OMB APPROVAL
OMB Number: 3235-0045 Estimated average burden hours per response............38

Required fields are shown with yellow backgrounds and asterisks.

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

File No.* SR - 2014 - * 006
Amendment No. (req. for Amendments *)

Filing by Financial Industry Regulatory Authority

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)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) *	Section 806(e)(2) *
☐	☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed Rule Change Relating to Per Share Estimated Valuations for Unlisted DPP and REITS

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 action.

First Name * Racquel
Last Name * Russell
Title * Associate General Counsel
E-mail * racquel.russell@finra.org
Telephone * (202) 728-8363
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 01/31/2014

By Patrice Gliniecki

(Name *)

(Title *)

Senior Vice President and Deputy General Counsel

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.

Patrice Gliniecki,

Required fields are shown with yellow backgrounds and asterisks.

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 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies * 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, security-based swap submission, or advance notice 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 Add Remove View 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 Add Remove View	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.

1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend the provisions addressing per share estimated valuations for unlisted direct participation program and real estate investment trust securities.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

At its meeting on April 17, 2013, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

The effective date of the proposed rule change will be announced in a Regulatory Notice no later than 90 days following Commission approval. In order to give industry participants time to make changes to distribution agreements they may wish to implement in response to the amendments, the effective date of the proposed rule change will be no earlier than 180 days following Commission approval.

---

[1] 15 U.S.C. 78s(b)(1).

3. <u>Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change</u>

(a) Purpose

FINRA proposes to amend (1) NASD Rule 2340 (Customer Account Statements) to modify the requirements relating to the inclusion of a per share estimated value for unlisted direct participation program ("DPP") and real estate investment trust ("REIT") securities on a customer account statement; and (2) FINRA Rule 2310 (Direct Participation Programs) to modify the requirements applicable to members' participation in a public offering of DPP or REIT securities.

<u>Proposed Amendments to NASD Rule 2340 (Customer Account Statements)</u>

NASD Rule 2340 generally requires that general securities members[2] provide periodic account statements to customers, on at least a quarterly basis, containing a description of any securities positions, money balances or account activity since the last statement. Paragraph (c) addresses the inclusion of per share estimated values for unlisted DPP or REIT securities held in customer accounts or included on customer account statements. The rule also provides for several disclosures regarding the illiquidity and resale value of unlisted DPPs and REITs.

---

[2] NASD Rule 2340(d)(2) defines "general securities member" as any member that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEA Rule 15c3-1(a). A member that does not carry customer accounts and does not hold customer funds or securities is exempt from the definition.

FINRA (then NASD) adopted these requirements[3] in part to respond to concerns expressed by the Commission's Division of Trading and Markets (then Division of Market Regulation) ("Division") regarding the sufficiency of information provided on customer account statements with respect to the current value of illiquid partnership securities.[4] To address these concerns, the Division suggested that FINRA adopt a rule requiring members to, at a minimum, disclose: (1) that there is no liquid market for most limited partnership interests; (2) that the value of a partnership, if any, reported on the account statement may not reflect a value at which customers can liquidate their positions; and (3) the source of any reported value and a short description of the methodology used to determine the value and the date the value was last determined. FINRA, therefore, developed the provisions found in paragraph (c) of NASD Rule 2340, which have not been amended since original adoption in 2000.[5]

NASD Rule 2340(c) also addresses the sources that may be used in developing the per share estimated value included on a customer account statement. When an unlisted DPP or REIT security's annual report includes a per share estimated value, the general securities member must include the estimated value from the annual report in the customer account statement or an estimated value from an independent valuation service or any other source, in the first account statement issued by the general securities member

---

[3] See Securities Exchange Act Release No. 43601 (November 21, 2000), 65 FR 71169 (November 29, 2000) (Order Approving File No. SR-NASD-2000-13) ("Original Approval Order").

[4] See Letter from Brandon Becker, Director, Division of Market Regulation, SEC, to Richard G. Ketchum, Executive Vice President and Chief Operating Officer, NASD, dated June 14, 1994.

[5] See Original Approval Order.

thereafter.[6] However, the customer account statement may not be left blank when an estimated value is included on an annual report.

While the rule permits the use of estimated values from sources other than the annual report, it has become industry practice to include the annual report's per share estimated value. During the offering period, the annual report typically reflects the security's gross offering price (e.g., $10.00/share par value). A per share estimated value that reflects the gross offering price does not take into account organization and offering expenses or cash distributions that occur during the offering period. An initial offering period can last for three years and may be extended.[7] Customer account statements thus may reflect the gross offering price for up to seven and a half years.[8]

FINRA proposes to eliminate the requirement in NASD Rule 2340(c) that general securities members, at a minimum, include the per share estimated value that is reflected

---

6 Notwithstanding this requirement, the rule provides that a general securities member must refrain from providing an estimated value for a DPP or REIT security on a customer account statement if the general securities member can demonstrate that the estimated value is inaccurate as of the date of the valuation or is no longer accurate as a result of a material change in the operations or assets of the program or trust. See NASD Rule 2340(c)(4). In addition, the estimated value must have been developed from data that is no more than 18 months old at the time the statement is issued. See NASD Rule 2340(c)(1)(B)(2).

7 Rule 415(a)(5) under the Securities Act of 1933 ("Securities Act") provides that certain types of securities offerings, including continuous offerings of DPPs and REITs, may continue for no more than three years from the initial effective date of the registration statement. Under Rule 415(a)(6), the SEC may declare another registration statement for a DPP or REIT effective such that an offering can continue for another three-year offering period.

8 Because NASD Rule 2340(c) permits the use of an estimated value developed from data that is no more than 18 months old, the estimated value from the annual report may be used until up to a year and a half from the conclusion of the offering.

on a DPP or REIT security's annual report. Under the proposal, a general securities member would not be required to include in a customer account statement a per share estimated value for an unlisted DPP or REIT security, but any member (not only a general securities member) may choose to do so if the value has been developed in a manner reasonably designed to ensure that it is reliable, the member has no reason to believe that it is unreliable,[9] and the account statement includes certain disclosures. FINRA proposes two methodologies under which an estimated value would be presumed reliable: (1) net investment; and (2) independent valuation.

The net investment methodology, which may be used for up to two years following the breaking of escrow,[10] would reflect the "net investment" disclosed in the issuer's most recent periodic or current report ("Issuer Report"). "Net investment" must be based on the "amount available for investment" percentage in the "Estimated Use of Proceeds" section of the offering prospectus or, where "amount available for investment" is not provided, another equivalent disclosure.[11] For example, if the prospectus for an

---

9 FINRA would not consider a last sale price of an unlisted REIT or DPP in the secondary market, by itself, to constitute a reason to believe that an estimate derived by one of the methodologies set forth in this proposal is unreliable because these transactions often are infrequent and the illiquid nature of the secondary market may result in large discounts from independent valuation prices.

10 Generally offering proceeds are placed in escrow until the minimum conditions of the offering are met, at which time the issuer is permitted to access the offering proceeds.

11 This disclosure is typically included in the prospectus for REIT offerings and is described in the SEC's Securities Act Industry Guide 5 (Preparation of registration statements relating to interests in real estate limited partnerships). FINRA would permit the use of equivalent disclosure in DPP offerings if the disclosure provides a percentage amount available for investment by the issuer after deduction of organizational and offering expenses.

offering with a $10 offering price per share disclosed selling commissions totaling 10% of the offering proceeds and organizational and offering expenses of 2%, the amount available for investment would be 88%, or $8.80 per share.

The per share estimated value also must deduct the portion, if any, of cumulative distributions per share that exceeded GAAP net income per share for the corresponding period, after adding back depreciation and amortization or depletion expenses. This provision recognizes that depreciation, amortization and depletion expenses reduce net income per share, but are not expenditures and do not impact the issuer's cash reserves. In addition, the deduction for each distribution would be limited to the full amount of the distribution. Therefore, even if net income, which may be negative during the two years following the breaking of escrow, with depreciation and amortization or depletion expenses added back in equals a negative number, the required deduction from the net investment amount would be limited to the amount of the distribution (rather than being further reduced by the amount of any negative net income).

The independent valuation methodology, which may be used at any time, would consist of the most recent valuation disclosed in the issuer's periodic or current reports. The independent valuation methodology requires that a third-party valuation expert or experts determine, or provide material assistance in the process of determining, the valuation.[12]

---

12 Valuation definitions and methodologies for real estate investments generally use GAAP (ASC 820) as a standard. Performance reporting for institutional real estate investments also relies on GAAP as its foundational basis. See Investment Program Association Practice Guidelines 2013-01 ("IPA Guidance") (April 29, 2013).

Consistent with the recommendations of the Division prior to the original adoption of paragraph (c), FINRA proposes to retain disclosure requirements relating to the nature and liquidity of DPP and REIT products in customer account statements. Under the proposal, when a customer account statement includes a per share estimated value for an unlisted DPP or REIT security, the statement must: (1) briefly describe the per share estimated value, its source and an explanation of the method by which such per share estimated value was developed; and (2) disclose that the DPP or REIT securities are not listed on a national securities exchange, are generally illiquid and that, even if a customer is able to sell the securities, the price received may be less than the per share estimated value provided in the statement.

When a member refrains from including a per share estimated value in a customer account statement for an unlisted DPP or REIT security, the statement nonetheless must disclose that: (1) unlisted DPP and REIT securities are generally illiquid; (2) the current value of the security will be different than its purchase price and may be less than the purchase price; and (3) if applicable, an estimated per share value of the security currently is not available.[13]

<u>Proposed Amendments to Rule 2310 (Direct Participation Programs)</u>

FINRA Rule 2310(b)(5) (Valuation for Customer Account Statements) generally provides that no member is permitted to participate in a public offering of DPP or REIT

---

13 FINRA also is proposing to amend the definitions of DPP and REIT in Rule 2340(d) to remove the exclusion for such securities if they are "on deposit in a registered securities depository and settled regular way." FINRA does not believe that the treatment of account statement disclosures for unlisted DPP or REIT securities should be different based upon where they are held on deposit or their settlement cycle.

securities unless the general partner or sponsor will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Act: (1) a per share estimated value of the securities; (2) the method by which such estimated value was developed; and (3) the date of the data used to develop the estimated value.

FINRA proposes to amend this provision to provide that a member may not participate in a public offering of a DPP or REIT security unless: (A) a per share estimated value is calculated on a periodic basis in accordance with a methodology disclosed in the prospectus, or (B) the general partner or sponsor has agreed to disclose in the first periodic report filed pursuant to Section 13(a) or 15(d) of the Act after the second anniversary of breaking escrow: (1) a per share estimated value of the DPP or REIT calculated by, or with the material assistance of, a third-party valuation expert;[14] (2) an explanation of the method by which the per share estimated value was developed; (3) the date of the valuation; and (4) the identity of the third-party valuation expert used. In addition, the general partner or sponsor of the program or REIT must have agreed to ensure that the valuation is conducted at least once every two years; is derived from a methodology that conforms to standard industry practice; and is accompanied by a written opinion to the general partner or sponsor of the program or REIT that explains the scope of the review, the methodology used to develop the valuation, and the basis for the per share estimated value.

---

[14] The issuer further must agree to ensure that such valuation is conducted at least once every two years, is derived from a methodology that conforms with standard industry practice, and is accompanied by a written opinion to the general partner or sponsor of the program or REIT that explains the scope of the review, the methodology used to develop the valuation and the basis for the per share estimated value.

Industry Consultation and Alternatives Considered

The proposal is intended to protect the investing public by seeking to ensure that any per share estimated value for an unlisted DPP or REIT security included on a customer's account statement is developed in a manner reasonably designed to ensure that it is reliable. In developing this proposed rule change, FINRA consulted extensively with members and other industry participants, including concerning the issues relevant to the various alternative approaches that were considered. These commenters expressed a variety of opinions concerning what type of valuation should be provided to customers. Specifically, FINRA requested public comment in two Regulatory Notices[15] and met with industry participants, including independent broker-dealers; broker-dealers affiliated with sponsors that act as wholesalers; broker-dealers that specialize in advising boards of directors and general partners; DPP general partners and executives of REITs; clearing firms; and trade association representatives. The comments received in response to the Regulatory Notices are summarized here and discussed in detail in Item 5 below.

For example, some commenters to Notice 11-44 favored the use of the gross offering price, while others preferred the use of a net offering price. In Notice 11-44, FINRA proposed to require general securities members that hold DPP or REIT securities in customer accounts to provide a per share estimated value of the security on the account statement only if it appeared in the most recent annual report of the DPP or REIT. Notice 11-44 proposed to prescribe the valuations that could be presented. As a practical matter, the proposal in Notice 11-44 would have required every customer

---

15 See Regulatory Notice 11-44 (September 2011) ("Notice 11-44") and Regulatory Notice 12-14 (March 2012) ("Notice 12-14").

account statement to present the prescribed per share estimated value unless the member has reason to know that it is unreliable.

