the program or REIT securities;

b. to any registered representative of a member who receives transaction-based compensation in connection with the offering, except to the extent that such compensation has been included in a. above;

c. to any registered representative who is engaged in the solicitation, marketing, distribution or sales of the program or REIT securities, except:

1. to the extent that such compensation has been included in a. above;

2. for a registered representative whose functions in connection with the offering are solely and exclusively clerical or ministerial; and

3. for a registered representative whose sales activities are *de minimis* and incidental to his or her clerical or ministerial job functions; or

d. for training and education meetings, legal

services provided to a member in connection with the offering, advertising and sales material generated by the member and contributions to conferences and meetings held by non-affiliated members for their registered representatives.

(iii) due diligence expenses incurred when a member affirmatively discharges its responsibilities to ensure that all material facts pertaining to a program or REIT are adequately and accurately disclosed in the offering document.

(D) Notwithstanding subparagraphs (b)(4)(C)(ii)b. and c. above, for every program or REIT filed with the Corporate Financing Department (the "Department") for review, the Department shall, based upon the information provided, make a determination as to whether some portion of a registered representative's non-transaction-based compensation should not be deemed to be underwriting compensation if the registered representative is either:

(i) a dual employee of a member and the sponsor, issuer or other affiliate with respect to a program or REIT with ten or fewer registered representatives engaged in wholesaling, in which instance the Department may make such determination with respect to the ten or fewer registered representatives engaged in wholesaling; or

(ii) a dual employee of a member and the sponsor, issuer

or other affiliate who is one of the top ten highest paid executives based on non-transaction-based compensation in any program or REIT.

[(C)](E) All items of compensation paid by the program or REIT directly or indirectly from whatever source to underwriters, brokers/dealers, or affiliates thereof, including, but not limited to, sales commissions, wholesaling fees, due diligence expenses, other underwriter's expenses, underwriter's counsel's fees, securities or rights to acquire securities, rights of first refusal, consulting fees, finder's fees, investor relations fees, and any other items of compensation for services of any kind or description, which are deemed to be in connection with or related to the public offering, shall be taken into consideration in computing the amount of compensation for purposes of determining compliance with the provisions of subparagraphs (A) and (B).

[(D)](F) The determination of whether compensation paid to underwriters, broker/dealers, or affiliates thereof is in connection with or related to a public offering, for purposes of this subparagraph (4), shall be made on the basis of such factors as the timing of the transaction, the consideration rendered, the investment risk, and the role of the member or affiliate in the organization, management and direction of the enterprise in which the sponsor is involved.

(i) An affiliate of a member which acts or proposes to act as a general partner, associate general partner, or other sponsor of

a program or REIT shall be presumed to be bearing investment risk for purposes of this paragraph (b) if the affiliate:

a. through b. No Change.

c. has a net worth equal to at least five percent of the net proceeds of the public offering or $1.0 million, whichever is less; provided, however, that the computation of the net worth shall not include an interest in the program offered but may include net worth applied to satisfy the requirements of this paragraph (b) with respect to other programs or REITs; and

d. agrees to maintain net worth as required by subparagraph c. above under its control until the earlier of the removal or withdrawal of the affiliate as a general partner, associate general partner, or other sponsor, or the dissolution of the program or REIT.

(ii) No Change.

[(E)](G) Subject to the limitations on direct and indirect non-cash compensation provided under subparagraph [(E)](C), no member shall accept any cash compensation unless all of the following conditions are satisfied:

(i) through (v) No Change.

(5) Valuation for Customer Account Statements

No member may participate in a public offering of direct participation program or REIT securities unless[:]

[(A)] the general partner or sponsor of the program or REIT will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Act a per share estimated value of the direct participation program securities, the method by which it was developed, and the date of the data used to develop the estimated value.

(6) No Change.

(c) Non-Cash Compensation

(1) No Change.

(2) Restriction on Non-Cash Compensation

In connection with the sale and distribution of direct participation program or REIT securities, no member or person associated with a member shall directly or indirectly accept or make payments or offers of payments of any non-cash compensation, except as provided in this provision. Non-cash compensation arrangements are limited to the following:

(A) through (B) No Change.

(C) Payment or reimbursement by offerors in connection with meetings held by an offeror or by a member for the purpose of training or education of associated persons of a member, provided that:

(i) No Change.

(ii) the location is appropriate to the purpose of the meeting, which shall mean a United States[an] office of the offeror

or the member holding the meeting, or a facility located in the vicinity of such office, or a United States regional location with respect to meetings of associated persons who work within that region or, with respect to [regional] meetings with direct participation programs or REITs, a United States location at which a significant or representative asset of the program or REIT is located;

(iii) through (iv) No Change.

(D) through (E) No Change.

(d) No Change.

[* A guideline for underwriting compensation of ten percent of proceeds received, plus a maximum of 0.5% for reimbursement of bona fide diligence expenses was published in Notice to Members 82-51 (October 19, 1982).]

[** A guideline for organization and offering expenses of 15 percent proceeds received was published in Notice to Members 82-51 (October 19, 1982).]

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