FINRA considered requiring that every customer account statement provided by a general securities member present a valuation of DPP and REIT securities. Requiring a valuation could provide a level of transparency concerning the value of those securities and the effect of brokerage commissions and other expenses. However, inclusion of a value on customer account statements for unlisted DPPs and REITs is beneficial to investors only if the valuation is reliable. As further discussed below, FINRA has determined not to explicitly require the presentation of a valuation in customer account statements because it could interfere with the objective of ensuring that valuations are reliable.

A preferable approach is to require that any valuation that is included in a customer account statement has been developed in a manner reasonably designed to ensure that it is reliable, and to prohibit a member from including any valuation that it has reason to believe is unreliable. This approach directly addresses our concern, which is that members currently are presenting an unreliable valuation (such as the gross offering price) in customer account statements – while also providing members with two possible methodologies that we believe would result in more informative disclosure to investors. Under the proposal, a methodology developed in a manner reasonably designed to ensure that it is reliable may be used (unless the member has reason to believe that the valuation is unreliable).

While the proposal would permit a member to develop its own methodology, FINRA expects that, in almost all cases, members will rely on the methodologies suggested by the proposal, both of which are derived by the program sponsor. Today

Rule 2340 permits members to present a valuation from an independent valuation service or some other source. When the provision was adopted in 2000, it was unclear whether members would rely on the valuation stated in the annual report, calculate their own valuation, or utilize a valuation service. Experience with the rule since its original adoption has shown that the consistent industry practice is to present the value in the program's annual report. If the proposal were adopted, we believe that members will continue to present the valuation in the program's periodic reports.

Nevertheless, optionality is necessary to ensure that the valuation is reliable. The proposal would prohibit a member from presenting a valuation that it has reason to believe is unreliable. Thus, if we require presentation of a valuation, then in some circumstances a member might have to weigh two conflicting obligations, to present a valuation or to exclude one that, in the member's judgment, might be unreliable.

The question of whether a valuation is "unreliable" may be difficult under particular facts. It will require consideration of the circumstances under which it was developed, the evidence of any "red flags" that indicate it may be unreliable and the significance of various aspects of the methodology. The difficulty is compounded by the fact that the valuation has been developed by the sponsor, not the member. If presentation of a valuation were optional, then the rule would not deter the member from following up on red flags and excluding a valuation that it has reason to believe is unreliable. A requirement to present the valuation would place the member in a conundrum: Should it exclude a suspicious valuation based upon the limited facts at its disposal, or must it present the valuation because the rule requires it? A requirement that might discourage members from being vigilant would not be consistent with the objective of investor protection.

Members and program sponsors have a strong incentive to provide these valuations; they know that their customers react very negatively to seeing their positions shown without a value. FINRA will monitor for changes to business practices and, if there is a significant shift to not presenting a valuation, then we will reconsider the optional nature of the proposal.

We recognize that the question of whether to require a valuation in all customer account statements of a general securities member is fundamental to the proposal. We will carefully review any comments on whether a valuation should be required and whether valuations will continue to be made available.

Among others, FINRA consulted extensively with the Investment Program Association's ("IPA") Task Force on Account Statement Reporting. On January 31, 2013, the IPA sent a letter proposing "possible solutions which achieve [FINRA's] regulatory objectives and enhance transparency, accuracy and understandability of account statement reporting for investors."[16] The IPA suggested that account statements reflect a net offering price until the earlier of (1) an appraisal-based valuation of the securities is published in the issuer's periodic or current report, or (2) the filing of the issuer's first periodic report following the first anniversary of the date when initial escrow is released to commence investments. The IPA proposed to define "net offering price" as the gross offering price less sales commissions and dealer manager fees (i.e., front-end underwriting compensation expenses as defined in Rule 2310(b)(4)(c)(ii)) reimbursed or paid for with offering proceeds.

---

16 See Letter from IPA Task Force on Account Statement Reporting, to Robert L.D. Colby, Chief Legal Officer, FINRA, dated January 31, 2013.

The IPA suggested that, following the filing of the issuer's first periodic report after the first anniversary of the breaking of escrow, the net offering price included on a customer account statement should be reduced to reflect that portion, if any, of cumulative distributions to investors through the anniversary of the breaking of escrow which was provided from borrowings, net offering proceeds, returns of capital in distributions from asset sales proceeds, or stock dividends. Such an adjustment would capture any dilution of per share value resulting from unearned distributions in the initial year following breaking of escrow. The IPA suggested that after the filing of the second periodic report following the second anniversary of the effective date of the first registration of the offering, the account statement should reflect the per share estimated value.

The IPA also recommended amending FINRA Rule 2310(b)(5) to prohibit a member from participating in an offering unless the general partner or sponsor of the REIT or DPP agrees to provide a per share estimated value no later than the filing of the second periodic report following the second anniversary of the effective date of the first registration of the offering. FINRA proposes to prohibit a member from participating in an offering unless the general partner or sponsor of the REIT or DPP agrees to provide a per share estimated value in a periodic report filed pursuant to Section 13(a) or 15(d) of the Act, no later than the second anniversary of breaking escrow and in each annual report thereafter.

On April 29, 2013, the IPA issued Practice Guidance 2013-01, entitled "Valuations of Publicly Registered Non-Listed REITs."[17] The IPA Guidance

---

[17] Investment Program Association Practice Guidelines 2013-01 (April 29, 2013).

recommends that REITs, subject to the approval of a valuation committee and its board of directors, engage a third-party valuation expert to assist in the process of determining an estimated per share value.[18] The IPA Guidance generally recommends that the independent third party be a qualified firm with substantial and demonstrable expertise in valuation of assets or investments similar to those owned by the REIT, that the valuation be first conducted after the closing of the REIT's initial public offering and at least once every two years thereafter, that it be conducted in accordance with the standards of the Appraisal Institute,[19] and that it be certified by a member of the Appraisal Institute with an appropriate designation.

Similarly, the proposed amendments to Rule 2310 would require that the general partner or sponsor of the REIT or program agree to ensure that the valuation is conducted at least once every two years, is derived from a methodology that conforms to standard industry practice, and is accompanied by a written opinion to the general partner or sponsor of the program or REIT that explains the scope of the review, the methodology used to develop the valuation, and the basis for the per share estimated value. The proposed rule change also builds upon the IPA Guidelines by offering a set of valuation

---

18 See IPA Guidance at 12.

19 The Appraisal Institute is a trade organization that, among other things, focuses on education, testing, experience and demonstration of knowledge, understanding and ability for real estate appraisers.

methodologies that are similar, but somewhat more expansive.[20]

As further discussed in Item 4 below, FINRA does not believe that the proposal will cause a significant economic impact on members. The current rule, and each of the previously proposed approaches to estimated valuation, requires the inclusion of estimated valuations in customer account statements in certain circumstances. In contrast, the instant proposal would remove this requirement, while allowing all members to voluntarily provide estimated values. Neither the disclosure requirements nor the proposed amendments to Rule 2310 should impose a significant economic impact on members. The Rule 2310 amendments generally build upon the existing requirements and are consistent with the IPA's guidance. The disclosures proposed by the amendments are substantially similar to those in the existing rule.

As noted in Item 2 of this filing, the effective date of the proposed rule change will be announced in a Regulatory Notice no later than 90 days following Commission approval. In order to give industry participants time to make changes to distribution agreements they may wish to implement in response to the amendments, the effective date of the proposed rule change will be no earlier than 180 days following Commission approval.

---

[20] For example, the net investment methodology suggested by the IPA would not deduct distributions until the end of the first year, whereas the current proposal provides for such deductions immediately. FINRA believes that investors will be better served by understanding immediately the effect of a return of capital as a distribution (rather than the use of the capital to generate a return on investment) on the value of their investment. Since expenses, other than those for distribution – such as program management fees – may contribute to a return on investment, the current proposal would not deduct those fees in the net investment calculation.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[21] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The proposed rule change is necessary for the protection of investors in unlisted DPP and REIT securities in that it seeks to ensure that per share estimated values for unlisted DPP and REIT securities included on customer account statements have been developed in a manner reasonably designed to ensure their reliability. The proposed rule change also would eliminate the current requirement that members must, at a minimum, include on customer account statements the per share estimated value of these securities when a value appears in the annual report. For the reasons explained earlier, FINRA has determined not to explicitly require the presentation of a valuation in customer account statements because it could interfere with the objective of ensuring that valuations are reliable. Instead, under the proposal, a general securities member would not be required to include in a customer account statement a per share estimated value for an unlisted DPP or REIT security, but any member (not only a general securities member) may choose to do so if the value has been developed in a manner reasonably designed to ensure that it is reliable, the member has no reason to believe that it is unreliable, and the account statement includes certain disclosures.

---

[21] 15 U.S.C. 78o–3(b)(6).

In addition, the proposed rule change would ensure that customers continue to receive meaningful information about the nature of DPPs and REITs where a value is not included and, when a value is provided, the source of the per share estimate, the methodology by which it is developed and the illiquid nature of the securities.

4. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As stated above, FINRA believes that this proposed rule change is necessary for the protection of investors in unlisted DPP and REIT securities who currently often receive unreliable per share estimates on their customer account statements. Further, the proposed rule change treats all general securities members uniformly, including in cases where the general securities member voluntarily refrains from including a per share estimate, which is permissible under the proposal.

Each general securities member may choose either to: refrain from including a per share estimated value (though the member must include the required disclosures, which are substantially similar to those required today); choose from one of the methodologies described in the proposed rule change (so long as the member has no reason to believe it is unreliable);[22] or provide a per share estimated value that is derived from some other methodology that was developed in a manner reasonably designed to ensure that it is reliable (and so long as the member has no reason to believe that it is unreliable).

---

22 FINRA also notes that the methodologies proposed are intended to provide general securities members with two acceptable approaches where they choose to continue to include per share estimated values on customer account statements. Such guidance was requested by commenters to the prior proposals, as further discussed in Item 5 below.

Irrespective of the methodology used, any member choosing to include a per share estimated value on a customer account statement must provide the disclosures required under the proposed rule, which also are substantially similar to those currently required. Therefore, FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

In September 2011, FINRA published Notice 11-44 requesting comment on proposed amendments to NASD Rule 2340(c). A copy of Notice 11-44 is attached as Exhibit 2a. The comment period expired on November 12, 2011, and FINRA received 25 comments.[23] A list of the commenters and copies of the comment letters received in response to Notice 11-44 are attached as Exhibits 2b and 2c, respectively. In March 2012, FINRA published Notice 12-14, which re-proposed amendments to NASD Rule 2340(c) in light of comments received in response to Notice 11-44. A copy of Notice 12-14 is attached as Exhibit 2d. The comment period expired on April 11, 2012, and FINRA received 17 comments.[24] A list of the commenters and copies of the comment letters received in response to Notice 12-14 are attached as Exhibits 2e and 2f, respectively. A summary of the comments and FINRA's response is provided below.

Notice 11-44 Proposal

---

23 See Exhibit 2b for a list of commenters on Notice 11-44.

24 See Exhibit 2e for a list of commenters on Notice 12-14.

In Notice 11-44, FINRA proposed several modifications to NASD Rule 2340 that were designed to improve the quality of the information provided to customers on account statements. The amendments proposed in Notice 11-44 would have limited the period of time during which per share estimated values could be based on the gross offering price to the initial three-year offering period provided for under Rule 415(a)(5) of the Securities Act. These amendments also would have required firms to deduct organization and offering expenses from the gross offering price to arrive at a per share estimated value (i.e., a net offering price). In addition, these amendments would have prohibited a firm from using a per share estimated value from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that came to the firm's attention. Finally, Notice 11-44 sought to permit members to refrain from providing a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT did not contain a value that complied with the disclosure requirements of NASD Rule 2340.

While commenters generally supported the proposed changes in Notice 11-44, the most notable comments concerned using a value other than the public offering price during the initial offering period and imposing an affirmative duty on members to monitor and confirm the reliability of the per share estimated value given the proposed requirement that the member must refrain from using the value if it knows or "had reason to know" that the value was unreliable.[25]

Notice 12-14 Proposal

---

[25] ABA and SIFMA.

FINRA considered the comments received in response to Notice 11-44 and issued Notice 12-14 reflecting changes that were responsive to the comments received. Under the revised proposal in Notice 12-14, general securities members would no longer be required to provide a per share estimated value, unless and until the issuer provided an estimate based on an appraisal of assets and liabilities in a periodic or current report. During the initial offering period, member firms would have the option of using a modified net offering price or designating the securities as “not priced.” The revised proposal also modified the account statement disclosures that accompany per share estimated values. Notice 12-14 also included alternative disclosure requirements for DPPs or REITs that calculate a daily NAV.

While most commenters supported the use of a modified net offering price on the customer account statement during the initial offering period,[26] some commenters requested that FINRA change the proposed rule language to uniformly state whether the net offering price should exclude fees other than front-end underwriting compensation expenses, as opposed to requiring it “at a minimum.”[27]

Further, while some commenters supported FINRA’s proposed use of a “not priced” option,[28] other commenters objected to members designating securities as “not priced” on the customer account statement.[29] In light of these comments, FINRA’s new

---

26 American Realty Capital, NAREIT, REISA and U.S. Chamber of Commerce.

27 NASAA and NorthStar.

28 ABA and NASAA.

29 Franklin Square, IPA, NAREIT, NorthStar and PIABA.

proposed amendments would allow, but not require, members to refrain from providing a per share estimated value on the customer account statement.

FINRA received several comments on the use of a per share estimated value based upon an appraisal or valuation of the program's assets and operations. While some objected,[30] several commenters supported the use of a per share estimated value, as proposed,[31] while others suggested that FINRA require the use of an independent third party valuation service to provide the value.[32] Some commenters requested that FINRA, at a minimum, clarify whether it would create or require members to use a standardized valuation methodology.[33] In view of the broad range of DPPs and REITs existing in the marketplace, the current proposal permits flexibility in choosing a methodology for developing an independent valuation.

Several commenters requested that FINRA broaden the proposal to accommodate programs, such as business development companies that use a NAV on a periodic basis.[34] The new proposed amendments do not specify the use of a daily NAV, but rather would accommodate any DPP or REIT that provides a per share estimated value reflecting a valuation disclosed in the issuer report where a third-party valuation expert or experts determine, or provide material assistance in the process of determining, the valuation.

---

30 ABA, ICON Investments, IPA and NAREIT.

31 American Realty Capital and W.P. Carey.

32 NASAA.

33 NASAA and Prodigious.

34 American Realty Capital, IPA, and NAREIT.

6. Extension of Time Period for Commission Action

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.[35]

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. Regulatory Notice 11-44 (September 2011)

Exhibit 2b. List of comment letters received on Regulatory Notice 11-44

Exhibit 2c. Copies of comment letters received in response to Regulatory Notice 11-44

Exhibit 2d. Regulatory Notice 12-14 (March 2012)

Exhibit 2e. List of comment letters received on Regulatory Notice 12-14

---

35 15 U.S.C. 78s(b)(2).

Exhibit 2f. Copies of comment letters received in response to Regulatory Notice 12-14

Exhibit 5. Text of proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2014-006)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to Per Share Estimated Valuations for Unlisted DPP and REITS

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on , Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the provisions addressing per share estimated valuations for unlisted direct participation program and real estate investment trust securities.

The text of the proposed rule change is available on FINRA's website at http://www.finra.org, at the principal office of FINRA and at the Commission's Public Reference Room.

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

II. <u>Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change</u>

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. <u>Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change</u>

1. Purpose

FINRA proposes to amend (1) NASD Rule 2340 (Customer Account Statements) to modify the requirements relating to the inclusion of a per share estimated value for unlisted direct participation program ("DPP") and real estate investment trust ("REIT") securities on a customer account statement; and (2) FINRA Rule 2310 (Direct Participation Programs) to modify the requirements applicable to members' participation in a public offering of DPP or REIT securities.

<u>Proposed Amendments to NASD Rule 2340 (Customer Account Statements)</u>

NASD Rule 2340 generally requires that general securities members[3] provide periodic account statements to customers, on at least a quarterly basis, containing a description of any securities positions, money balances or account activity since the last statement. Paragraph (c) addresses the inclusion of per share estimated values for

---

[3] NASD Rule 2340(d)(2) defines "general securities member" as any member that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEA Rule 15c3-1(a). A member that does not carry customer accounts and does not hold customer funds or securities is exempt from the definition.

unlisted DPP or REIT securities held in customer accounts or included on customer account statements. The rule also provides for several disclosures regarding the illiquidity and resale value of unlisted DPPs and REITs.

FINRA (then NASD) adopted these requirements[4] in part to respond to concerns expressed by the Commission's Division of Trading and Markets (then Division of Market Regulation) ("Division") regarding the sufficiency of information provided on customer account statements with respect to the current value of illiquid partnership securities.[5] To address these concerns, the Division suggested that FINRA adopt a rule requiring members to, at a minimum, disclose: (1) that there is no liquid market for most limited partnership interests; (2) that the value of a partnership, if any, reported on the account statement may not reflect a value at which customers can liquidate their positions; and (3) the source of any reported value and a short description of the methodology used to determine the value and the date the value was last determined. FINRA, therefore, developed the provisions found in paragraph (c) of NASD Rule 2340, which have not been amended since original adoption in 2000.[6]

NASD Rule 2340(c) also addresses the sources that may be used in developing the per share estimated value included on a customer account statement. When an unlisted DPP or REIT security's annual report includes a per share estimated value, the

---

4 See Securities Exchange Act Release No. 43601 (November 21, 2000), 65 FR 71169 (November 29, 2000) (Order Approving File No. SR-NASD-2000-13) ("Original Approval Order").

5 See Letter from Brandon Becker, Director, Division of Market Regulation, SEC, to Richard G. Ketchum, Executive Vice President and Chief Operating Officer, NASD, dated June 14, 1994.

6 See Original Approval Order.

general securities member must include the estimated value from the annual report in the customer account statement or an estimated value from an independent valuation service or any other source, in the first account statement issued by the general securities member thereafter.[7] However, the customer account statement may not be left blank when an estimated value is included on an annual report.

While the rule permits the use of estimated values from sources other than the annual report, it has become industry practice to include the annual report's per share estimated value. During the offering period, the annual report typically reflects the security's gross offering price (e.g., $10.00/share par value). A per share estimated value that reflects the gross offering price does not take into account organization and offering expenses or cash distributions that occur during the offering period. An initial offering period can last for three years and may be extended.[8] Customer account statements thus may reflect the gross offering price for up to seven and a half years.[9]

---

7 Notwithstanding this requirement, the rule provides that a general securities member must refrain from providing an estimated value for a DPP or REIT security on a customer account statement if the general securities member can demonstrate that the estimated value is inaccurate as of the date of the valuation or is no longer accurate as a result of a material change in the operations or assets of the program or trust. See NASD Rule 2340(c)(4). In addition, the estimated value must have been developed from data that is no more than 18 months old at the time the statement is issued. See NASD Rule 2340(c)(1)(B)(2).

8 Rule 415(a)(5) under the Securities Act of 1933 ("Securities Act") provides that certain types of securities offerings, including continuous offerings of DPPs and REITs, may continue for no more than three years from the initial effective date of the registration statement. Under Rule 415(a)(6), the SEC may declare another registration statement for a DPP or REIT effective such that an offering can continue for another three-year offering period.

9 Because NASD Rule 2340(c) permits the use of an estimated value developed from data that is no more than 18 months old, the estimated value from the annual report may be used until up to a year and a half from the conclusion of the offering.

FINRA proposes to eliminate the requirement in NASD Rule 2340(c) that general securities members, at a minimum, include the per share estimated value that is reflected on a DPP or REIT security's annual report. Under the proposal, a general securities member would not be required to include in a customer account statement a per share estimated value for an unlisted DPP or REIT security, but any member (not only a general securities member) may choose to do so if the value has been developed in a manner reasonably designed to ensure that it is reliable, the member has no reason to believe that it is unreliable,[10] and the account statement includes certain disclosures. FINRA proposes two methodologies under which an estimated value would be presumed reliable: (1) net investment; and (2) independent valuation.

The net investment methodology, which may be used for up to two years following the breaking of escrow,[11] would reflect the "net investment" disclosed in the issuer's most recent periodic or current report ("Issuer Report"). "Net investment" must be based on the "amount available for investment" percentage in the "Estimated Use of Proceeds" section of the offering prospectus or, where "amount available for investment"

---

[10] FINRA would not consider a last sale price of an unlisted REIT or DPP in the secondary market, by itself, to constitute a reason to believe that an estimate derived by one of the methodologies set forth in this proposal is unreliable because these transactions often are infrequent and the illiquid nature of the secondary market may result in large discounts from independent valuation prices.

[11] Generally offering proceeds are placed in escrow until the minimum conditions of the offering are met, at which time the issuer is permitted to access the offering proceeds.

is not provided, another equivalent disclosure.[12] For example, if the prospectus for an offering with a $10 offering price per share disclosed selling commissions totaling 10% of the offering proceeds and organizational and offering expenses of 2%, the amount available for investment would be 88%, or $8.80 per share.

The per share estimated value also must deduct the portion, if any, of cumulative distributions per share that exceeded GAAP net income per share for the corresponding period, after adding back depreciation and amortization or depletion expenses. This provision recognizes that depreciation, amortization and depletion expenses reduce net income per share, but are not expenditures and do not impact the issuer's cash reserves. In addition, the deduction for each distribution would be limited to the full amount of the distribution. Therefore, even if net income, which may be negative during the two years following the breaking of escrow, with depreciation and amortization or depletion expenses added back in equals a negative number, the required deduction from the net investment amount would be limited to the amount of the distribution (rather than being further reduced by the amount of any negative net income).

The independent valuation methodology, which may be used at any time, would consist of the most recent valuation disclosed in the issuer's periodic or current reports. The independent valuation methodology requires that a third-party valuation expert or

---

[12] This disclosure is typically included in the prospectus for REIT offerings and is described in the SEC's Securities Act Industry Guide 5 (Preparation of registration statements relating to interests in real estate limited partnerships). FINRA would permit the use of equivalent disclosure in DPP offerings if the disclosure provides a percentage amount available for investment by the issuer after deduction of organizational and offering expenses.

experts determine, or provide material assistance in the process of determining, the valuation.[13]

Consistent with the recommendations of the Division prior to the original adoption of paragraph (c), FINRA proposes to retain disclosure requirements relating to the nature and liquidity of DPP and REIT products in customer account statements. Under the proposal, when a customer account statement includes a per share estimated value for an unlisted DPP or REIT security, the statement must: (1) briefly describe the per share estimated value, its source and an explanation of the method by which such per share estimated value was developed; and (2) disclose that the DPP or REIT securities are not listed on a national securities exchange, are generally illiquid and that, even if a customer is able to sell the securities, the price received may be less than the per share estimated value provided in the statement.

When a member refrains from including a per share estimated value in a customer account statement for an unlisted DPP or REIT security, the statement nonetheless must disclose that: (1) unlisted DPP and REIT securities are generally illiquid; (2) the current value of the security will be different than its purchase price and may be less than the purchase price; and (3) if applicable, an estimated per share value of the security

---

[13] Valuation definitions and methodologies for real estate investments generally use GAAP (ASC 820) as a standard. Performance reporting for institutional real estate investments also relies on GAAP as its foundational basis. See Investment Program Association Practice Guidelines 2013-01 ("IPA Guidance") (April 29, 2013).

currently is not available.[14]

Proposed Amendments to Rule 2310 (Direct Participation Programs)

FINRA Rule 2310(b)(5) (Valuation for Customer Account Statements) generally provides that no member is permitted to participate in a public offering of DPP or REIT securities unless the general partner or sponsor will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Act: (1) a per share estimated value of the securities; (2) the method by which such estimated value was developed; and (3) the date of the data used to develop the estimated value.

FINRA proposes to amend this provision to provide that a member may not participate in a public offering of a DPP or REIT security unless: (A) a per share estimated value is calculated on a periodic basis in accordance with a methodology disclosed in the prospectus, or (B) the general partner or sponsor has agreed to disclose in the first periodic report filed pursuant to Section 13(a) or 15(d) of the Act after the second anniversary of breaking escrow: (1) a per share estimated value of the DPP or REIT calculated by, or with the material assistance of, a third-party valuation expert;[15] (2) an explanation of the method by which the per share estimated value was developed;

---

14 FINRA also is proposing to amend the definitions of DPP and REIT in Rule 2340(d) to remove the exclusion for such securities if they are "on deposit in a registered securities depository and settled regular way." FINRA does not believe that the treatment of account statement disclosures for unlisted DPP or REIT securities should be different based upon where they are held on deposit or their settlement cycle.

15 The issuer further must agree to ensure that such valuation is conducted at least once every two years, is derived from a methodology that conforms with standard industry practice, and is accompanied by a written opinion to the general partner or sponsor of the program or REIT that explains the scope of the review, the methodology used to develop the valuation and the basis for the per share estimated value.

(3) the date of the valuation; and (4) the identity of the third-party valuation expert used. In addition, the general partner or sponsor of the program or REIT must have agreed to ensure that the valuation is conducted at least once every two years; is derived from a methodology that conforms to standard industry practice; and is accompanied by a written opinion to the general partner or sponsor of the program or REIT that explains the scope of the review, the methodology used to develop the valuation, and the basis for the per share estimated value.

Industry Consultation and Alternatives Considered

The proposal is intended to protect the investing public by seeking to ensure that any per share estimated value for an unlisted DPP or REIT security included on a customer's account statement is developed in a manner reasonably designed to ensure that it is reliable. In developing this proposed rule change, FINRA consulted extensively with members and other industry participants, including concerning the issues relevant to the various alternative approaches that were considered. These commenters expressed a variety of opinions concerning what type of valuation should be provided to customers. Specifically, FINRA requested public comment in two Regulatory Notices[16] and met with industry participants, including independent broker-dealers; broker-dealers affiliated with sponsors that act as wholesalers; broker-dealers that specialize in advising boards of directors and general partners; DPP general partners and executives of REITs; clearing firms; and trade association representatives. The comments received in response to the Regulatory Notices are summarized here and discussed in detail in Item II. C. below.

16 See Regulatory Notice 11-44 (September 2011) ("Notice 11-44") and Regulatory Notice 12-14 (March 2012) ("Notice 12-14").

For example, some commenters to Notice 11-44 favored the use of the gross offering price, while others preferred the use of a net offering price. In Notice 11-44, FINRA proposed to require general securities members that hold DPP or REIT securities in customer accounts to provide a per share estimated value of the security on the account statement only if it appeared in the most recent annual report of the DPP or REIT. Notice 11-44 proposed to prescribe the valuations that could be presented. As a practical matter, the proposal in Notice 11-44 would have required every customer account statement to present the prescribed per share estimated value unless the member has reason to know that it is unreliable.

FINRA considered requiring that every customer account statement provided by a general securities member present a valuation of DPP and REIT securities. Requiring a valuation could provide a level of transparency concerning the value of those securities and the effect of brokerage commissions and other expenses. However, inclusion of a value on customer account statements for unlisted DPPs and REITs is beneficial to investors only if the valuation is reliable. As further discussed below, FINRA has determined not to explicitly require the presentation of a valuation in customer account statements because it could interfere with the objective of ensuring that valuations are reliable.

A preferable approach is to require that any valuation that is included in a customer account statement has been developed in a manner reasonably designed to ensure that it is reliable, and to prohibit a member from including any valuation that it has reason to believe is unreliable. This approach directly addresses our concern, which is that members currently are presenting an unreliable valuation (such as the gross offering price) in customer account statements – while also providing members with two possible methodologies that we believe would result in more informative disclosure to investors. Under the proposal, a methodology developed in a manner reasonably designed to ensure that it is reliable may be used (unless the member has reason to believe that the valuation is unreliable).

While the proposal would permit a member to develop its own methodology, FINRA expects that, in almost all cases, members will rely on the methodologies suggested by the proposal, both of which are derived by the program sponsor. Today Rule 2340 permits members to present a valuation from an independent valuation service or some other source. When the provision was adopted in 2000, it was unclear whether members would rely on the valuation stated in the annual report, calculate their own valuation, or utilize a valuation service. Experience with the rule since its original adoption has shown that the consistent industry practice is to present the value in the program's annual report. If the proposal were adopted, we believe that members will continue to present the valuation in the program's periodic reports.

Nevertheless, optionality is necessary to ensure that the valuation is reliable. The proposal would prohibit a member from presenting a valuation that it has reason to believe is unreliable. Thus, if we require presentation of a valuation, then in some circumstances a member might have to weigh two conflicting obligations, to present a valuation or to exclude one that, in the member's judgment, might be unreliable.

The question of whether a valuation is "unreliable" may be difficult under particular facts. It will require consideration of the circumstances under which it was developed, the evidence of any "red flags" that indicate it may be unreliable and the significance of various aspects of the methodology. The difficulty is compounded by the fact that the valuation has been developed by the sponsor, not the member. If presentation of a valuation were optional, then the rule would not deter the member from following up on red flags and excluding a valuation that it has reason to believe is unreliable. A requirement to present the valuation would place the member in a conundrum: Should it exclude a suspicious valuation based upon the limited facts at its disposal, or must it present the valuation because the rule requires it? A requirement that might discourage members from being vigilant would not be consistent with the objective of investor protection.

Members and program sponsors have a strong incentive to provide these valuations; they know that their customers react very negatively to seeing their positions shown without a value. FINRA will monitor for changes to business practices and, if there is a significant shift to not presenting a valuation, then we will reconsider the optional nature of the proposal.

We recognize that the question of whether to require a valuation in all customer account statements of a general securities member is fundamental to the proposal. We will carefully review any comments on whether a valuation should be required and whether valuations will continue to be made available.

Among others, FINRA consulted extensively with the Investment Program Association's ("IPA") Task Force on Account Statement Reporting. On January 31, 2013, the IPA sent a letter proposing "possible solutions which achieve [FINRA's] regulatory objectives and enhance transparency, accuracy and understandability of account statement reporting for investors."[17] The IPA suggested that account statements reflect a net offering price until the earlier of (1) an appraisal-based valuation of the

[17] See Letter from IPA Task Force on Account Statement Reporting, to Robert L.D. Colby, Chief Legal Officer, FINRA, dated January 31, 2013.

securities is published in the issuer's periodic or current report, or (2) the filing of the issuer's first periodic report following the first anniversary of the date when initial escrow is released to commence investments. The IPA proposed to define "net offering price" as the gross offering price less sales commissions and dealer manager fees (i.e., front-end underwriting compensation expenses as defined in Rule 2310(b)(4)(c)(ii)) reimbursed or paid for with offering proceeds.

The IPA suggested that, following the filing of the issuer's first periodic report after the first anniversary of the breaking of escrow, the net offering price included on a customer account statement should be reduced to reflect that portion, if any, of cumulative distributions to investors through the anniversary of the breaking of escrow which was provided from borrowings, net offering proceeds, returns of capital in distributions from asset sales proceeds, or stock dividends. Such an adjustment would capture any dilution of per share value resulting from unearned distributions in the initial year following breaking of escrow. The IPA suggested that after the filing of the second periodic report following the second anniversary of the effective date of the first registration of the offering, the account statement should reflect the per share estimated value.

The IPA also recommended amending FINRA Rule 2310(b)(5) to prohibit a member from participating in an offering unless the general partner or sponsor of the REIT or DPP agrees to provide a per share estimated value no later than the filing of the second periodic report following the second anniversary of the effective date of the first registration of the offering. FINRA proposes to prohibit a member from participating in an offering unless the general partner or sponsor of the REIT or DPP agrees to provide a per share estimated value in a periodic report filed pursuant to Section 13(a) or 15(d) of the Act, no later than the second anniversary of breaking escrow and in each annual report thereafter.

On April 29, 2013, the IPA issued Practice Guidance 2013-01, entitled "Valuations of Publicly Registered Non-Listed REITs."[18] The IPA Guidance recommends that REITs, subject to the approval of a valuation committee and its board of directors, engage a third-party valuation expert to assist in the process of determining an estimated per share value.[19] The IPA Guidance generally recommends that the independent third party be a qualified firm with substantial and demonstrable expertise in valuation of assets or investments similar to those owned by the REIT, that the valuation be first conducted after the closing of the REIT's initial public offering and at least once every two years thereafter, that it be conducted in accordance with the standards of the Appraisal Institute,[20] and that it be certified by a member of the Appraisal Institute with an appropriate designation.

Similarly, the proposed amendments to Rule 2310 would require that the general partner or sponsor of the REIT or program agree to ensure that the valuation is conducted at least once every two years, is derived from a methodology that conforms to standard industry practice, and is accompanied by a written opinion to the general partner or sponsor of the program or REIT that explains the scope of the review, the methodology used to develop the valuation, and the basis for the per share estimated value. The

---

[18] Investment Program Association Practice Guidelines 2013-01 (April 29, 2013).

[19] See IPA Guidance at 12.

[20] The Appraisal Institute is a trade organization that, among other things, focuses on education, testing, experience and demonstration of knowledge, understanding and ability for real estate appraisers.

proposed rule change also builds upon the IPA Guidelines by offering a set of valuation methodologies that are similar, but somewhat more expansive.[21]

As further discussed in Item II. B. below, FINRA does not believe that the proposal will cause a significant economic impact on members. The current rule, and each of the previously proposed approaches to estimated valuation, requires the inclusion of estimated valuations in customer account statements in certain circumstances. In contrast, the instant proposal would remove this requirement, while allowing all members to voluntarily provide estimated values. Neither the disclosure requirements nor the proposed amendments to Rule 2310 should impose a significant economic impact on members. The Rule 2310 amendments generally build upon the existing requirements and are consistent with the IPA's guidance. The disclosures proposed by the amendments are substantially similar to those in the existing rule.

The effective date of the proposed rule change will be announced in a Regulatory Notice no later than 90 days following Commission approval. In order to give industry participants time to make changes to distribution agreements they may wish to implement in response to the amendments, the effective date of the proposed rule change will be no earlier than 180 days following Commission approval.

---

21 For example, the net investment methodology suggested by the IPA would not deduct distributions until the end of the first year, whereas the current proposal provides for such deductions immediately. FINRA believes that investors will be better served by understanding immediately the effect of a return of capital as a distribution (rather than the use of the capital to generate a return on investment) on the value of their investment. Since expenses, other than those for distribution – such as program management fees – may contribute to a return on investment, the current proposal would not deduct those fees in the net investment calculation.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[22] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The proposed rule change is necessary for the protection of investors in unlisted DPP and REIT securities in that it seeks to ensure that per share estimated values for unlisted DPP and REIT securities included on customer account statements have been developed in a manner reasonably designed to ensure their reliability. The proposed rule change also would eliminate the current requirement that members must, at a minimum, include on customer account statements the per share estimated value of these securities when a value appears in the annual report. For the reasons explained earlier, FINRA has determined not to explicitly require the presentation of a valuation in customer account statements because it could interfere with the objective of ensuring that valuations are reliable. Instead, under the proposal, a general securities member would not be required to include in a customer account statement a per share estimated value for an unlisted DPP or REIT security, but any member (not only a general securities member) may choose to do so if the value has been developed in a manner reasonably designed to ensure that it is reliable, the member has no reason to believe that it is unreliable, and the account statement includes certain disclosures.

---

22 15 U.S.C. 78o–3(b)(6).

In addition, the proposed rule change would ensure that customers continue to receive meaningful information about the nature of DPPs and REITs where a value is not included and, when a value is provided, the source of the per share estimate, the methodology by which it is developed and the illiquid nature of the securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As stated above, FINRA believes that this proposed rule change is necessary for the protection of investors in unlisted DPP and REIT securities who currently often receive unreliable per share estimates on their customer account statements. Further, the proposed rule change treats all general securities members uniformly, including in cases where the general securities member voluntarily refrains from including a per share estimate, which is permissible under the proposal.

Each general securities member may choose either to: refrain from including a per share estimated value (though the member must include the required disclosures, which are substantially similar to those required today); choose from one of the methodologies described in the proposed rule change (so long as the member has no reason to believe it is unreliable);[23] or provide a per share estimated value that is derived from some other methodology that was developed in a manner reasonably designed to ensure that it is reliable (and so long as the member has no reason to believe that it is unreliable).

---

23 FINRA also notes that the methodologies proposed are intended to provide general securities members with two acceptable approaches where they choose to continue to include per share estimated values on customer account statements. Such guidance was requested by commenters to the prior proposals, as further discussed in Item II. C. below.

Irrespective of the methodology used, any member choosing to include a per share estimated value on a customer account statement must provide the disclosures required under the proposed rule, which also are substantially similar to those currently required. Therefore, FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

In September 2011, FINRA published Notice 11-44 requesting comment on proposed amendments to NASD Rule 2340(c). A copy of Notice 11-44 is attached as Exhibit 2a. The comment period expired on November 12, 2011, and FINRA received 25 comments.[24] A list of the commenters and copies of the comment letters received in response to Notice 11-44 are attached as Exhibits 2b and 2c, respectively. In March 2012, FINRA published Notice 12-14, which re-proposed amendments to NASD Rule 2340(c) in light of comments received in response to Notice 11-44. A copy of Notice 12-14 is attached as Exhibit 2d. The comment period expired on April 11, 2012, and FINRA received 17 comments.[25] A list of the commenters and copies of the comment letters received in response to Notice 12-14 are attached as Exhibits 2e and 2f, respectively. A summary of the comments and FINRA's response is provided below.

Notice 11-44 Proposal

In Notice 11-44, FINRA proposed several modifications to NASD Rule 2340 that were designed to improve the quality of the information provided to customers on

---

[24] See Exhibit 2b for a list of commenters on Notice 11-44.

[25] See Exhibit 2e for a list of commenters on Notice 12-14.

account statements. The amendments proposed in Notice 11-44 would have limited the period of time during which per share estimated values could be based on the gross offering price to the initial three-year offering period provided for under Rule 415(a)(5) of the Securities Act. These amendments also would have required firms to deduct organization and offering expenses from the gross offering price to arrive at a per share estimated value (i.e., a net offering price). In addition, these amendments would have prohibited a firm from using a per share estimated value from any source, if it “knows or has reason to know the value is unreliable,” based upon publicly available information or nonpublic information that came to the firm’s attention. Finally, Notice 11-44 sought to permit members to refrain from providing a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT did not contain a value that complied with the disclosure requirements of NASD Rule 2340.

While commenters generally supported the proposed changes in Notice 11-44, the most notable comments concerned using a value other than the public offering price during the initial offering period and imposing an affirmative duty on members to monitor and confirm the reliability of the per share estimated value given the proposed requirement that the member must refrain from using the value if it knows or “had reason to know” that the value was unreliable.[26]

Notice 12-14 Proposal

FINRA considered the comments received in response to Notice 11-44 and issued Notice 12-14 reflecting changes that were responsive to the comments received. Under the revised proposal in Notice 12-14, general securities members would no longer be

[26] ABA and SIFMA.

required to provide a per share estimated value, unless and until the issuer provided an estimate based on an appraisal of assets and liabilities in a periodic or current report. During the initial offering period, member firms would have the option of using a modified net offering price or designating the securities as "not priced." The revised proposal also modified the account statement disclosures that accompany per share estimated values. Notice 12-14 also included alternative disclosure requirements for DPPs or REITs that calculate a daily NAV.

While most commenters supported the use of a modified net offering price on the customer account statement during the initial offering period,[27] some commenters requested that FINRA change the proposed rule language to uniformly state whether the net offering price should exclude fees other than front-end underwriting compensation expenses, as opposed to requiring it "at a minimum."[28]

Further, while some commenters supported FINRA's proposed use of a "not priced" option,[29] other commenters objected to members designating securities as "not priced" on the customer account statement.[30] In light of these comments, FINRA's new proposed amendments would allow, but not require, members to refrain from providing a per share estimated value on the customer account statement.

FINRA received several comments on the use of a per share estimated value based upon an appraisal or valuation of the program's assets and operations. While some

---

27 American Realty Capital, NAREIT, REISA and U.S. Chamber of Commerce.

28 NASAA and NorthStar.

29 ABA and NASAA.

30 Franklin Square, IPA, NAREIT, NorthStar and PIABA.

objected,[31] several commenters supported the use of a per share estimated value, as proposed,[32] while others suggested that FINRA require the use of an independent third party valuation service to provide the value.[33] Some commenters requested that FINRA, at a minimum, clarify whether it would create or require members to use a standardized valuation methodology.[34] In view of the broad range of DPPs and REITs existing in the marketplace, the current proposal permits flexibility in choosing a methodology for developing an independent valuation.

Several commenters requested that FINRA broaden the proposal to accommodate programs, such as business development companies that use a NAV on a periodic basis.[35] The new proposed amendments do not specify the use of a daily NAV, but rather would accommodate any DPP or REIT that provides a per share estimated value reflecting a valuation disclosed in the issuer report where a third-party valuation expert or experts determine, or provide material assistance in the process of determining, the valuation.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

---

31 ABA, ICON Investments, IPA and NAREIT.

32 American Realty Capital and W.P. Carey.

33 NASAA.

34 NASAA and Prodigious.

35 American Realty Capital, IPA, and NAREIT.

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2014-006 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2014-006. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2014-006 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Elizabeth M. Murphy

Secretary

[36] 17 CFR 200.30-3(a)(12).

Exhibit 2a

Regulatory Notice 11-44

Customer Account Statements

FINRA Requests Comment on Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements

Comment Period Expires: November 12, 2011

Executive Summary

FINRA is proposing amendments to NASD Rule 2340 (Customer Account Statements) to address how firms report the per share estimated values of unlisted Direct Participation Programs (DPPs) and unlisted Real Estate Investment Trusts (REITs) on customer account statements.[1] The amendments would limit the time period that the offering price may be used as the basis for a per share estimated value to the period provided under Rule 415(a)(5) of the Securities Act of 1933 (Initial Offering Period). The amendments also would require firms to deduct organization and offering expenses from per share estimated values during the Initial Offering Period. The amendments would prohibit a firm from using a per share estimated value, from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that has come to the firm's attention. Finally, the amendments would allow a firm to omit a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT does not contain a value that complies with the disclosure requirements of Rule 2340.[2]

Questions regarding this *Notice* may be directed to:

- Joseph E. Price, Senior Vice President, Corporate Financing/Advertising Regulation, at (240) 386-4623;
- Gary L. Goldsholle, Vice President and Associate General Counsel, Office of the General Counsel, at (202) 728-8104; or
- Paul Mathews, Director, Corporate Financing Department, at (240) 386-4639.

September 2011

Notice Type
- Request for Comment

Suggested Routing
- Compliance
- Legal
- Senior Management

Key Topics
- Customer Account Statements
- Unlisted Direct Participation Programs (DPPs)
- Unlisted Real Estate Investment Trusts (REITs)

Referenced Rules & Notices
- FINRA Rule 2231
- FINRA Rule 2310
- NASD Rule 2340
- NASD Rule 5110
- Regulatory Notice 09-09
- Rule 415 under the Securities Act of 1933

FINRA® Financial Industry Regulatory Authority

Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by November 12, 2011.

Member firms and other interested parties can submit their comments using the following methods:

- Emailing comments to *pubcom@finra.org*; or
- Mailing comments in hard copy to:

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

To help FINRA process and review comments more efficiently, persons should use only one method to comment on the proposal.

Important Notes: The only comments that FINRA will consider are those submitted pursuant to the methods described above. All comments received in response to this *Notice* will be made available to the public on the FINRA website. Generally, FINRA will post comments on its site one week after the end of the comment period.[3]

Before becoming effective, a proposed rule change must be authorized for filing with the SEC by the FINRA Board of Governors, and then must be approved by the SEC, following publication for public comment in the *Federal Register*.[4]

Background

NASD Rule 2340 generally requires each general securities member firm to send account statements to customers at least quarterly. The account statements must include a description of any securities positions, money balances and account activity since the firm issued the prior account statement. A firm that does not carry customer accounts and does not hold customer funds or securities is not a general securities member firm and is not subject to the provisions of Rule 2340.

NASD Rule 2340(c) contains specific provisions addressing the estimated values of DPPs and REITs on customer account statements.[5] The rule generally requires that a general securities member firm include an estimated value for a DPP or REIT security held in a customer's account. The rule states that the per share estimated value included on a customer account statement may be obtained from the annual report, an independent valuation service or any other source. The rule requires that firms develop a per share estimated value on a customer account statement from data that is not more than 18 months old.[6] The rule also requires a firm to remove or amend a per share estimated value if the firm can demonstrate that the value was inaccurate as of the date of valuation or is no longer accurate as a result of a material change in operations.

FINRA Rule 2310 (Direct Participation Programs) prohibits a firm from participating in a public offering of a DPP or REIT unless the general partner or sponsor represents that it will include a per share estimated value in each annual report.[7] The current industry practice is to use the value in the issuer's annual report as the per share estimated value on a customer account statement.

Regulatory Notice 09-09 addressed the use of the offering price, or "par value," as the basis of the per share estimated value required under NASD Rule 2340. The *Notice* discussed the interplay between the use of the offering price from the annual report and the requirement that the per share estimated value on a customer account statement be developed from data that is not more than 18 months old. The *Notice* explained that 18 months after the conclusion of the offering, the per share estimated value must be derived from an appraisal of the issuer's assets and operations, and may not simply be a restatement of the aged offering price.

Proposed Amendments[8]

Presenting Per Share Estimated Value, Net of Organization and Offering Expenses

The estimated value of an illiquid security such as a DPP or REIT may be derived from several sources. An appraisal of the issuer's assets and operations will assist investors in understanding the value and relative performance of the DPP and REIT over time. However, in the earlier stages of an offering of a DPP or REIT, as it accumulates assets, the net offering price can be a suitable alternative, particularly since an appraisal would involve recently acquired assets and cash that is yet to be invested during the ramp-up period. Appraisals also may be expensive depending on factors such as the nature and geographic dispersal of assets. In consideration of these concerns, FINRA proposes to permit valuations based on the offering price during the Initial Offering Period when the program is acquiring assets and firms are selling shares at a stable value on a best-efforts basis. However, FINRA proposes to amend the rule to require that all per share estimated values, including those that are based on the offering price, reflect a deduction of all organization and offering expenses (net value).[9]

Under Rule 2310(a)(12), organization and offering expenses consist of expenses incurred in connection with registration and distribution, including all forms of compensation paid to broker-dealers and affiliates in connection with the offering. Rule 2310 generally limits organization and offering expenses to 15 percent of the gross proceeds of an offering.

These expenses have three components: (1) issuer expenses that are reimbursed or paid for with offering proceeds, (2) underwriting compensation, and (3) due diligence expenses.

While any value of an illiquid security is an estimate, netting out the offering expenses is likely to be a closer approximation to the intrinsic value, particularly since the up-front fees and expenses reduce the amount of the investable capital during the ramp-up period when the assets are acquired by the DPP or REIT.[10] Requiring net values on customer account statements during the Initial Offering Period will provide greater transparency to investors about the fees and expenses, which would benefit investors.[11]

Close of Initial Offering Period and Appraised Values

Rule 415(a)(5) provides that certain types of registered securities, including DPPs and REITs, may be offered and sold if no more than three years have elapsed since the initial effective date of the registration statement. Under Rule 415(a)(6), the Securities and Exchange Commission may make another registration statement for a DPP or REIT effective for a second three-year offering period. If a new registration statement is filed, Rule 415(a)(5)(A) permits securities covered by the prior registration statement to continue to be offered and sold until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the initial effective date. Under the proposed amendments, the three-year period under Rule 415(a)(5) and any "carryover period" under Rule 415(a)(5)(A) constitute the Initial Offering Period in NASD Rule 2340.

FINRA proposes to limit the period during which a per share estimated value based on the net offering price may be included on an account statement to the Initial Offering Period. Beyond the Initial Offering Period, the volatility in the value of the underlying assets of a DPP or REIT can cause the value to deviate substantially from the initial offering price, rendering the net offering price a poor estimate of the per share estimated value. After the Initial Offering Period, the basis for a per share estimated value included on a customer account statement must be based on an appraisal of a DPP or REIT's assets, liabilities and operations.

The proposed amendments eliminate the provision in NASD Rule 2340(c)(2) that requires firms to develop a per share estimated value from data that is no more than 18 months old.

Instead, the proposed amendments require the data that serves as the basis for a per share estimated value to be no less current than the data in the most recent annual report. If a per share estimated value is available that is more recent than the value in the annual report, member firms can disclose that value if it meets the requirements of Rule 2340.[12]

Reliability of Estimated Values

Rule 2340 currently requires a member firm to remove or amend a per share estimated value if the firm can demonstrate that the value was inaccurate as of the date of valuation or is no longer accurate as a result of a material change in operations. The proposed amendments adjust this requirement to prohibit a firm from using a per share estimated value, from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that has come to the firm's attention.

The proposed amendments also allow a firm to omit the per share estimated value if the most recent annual report of the DPP or REIT does not contain a value that complies with the disclosure requirements of the rule. In the alternative, a firm could decide to provide a reliable value from a source other than the annual report that meets the rule's requirements. The amendments would require, however, that if a per share estimated value does not appear in or has been removed from a customer account statement, the firm must disclose the reason the value does not appear or has been removed.

Endnotes

1. Unlisted DPPs and unlisted REITs do not trade on a national securities exchange. DPPs are defined in FINRA Rule 2310 and offer investors an equity interest in an entity such as a limited partnership that provides flow-through tax consequences and distributes income generated from underlying assets. REITs are defined in Section 856 of the Internal Revenue Code and are pass-through entities that offer investors an equity interest in a pool of real estate assets, including land, buildings, shopping centers, hotels and office properties. The definitions of DPP and REIT in NASD Rule 2340(d)(3) and (4) exclude securities listed on a national securities exchange as well as securities that are in a depository and settle regular way. The definition of DPP also excludes any program registered as a commodity pool.
2. NASD Rule 2340 only applies to customer account statements, as defined by that rule. Rule 2340, and as proposed to be amended, would not apply to annual statements of the fair market value of assets provided by retirement account trustees and custodians under Internal Revenue Service Regulations, including Section 1.408-2(e)(5)(ii)(E).
3. FINRA will not edit personal identifying information, such as names or email addresses, from submissions. Persons should submit only information that they wish to make publicly available. *See NTM 03-73* (November 2003) (NASD Announces Online Availability of Comments) for more information.

4. *See* SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Certain limited types of proposed rule changes, however, take effect upon filing with the SEC. *See* SEA Section 19(b)(3) and SEA Rule 19b-4.

5. NASD Rule 2340 applies to DPPs and REITs regardless of whether they are listed or itemized "above the line" or "below the line." The term "below the line" means that securities and other assets are reported on the account statement, but are not in the possession of the member. New platforms that provide processing for alternative investments may result in DPPs and REITs being reported more frequently above the line because the securities are in the possession of member firms.

6. NASD Rule 2340(c) also requires that account statements provide: (1) a brief description of the estimated value, its source and the method by which it was developed; and (2) disclosure that the investment program securities are generally illiquid securities and the estimated value may not be realized when investors seek to sell the security. Additional disclosure are required if the account statement does not provide an estimated value.

7. Section 13(a) of the Securities Exchange Act requires annual reports to be distributed to investors.

8. As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. *See* SR-FINRA-2009-028. The amendments discussed herein would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of SEC approval.

9. Some REITs have begun to calculate a daily net asset value (NAV). The selling price per share is based on the daily NAV calculation and typically includes a selling commission. Under the proposal, the net estimated value required on customer account statements for such programs would be the NAV and could not include any commissions, nor any other organization or offering expense associated with the offering.

10. If any organization and offering expenses are to be deducted from portfolio assets or income, then under the proposal the net estimated value would have to reflect those deductions that will be taken during the Initial Offering Period, in addition to the deduction for organization and offering expenses paid out of proceeds from the offering.

11. *Regulatory Notice 09-09* reminded firms of their obligation under the suitability rule to determine the amount of dividend distributions that represents a return of investors' capital and whether that amount is changing. In addition, firms must consider whether there are impairments to the real estate investment program's assets or other material events that would affect the distributions and whether disclosure regarding dividend distributions needs to be updated to reflect these events.

12. Firms would not be required to immediately update the per share estimated values shown in customer account statements when a new value appears in the annual report. However, firms must use reasonable efforts to address operational or technical requirements associated with updating per share estimated values, to ensure that the updating occurs as promptly as practicable. Firms that require more than one statement cycle to update the per share estimated values are likely to raise a presumption that the firm is not making reasonable efforts.

Attachment A

Below is the text of the proposed amendments to Rule 2340.

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 a direct participation program (DPP) or real estate investment trust (REIT) security in a customer's account must provide a per share estimated value of such security on the account statement as provided below:

(A) The customer account statement must disclose:

(i) the source of the per share estimated value, which may be from the annual report, independent valuation service or any other source, and the manner in which the per share estimated value was calculated, and

(ii) that unlisted DPP or REIT securities are illiquid securities and that the per share estimated value may not be realized when the customer seeks to liquidate the security.

(B) During a period not to exceed the period provided under SEC Rule 415(a)(5) since the initial effective date of the first registration statement under which the DPP or REIT is offered and sold (Initial Offering Period), any per share estimated value based upon the offering price must reflect a deduction of the amount of organization and offering expenses, as defined by FINRA Rule 2310(a)(12).

(C) After the Initial Offering Period, only a per share estimated value calculated based on an appraisal of the assets, liabilities and operations of the DPP or REIT and derived from data no less current than the data in the most recent annual report may be disclosed.

(2) Notwithstanding the requirements in paragraph (1):

(A) A member must refrain from providing a per share estimated value, from any source, if it knows or has reason to know the value is unreliable, based upon publicly available information or nonpublic information that has come to the member's attention; and

(B) A member may refrain from providing a per share estimated value if the most recent annual report of a DPP or REIT does not contain a per share estimated value that complies with the requirements in paragraphs (1)(B) or (1)(C).

(3) For any member refraining from providing a per share estimated value as permitted in paragraph (2), the customer account statement must disclose that:

(i) unlisted DPP or REIT securities are illiquid;

(ii) the value of the security is different from its purchase and may be less than the purchase price

(iii) an estimated valuation of the security is unavailable; and

(iv) the reason the value does not appear in, or has been removed from, the account statement.

(d) Definitions

No change.

Exhibit 2b

REGULATORY NOTICE 11-44

Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements

	Date Letter Received	Sender	Company Name
1.	11/11/11	Ryan K. Bakhtiari	Public Investors Arbitration Bar Association
2.	1/11/11	David T. Bellaire	Financial Services Institute
3.	11/11/11	Stephanie L. Brown	LPL Financial
4.	11/12/11	Richard B. Chess	Real Estate Investment Securities Association
5.	11/1111	Ryan D. Conley	Franklin Square Holdings, L.P.
6.	11/11/11	Martel Day	Investment Program Association
7.	10/04/11	DFPG Investments, Inc	DFPG Investments, Inc.
8.	11/11/11	Daniel R. Gilbert and W. Timothy O'Toole	NorthStar Realty Finance
9.	11/11/11	Jon Hale	Partnership Consultants, Inc.
10.	11/14/11	Jon Hale	Partnership Consultants, Inc.
11.	11/18/11	Jack E. Herstein	North American Securities Administrators Association, Inc.
12.	11/11/11	David Hirschmann	U.S. Chamber of Commerce
13.	11/11/11	Charlie Howell and Laura Stankosky	
14.	11/11/11	William A, Jacobson and Brittany Ruiz	Cornell University Law School
15.	11/11/11	John F. Kearney	Research and Due Diligence Association, Inc.
16.	09/30/11	Randy Lewis	Ascent Real Estate Securities, LLC
17.	11/15/11	Thomas F. Price	Securities Industry and Financial Markets Association
18.	11/11/11	Prodigious, LLC	Prodigious, LLC
19.	11/16/11	Jeffrey W. Rubin	American Bar Association
20.	11/11/11	Nicholas S. Schorsch and Michael Weil	American Realty Capital
21.	11/14/11	James M. Stanfield	VSR Financial Services, Inc.
22.	11/17/11	Gordon Taylor	Dividend Capital Securities, LLC
23.	11/11/11	Steven A. Wechsler	National Association of Real Estate Investment Trusts
24.	11/01/11	Daniel Wildermuth	Kalos Financial
25.	11/11/11	W.P. Carey & Co., LLP	W.P. Carey & Co., LLP

Public Investors Arbitration Bar Association

November 11, 2011

Via Email Only
pubcom@finra.org

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

Re: Regulatory Notice 11-44 – Proposed Amendments to NASD Rule 2340

Dear Ms. Asquith:

On behalf of the Public Investors Arbitration Bar Association ("PIABA"),[1] I thank FINRA for the opportunity to comment on the proposed amendments to NASD Rule 2340. We believe some provisions of the proposed amendments may benefit investors by causing general securities members to provide investors with more accurate valuation information concerning unlisted direct participation program ("DPP") and unlisted REIT shares on account statements. We also write to point out that the provisions of the amended rule allowing general securities members to not provide valuation information to investors if the most recent annual report of a DPP or REIT does not contain per share estimated value in compliance with the amended rule is a step backwards.

Rule 2340 was previously amended in late 2000. The amended rule required general securities members to make certain disclosures about DPP and REIT securities and to require the inclusion on account statements of a per share estimated value for DPP or REIT securities if the annual report filed by a DPP or REIT sponsor with the Securities and Exchange Commission ("SEC") included a per share estimated value. Coincident with the amendment of NASD Conduct Rule 2340, the SEC approved amendments to NASD Conduct Rules 2710 and 2810 with respect to REIT and DPP securities.

1 PIABA is a national, not-for-profit bar association comprised of attorneys, including law professors and regulators, both former and current, who devote a significant portion of their practice to representation of public investors in securities arbitrations.

Background Concerning Amendments to
NASD Conduct Rules 2340, 2710, and 2810

On November 29, 2000, the SEC issued Release No. 34-34601, announcing amendments to NASD Conduct Rules 2340, 2710 and 2810 (the "SEC Release"). The SEC Release makes clear that the genesis of the amendments to the above-referenced rules was a March 9, 1994, letter from Representative Edward J. Markey, Chairman, and Representative Jack Fields, Ranking Republican Member, of the Subcommittee on Telecommunications and Finance, U.S. House of Representatives, to Joseph R. Hardiman, then President and Chief Executive Officer of the National Association of Securities Dealers, Inc. ("NASD") (hereinafter the "1994 Letter"). See SEC Release at p. 71169, FN 8. According to the SEC Release, Rep. Markey and Rep. Fields "expressed concern to the NASD regarding the sufficiency of information provided on customer account statements with respect to the current value of illiquid partnership securities. The House Subcommittee noted that investors in non-traded partnerships should be able to know how their investments are performing and expressed a belief that their [sic] might be shortcomings in current valuation reporting to that group of investors." Id.

The comments of Rep. Markey and Fields followed closely the limited partnership debacle of the late 1980's and early 1990's. For years, broker/dealers carried limited partnership units at cost basis on customers' monthly statements, or customers' monthly statements indicated that valuation of their limited partnership units was not available.

In response to the 1994 Letter, the NASD proposed and the SEC approved amendments to NASD Conduct Rules 2340, 2710, and 2810.

NASD Conduct Rule 2340 was amended to include subsection (b) (currently subsection (c)). Subsection (b)(1)(B) of the Rule required members, which carry customer accounts and hold customer funds or securities, to provide on customer statements a per share estimated value for any DPP or REIT security held in a customer's account, if the annual report for a DPP or REIT included a per share estimated value for a DPP or REIT security and if certain conditions were met. The estimated value stated in the annual report or derived from an independent valuation service or another source was required to be included on the first customer account statement issued after the annual report became available, provided the member met the conditions of subsections (b)(2) and (3). See SEC Release at p. 71170. Subsection (b)(2) dictated that a member could provide a per share estimated value for a DPP or REIT security on an account statement only if the estimated value had been developed from data that is of a date no more than eighteen months prior to the date of the statement. Subsection (b)(3) was added to require that any account statement providing an estimated value for a DPP or REIT security include a brief description of the estimated value, its source, and the method by which it was developed. Subsection (b)(3) also required that the account statement disclose that DPP or REIT securities are generally illiquid and the estimated value may not be the actual liquidation value of the security.

The SEC Release stated that during the course of the amendment process, NASD Regulation revised Rule 2340(b)(4) to prohibit a member from including estimated per share value for a DPP or REIT security on a customer account statement if the member was able to demonstrate that the value was inaccurate as of the date of valuation or later became inaccurate. The SEC Release further stated that NASD Regulation had noted that the revision of NASD Rule 2340(b)(4) did not relieve a member of its obligation to provide an alternative per share estimated value when the member's obligation was triggered by NASD Rule 2340(b)(1)(B). See SEC Release at p. 71171.

The SEC Release stated the rationale for the eighteen month time period for the use of the per share estimated value information provided in a sponsor's annual report. The SEC Release stated, in pertinent part:

> NASD Regulation believe that the 18-month standard provides sufficient time for the member and for an independent valuation source to develop an estimated value for DPP and REIT securities based on the audited financial statements contained in the Form 10-K of the DPP or REIT. For example, an estimated value based on December 31, 1999, financial statements could be used from January 1, 2000, through June 30, 2011, thereby allowing time between April and June, 2001, for a new estimated value to be developed based on the December 31, 2000, financial statements.
>
> * * *
>
> The Commission believes that NASD Rule 2340(b)(2) will help ensure the reliability of estimated valuations provided on customer account statements by requiring the valuations to be based on relatively recent data. In addition, as NASD Regulation noted in its proposal, the 18-month period should provide a member or an independent valuation source with sufficient time to develop a new valuation based on audited financial statements provided in a DPP or REIT's most recent Form 10-K.

See SEC Release at pp. 71170 and 71172 (emphasis supplied).

The SEC Release also explained the rationale for the amendments to NASD Conduct Rules 2710 and 2810. The SEC Release stated, in pertinent part:

> NASD Regulation believe that the amendments to NASD Rule 2710, "Corporate Financing Rule – Underwriting Terms and Arrangements," and NASD Rule 2810, "Direct Participation Programs," will help

> ensure that DPP general partners or sponsors and REIT trustees provide estimated per share values in their annual reports. NASD Rule 2710(c)(6), as amended, states that, when proposed in connection with the distribution of a public offering of securities, it shall be unfair and unreasonable for a member or associated person to participate in a public offering of REIT securities unless the trustee will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Act a per share estimated value of the trust securities, the method by which it was developed, and the date of the data used to develop the estimated value.

See SEC Release at p. 71171 (emphasis supplied).

NASD Regulation announced the changes to Rules 2340, 2710, and 2810 in NASD Notice to Members 01-08. The amendments became effective on April 16, 2001. In announcing the changes to Rules 2710 and 2810, NASD Regulation incorporated the rationale set forth in the SEC Release. NASD NTM 01-08 stated, in pertinent part:

> **Rules 2710 And 2810** – NASD Regulation has also adopted amendments to Rule 2710, "Corporate Financing Rule – Underwriting Terms and Arrangements," and Rule 2810, "Direct Participation Programs," that are intended to help ensure that DPP general partners or sponsors and REIT trustees provide estimated per share values in their annual reports. Rule 2710(c)(6) and Rule 2810(b)(5), as amended, prohibit a member or associated person from participated in a public offering of DPP or REIT securities unless the general partner or trustee, as applicable, agrees to disclose in each annual report distributed to investors pursuant to Section 13(a) of the Securities Exchange Act of 1934 a per share estimated value of the securities, the method by which it was developed, and the date of the data used to develop the estimated value.

See NASD NTM 01-08 at p. 2.

Section 2710(a)(4) broadly defined "participation or participating in a public offering." Subsection (c)(6) of the July, 2001, Conduct Rules set forth a list of terms and arrangements which the NASD had determined were unfair or unreasonable with respect to publicly offered securities. Subsection (c)(6) also prohibited members or associated persons from participating in any way in the public offering of securities after any arrangement, term, or condition proposed in connection with the public offering had been determined to be unfair or unreasonable. Subsection (c)(6)(A) provided as follows:

> No member or person associated with a member shall participate in any manner in a public offering of securities after any arrangement proposed in connection with the public offering, or the terms and conditions relating thereto, has been determined to be unfair or unreasonable pursuant to this Rule or inconsistent with any By-Law or any Rule or regulation of NASD.

Subsection (c)(6)(B) set forth the terms and arrangements proposed in connection with the distribution of a public offering of securities which NASD Regulation had determined to be unfair and unreasonable.

The amendment to Rule 2710 with respect to publicly offered, non-traded REIT securities announced in the SEC Release and NASD Regulation NTM 01-08 was set forth in subsection (xiv) of NASD Conduct Rule 2710(c)(6)(B). Subsection (c)(6)(B)(xiv) provided that it was an unfair or unreasonable term or arrangement of a public offering of non-traded REIT securities as follows:

> For a member or person associated with a member to participate in a public offering of real estate investment trust securities, as defined in Rule 2340(c)(4), unless the trustee will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Act a per share estimated value of the trust's securities, the method by which it was developed, and the date of the data used to develop the estimated value. (emphasis supplied)

This amendment to Rule 2710 remained in Rule 2710 until FINRA adopted Rule 5110. The amendment remains unchanged in Rule 5110(f)(2)(M) and is also set forth in FINRA Rule 2310(b)(5).

Comments on Proposed Amendments

The proposed replacement of subsection (c)(4) of Rule 2340 with subsection (c)(2)(A) is certainly an improvement of the rule for the benefit of investors. The proposed amendment changes the basis on which a member must refrain from including a per share estimated value for a DPP or REIT security on an account statement as follows: from the ability of the member to demonstrate that the value is inaccurate or later becomes inaccurate to a member knowing or having reason to know based on information from any source that the value provided by the sponsor in its annual report is unreliable. The broadening of the standard under which a member must refrain from providing an inaccurate per share estimated value on an account statement is certainly beneficial to investors.

However, the proposed amendment set forth in subsection (c)(2)(B) is troubling and is contrary to the interests of investors. Under current subsections (c)(1)(B) and subsection (c)(4), if a member can demonstrate that the value of a DPP or REIT security set forth in the annual report filed by the sponsor with the SEC is inaccurate or later becomes inaccurate, the member is still obligated to include an estimated value from an independent valuation service or another source.

Under the proposed amended subsection (c)(2)(B), a member may refrain from including a per share estimated value if the most recent annual report of a DPP or REIT does not contain a per share estimated value in compliance with the requirements of subsections (c)(1)(B) or (C). The proposed amendment in subsection (c)(2)(B) allows a member to refrain from providing a per share estimated value, so long as the member makes the disclosures set forth in subsection (c)(3).

Under the existing rule, a member still must provide an estimated value from a source other than the annual report for a DPP or REIT if the member can demonstrate the value set forth in the annual report is inaccurate or has become inaccurate as a result of material changes in the operations or assets of the program or trust. Relieving members of their obligation to provide per share estimated value of DPP or REIT securities if a member knows or has reason to know that the value stated in the annual report is inaccurate is a disservice to investors and is contrary to the intent of the previous changes to NASD Conduct Rules 2340, 2710, and 2810.

The proposed amendments to subsections (c)(1)(B) and (C) are both potentially beneficial to investors and detrimental to investors. In proposed subsection (c)(1)(B), FINRA gives its express approval of the use of offering price or cost basis, reduced by the amount of organization and offering expenses, as a permissible estimated value during the Initial Offering Period. Certainly, the requirement that organization and offering expenses be deducted from per share estimated value based upon the offering price of the securities, is beneficial to investors. However, allowing offering price or cost basis during the Initial Offering Period to be utilized as the basis for an estimated value is a disservice to investors and is contrary to the intent and express provisions of FINRA Rules 2310(b)(5) and 5110(f)(2)(M).

Subsection (b)(5) of Rule 2310 prohibits members from participating in a public offering of DPP or REIT securities unless the general partner or sponsor of the program or REIT will disclose in each annual report distributed to investors a per share estimated value of the securities, the method by which that value was developed, and the date of the data used to develop the estimated value. Subsection (f)(2)(M) of Rule 5120 contains the same prohibition with respect to REIT securities. The intent of the 2000 amendments to NASD Conduct Rules 2340, 2710, and 2810, as stated in the SEC Release, was to help ensure that general partners and sponsors of DPPs and REITs would provide per share valuation information based upon financial statements contained in annual reports. We submit that reporting offering price or cost basis as the estimated value of DPP or REIT securities is not a "method" by which a per share estimated value is "developed" and is not based on anything in the financial statements set forth in an annual report.

In Regulatory Notice 09-09, FINRA provided guidance with respect to the use of "Par Value" as estimated value. The notice stated: "During the offering period, it **may** be reasonable to determine that the estimated value is the value at which the shares are being offered to the public." (emphasis supplied)

In proposed subsection (c)(1)(B), FINRA gives its express authorization to use offering price or cost basis, reduced by the amount of organization and offering expenses, as per share estimated value. Per share estimated value based upon offering price, reduced by organization and offering expenses, may well bear little, if any, relationship to an accurate estimated value of shares.

In FINRA's allegations in its May, 2011, enforcement complaint against David Lerner & Associates, FINRA documents that the Apple REIT sponsor paid distributions to shareholders during the offering period from borrowed funds and investors' capital. Information available from the financial statements of other REIT sponsors indicates that several other REIT sponsors have paid and are paying distributions with borrowed funds and investors' capital. The only manner in which a reasonably accurate estimated value may be obtained during the Initial Offering Period, and thereafter, is from an appraisal of the assets, liabilities, and operations of a REIT.

The requirement of proposed subsection (c)(1)(C) that per share estimated value be calculated based on appraisal of the assets, liabilities, and operations of a DPP or REIT after the Initial Offering Period is clearly beneficial to investors. However, such appraisals should be required as the basis for per share estimated values of DPP or REIT securities during the Initial Offering Period, as well.

Whatever beneficial effects the proposed amendments in subsections (c)(1)(B) and (C) may have for investors are vitiated by proposed subsection (c)(2)(B). Under that subsection, a member may refrain from providing a per share estimated value on investor account statements if the annual report of a DPP or REIT does not contain a per share estimated value that complies with the requirements of sections (1)(B) or (1)(C). All general partners or sponsors have to do to avoid a member reporting a per share estimated value on investor account statements which is lower than offering price is to fail to provide per share estimated values in annual reports in compliance with subsections (c)(1)(B) or (C).

Per share estimated values should be required to be based upon appraisals of the assets, liabilities, and operations of a DPP or REIT beginning with the first annual report filed with the SEC. If general partners or sponsors fail to provide per share estimated values based upon such appraisals, members should be required to report per share estimated value based upon an analysis of the financial statements in an annual report by an independent valuation service or another source.

There is an alternative available to place the burden of providing per share estimated values on general partners or sponsors, rather than FINRA members. To ensure that general partners and sponsors provide per share estimated values based upon an analysis of the assets, liabilities, and operations of DPPs and REITs, FINRA could and should propose amendments to subsection (b)(5) of FINRA Rule 2310 and subsection (f)(2)(M) of Rule 5110. Those proposed amendments should provide that members are barred from participating in a public offering of DPP or REIT securities unless the general partner or sponsor of the program or REIT will disclose in each annual report a per share estimated value based upon an annual appraisal of the assets, liabilities, and operations of the program or REIT.

Respectfully submitted,

Ryan K. Bakhtiari
Aidikoff, Uhl & Bakhtiari
9454 Wilshire Blvd., Suite 303
Beverly Hills, California 90212
Telephone (310) 274-0666
Fax (310) 859-0513
rbakhtiari@aol.com

FINANCIAL SERVICES INSTITUTE
VOICE OF INDEPENDENT BROKER-DEALERS AND INDEPENDENT FINANCIAL ADVISORS
www.financialservices.org

VIA ELECTRONIC MAIL

November 11, 2011

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

RE: FINRA RN 11-44 – Customer Account Statements

Dear Ms. Asquith:

On September 29, 2011 the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 11-44 on Customer Account Statements (RN 11-44).[1] In RN 11-44, FINRA proposed amendments (Proposed Amendments) to NASD Rule 2340[2] affecting how firms report per share estimated values of unlisted Direct Participation Programs (DPPs) and unlisted Real Estate Investment Trusts (REITs) on customer account statements. The amendments would limit the time period that the offering price may be used as the basis for a per share estimated value and would also require firms to deduct organization and offering expenses from per share estimated values during the Initial Offering Period.[3] Finally, the Proposed Amendments would prohibit a firm from using a per share estimated value, from any source, if it "knows or has reason to know the value is unreliable," based on available information that is publicly available or nonpublic information that has come to the firm's attention, and would allow omission of the per share estimated value on a customer account statement provided that the most recent annual report of the DPP or REIT does not contain a value that comports with the disclosure requirements under NASD Rule 2340.[4]

The Financial Services Institute (FSI)[5] welcomes the opportunity to comment on the Proposed Amendments. We support the intent of the Proposed Amendments which seek to enhance investor protection by providing improved disclosure regarding the value of illiquid DPPs and REITs. However,

---

[1] FINRA Regulatory Notice 11-44, available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124538.pdf
[2] Available at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=4324&element_id=3647&highlight=2340#r4324
[3] FINRA Regulatory Notice 11-44, available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124538.pdf
[4] Id.
[5] The Financial Services Institute is an advocacy organization for the financial services industry – the only one of its kind – FSI is the voice of independent broker-dealers and independent financial advisors in Washington, D.C. Established in January 2004, FSI's mission is to create a healthier regulatory environment for their members through aggressive and effective advocacy, education and public awareness. FSI represents more than 125 independent broker-dealers and more than 31,000 independent financial advisors, reaching more than 15 million households. FSI is headquartered in Atlanta, GA with an office in Washington, D.C.

we do have concerns regarding certain aspects of the Proposed Amendments and seek clarification regarding several issues. These concerns are discussed in detail below.

Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 independent financial advisors – or approximately 64% percent of all practicing registered representatives – operate in the IBD channel.[6] These financial advisors are self-employed independent contractors, rather than employees of the IBD firms. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically "main street America" – it is, in fact, almost part of the "charter" of the independent channel. The core market of advisors affiliated with IBDs is comprised of clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.[7] Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI's primary goal is to insure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

Comments on the Proposed Amendments

As noted above, FSI welcomes the opportunity to comment on the Proposed Amendments. While we applaud FINRA's efforts to improve investor protection through the Proposed Amendments, we have several concerns that we urge FINRA to consider. These concerns are addressed below.

[6] Cerulli Associates at http://www.cerulli.com/

[7] These "centers of influence" may include lawyers, accountants, human resources managers, or other trusted advisors.

- Application of Proposed Amendments to an Introducing Broker-Dealer that Does Not Custody the Security or Hold Customer Funds – NASD Rule 2340 requires each general security member to send customer account statements on at least a quarterly basis. The Rule also contains specific provisions regarding estimated values of DPPs and REITs contained in the customer account statement. Under the current Rule, a general securities member must provide a per share value of a DPP or REIT which is based on information which is no more than 18 months old. The Proposed Amendments would alter this requirement by obligating a general securities member to provide a per share estimated value based on an appraisal of the value of the assets, liabilities and operations of the DPP or REIT derived from data which is no less current than the data in the most recent annual report.

  While we note that the definition of "general securities member" excludes a member that does not "not carry customer accounts and does not hold customer funds or securities," we seek specific guidance from FINRA on an introducing broker's obligations under the Proposed Amendments. Specifically, we seek explicit language in the Proposed Amendments indicating that an introducing broker will not be required to provide a per share estimated value for a DPP or REIT where the introducing broker does not carry customer accounts and does not hold customer funds or securities. Further, we urge FINRA to adopt language that states clearly that introducing broker-dealers may reasonably rely upon valuations provided by the firm custodying the DPP and/or REIT securities.

- Member Obligations Under the "Knows or Has Reason to Know" Standard – Under the Proposed Amendments, a member is prohibited from providing a per share estimated value for a DPP or REIT if the member "knows or has reason to know" that the value is unreliable. The Proposed Amendments indicate that actual knowledge or a reason to know that the value is unreliable may come from publicly available or non-public information that has come to the firm's attention. However, we seek additional guidance regarding a member's obligations and FINRA's expectations regarding when a member "has reason to know." Specifically, we urge FINRA to indicate the factors it would use to determine if a firm "knows or has reason to know" that an estimated per share value is unreliable. Additionally, we urge FINRA to provide guidance regarding a firm's responsibilities with respect to information "that comes to the firm's attention." Is a member required to actively pursue information to confirm the reliability of the valuation? If a member does not engage in active research to confirm the reasonableness of the valuation and receives no information questioning the validity of the per share estimated value, has the member satisfied its obligations under the Proposed Amendments? Absent this clarification, our members will lack the information necessary to develop policies and procedures designed to achieve compliance with the Proposed Amendments.

- Increased Cost to Investors – We urge FINRA to reconsider the requirement in the Proposed Amendments to derive the estimated per share value of the DPP or REIT from data that is no less current than the data in the most recent annual report. Changing the requirement that member firms use data that is no less current than the data in the most recent annual report from the existing requirement that they use data that is no more than 18 months old will increase costs for member firms. These costs will result from the obligation to recalculate the per share estimated value more frequently. These costs will ultimately be passed on to investors. Therefore, we urge FINRA to retain the existing 18 month requirement which properly balances the costs of valuation calculations with the benefit of enhanced investor protections.

- Presenting Estimated Per Share Value Net of Organization and Offering Expenses – The Proposed Amendments would require member firms to provide an estimated per share value that is net of organization and offering expenses. Organization and offering expenses consist of expenses incurred in connection with registration and distribution of shares, and include all compensation paid to broker-dealers and affiliates paid in connection with the offering.

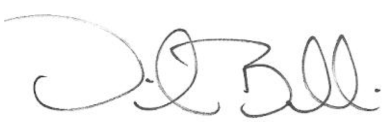
  This proposal unnecessarily singles out DPPs and REITs for adjustments to value that are not required in other investments. For example, values of five-year certificates of deposit are not required to be adjusted to reflect early withdrawal fees. Similarly, the value of a variable annuity is not required to be adjusted to reflect a potential surrender penalty at the time the statement is prepared. On these investment products, disclosures at the point of sale and in the prospectus are deemed to be sufficient. We urge FINRA to treat DPPs and REITs in a similar manner.

Conclusion

We remain committed to constructive engagement in the regulatory process and welcome the opportunity to work with FINRA to enhance investor protection and broker-dealer compliance efforts.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 770 980-8488.

Respectfully submitted,



David T. Bellaire, Esq.
General Counsel and Director of Government Affairs

LPL Financial

Stephanie L. Brown
Managing Director
General Counsel

One Beacon Street, 22nd Floor
Boston, MA 02108-3106
stephanie.brown@lpl.com
617 897 4340 *office*
617 556 2811 *fax*

9785 Towne Centre Drive
San Diego, CA 92121-1968
858 909 6340 *office*
858 646 0609 *fax*

VIA ELECTRONIC MAIL

November 12, 2011

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

Re: FINRA Regulatory Notice 11-44 ("Request for Comment")

Dear Ms. Asquith:

We appreciate the opportunity to comment on the proposed amendments to NASD Rule 2340 ("Proposed Rule") addressing values of unlisted direct participation programs ("DPPs") and real estate investment trusts ("REITs") in customer account statements. The Proposed Rule would limit the time period that the offering price may be used as a basis for a per share estimated value to the period provided under Rule 415(a)(5) of the Securities Act of 1933 ("Initial Offering Period"). The Proposed Rule also would require firms to deduct organization and offering expenses from the per share estimated values during the Initial Offering Period. The Proposed Rule would further prohibit a firm from using a per share estimated value, from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that has come to the firm's attention. Finally, the Proposed Rule would allow a firm to omit a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT does not contain a value that complies with the disclosure requirements of Rule 2340.

As stated below, while we are fully supportive of FINRA's goals of providing greater transparency to DPP and REIT investors, there are several aspects of the Proposed Rule that we believe should be modified to better serve investor interests. We commend FINRA's attempts to provide REIT and DPP investors more frequent appraisals and believe that this will serve as the primary driver to enhanced investor understanding of the products' overall performance. We also believe that improved disclosure surrounding the price displayed on customer account statements during the Initial Offering Period is the appropriate manner in which to address the valuation of the security prior to full appraisals. However, we believe that efforts to regulate DPP and REIT products are better directed at the issuing entities and that attempting to regulate DPP and REIT practices indirectly through retail distribution channels is inefficient and potentially costly.

Ms. Marcia E. Asquith
November 12, 2011
Page 2 of 5

I. Introduction

LPL Financial LLC ("LPL") is one of the nation's leading diversified financial services companies and is registered with the SEC as both an investment adviser and broker-dealer. LPL currently supports the largest independent registered representative base,[1] (referred to herein as "financial advisors") and the fifth largest overall registered representative base in the United States, providing financial professionals with the front, middle, and back-office support they need to serve the large and growing market for brokerage services and independent investment advice, particularly in the market of investors with $100,000 to $1,000,000 in investable assets. As of September 30, 2011, brokerage and advisory assets totaled $316 billion, of which $96.3 billion was in advisory assets. LPL self-clears its transactions and maintains custody of its brokerage client customer accounts.

In 2010, LPL sold in excess of $800 million in REITs and DPP products. We believe that REITs and other DPP products offer investors' exposure to a non-traditional asset class that can diversify a portfolio through a security less correlated to the overall market.

II. Presenting Per Share Estimated Value, Net of Organization and Offering Expenses

Under the Proposed Rule, FINRA would require that all DPP and REIT per share estimated values that appear on customer account statements, including those that are based on the offering price, reflect the deduction of all organization and offering expenses. FINRA's stated purpose of this requirement is based off of the presumption that "the netting out of the offering expenses is likely to be a closer approximation to the intrinsic value, particularly since the up-front fees and expenses reduce the amount of the investable capital during the ramp-up period when the assets are acquired by the DPP or REIT."[2] While LPL is supportive of the conceptual notion of deducting the sales commission from the public offering price, we believe that the issue is best solved through enhanced disclosure and through requirements for more frequent appraisal as described below, and suggested by FINRA in the Proposed Rule. Notably, the $10 per share public offering price that currently is displayed during the Initial Offering Period is an arbitrary number. It is used primarily because it represents a simplistic and easily calculable number from which investors can effortlessly determine yield and unit interests in the issuance. Because the $10 public offering price is not a reflection of the net asset value of the security – subtracting organizational and offering expenses from this arbitrary number to create a second arbitrary number fails to properly address the issue – *i.e., that the net asset value of the security is not calculable until the assets have been invested.*

Moreover, it should be noted that many REIT and DPP products are designed as longer-term yield producing products where the capital appreciation of the underlying securities is of secondary importance. The proposed change to a new offering price may have the unintended consequence of changing this dynamic and of arbitrarily increasing the yield - thus making the product seem more attractive than it otherwise may appear. In addition, because of the additional manners in which a REIT may be purchased and sold (such as through dividend

[1] Investment Advisor's Top 25 Independent Broker/Dealers, *Investment Advisor*, June 2010.
[2] FINRA Regulatory Notice 11-44, September 2011.

Ms. Marcia E. Asquith
November 12, 2011
Page 3 of 5

reinvestment plans, volume discounts and repurchase plans), the creation of a new arbitrary and more complicated "value" may lead to greater investor confusion.[3]

While at first glance the deduction of the organizational and offering expenses may seem akin to the deduction of sales charges from the public offering price afforded other securities – the comparison is not analogous. The Proposed Rule requires deduction of more than sales charges and includes issuer expenses (which may decrease depending on the size of the capital raise), underwriting compensation and due diligence expenses. For instance, the due diligence fees paid to the broker-dealer from a REIT, while charged up-front, are not a distribution expense and instead are paid to provide broker-dealers the resources necessary to *initially* and *continuously* perform due diligence on the product on behalf of investors throughout the offering period of the REIT or DPP. Other products do not deduct these expenses from the public offering price (for instance broker-dealers perform ongoing due diligence of mutual funds – the fees for which may be indirectly derived from the expenses of the mutual fund that are reflected in the expense ratio of the fund). Finally, it should be noted that many investors could invest directly with a REIT issuer or alternatively could make the investment through their brokerage relationship. It would be confusing and inequitable were an investor to receive a statement from the broker-dealer reflecting a different arbitrary number than the statement they received from the issuer who is not bound by FINRA's rules.

We therefore respectfully request that while other elements of the Proposed Rule are promising efforts to increase transparency, that this aspect of the Proposal be reexamined. In its place, LPL would encourage FINRA to support efforts to increase customer awareness of the valuation issue of the Initial Offering Period and the organizational and sales charges imposed by REITs and DPPs. This could be accomplished by enhancing disclosure through both point of sale and customer account statement disclosures. Investors should have full knowledge of the sales charges being paid to their financial advisor and customer account statements should indicate that the price displayed does not represent a net asset value of the security.

III. Close of Initial Offering Period and Appraised Values

As indicated above, while we harbor concerns regarding the proposed change from the $10 fixed price used during the Initial Offering Period, LPL is supportive of changes to the frequency of required appraisals. The Proposed Rule would require that after the Initial Offering Period customer account statements only reflect per share estimated values based off of an appraisal of assets, liabilities and operations of the DPP or REIT that is derived from data no less current than the most recent annual report.

LPL is in agreement that more frequent *independent* appraisals will benefit investors and will provide at least a point in time static valuation of the security. Importantly, while the cost of more frequent appraisals is not insignificant, we believe that the benefits to the investing public of greater transparency outweigh those costs. LPL would continue to recommend that disclosure accompany any such "value" to explain that the REIT valuation is static, may not represent the liquidation value of the security and is not reflective of a true net asset value (*i.e.*, it would not

[3] I.e., investor public offering prices may differ from investor to investor.

reflect the expected return of future dividends that a fixed income security trading on the market may reflect).

IV. Reliability of Estimated Values

While LPL applauds FINRA's efforts at providing additional safeguards to investors regarding the valuation of REITs and DPPs, we believe that FINRA's efforts at directing broker-dealers to revise the price or display a price as unavailable (and the reasons why it is unavailable) on a customer account statement is misdirected. Broker-dealers lack the requisite information necessary to make accurate valuation judgments and would be substituting their own imprecise and uninformed valuation in place of the issuer's judgment. In addition, if the burden to monitor the price is imposed on broker-dealers with imprecise and incomplete information, broker-dealers will be exposed to significant litigation risk. Because it would be easy to second guess with hindsight the valuation decision of the broker-dealer, we believe that broker-dealers may elect to remove the price altogether to mitigate this risk – a result that would lead to even greater customer confusion. We believe that direct rulemaking directed to REIT and DPP issuers by their functional regulator would be more effective and that broker-dealers should be able to rely upon the issuer's annual appraisal values provided adequate disclosure is provided to investors as described above.

V. Conclusion

Thank you for the opportunity to comment on the Proposed Rule. Should the Proposed Rule (or parts thereof) be adopted, LPL would strongly encourage FINRA to clarify how such a rule would apply to REITs and DPPs that have already been issued or that may have recently entered their Initial Offering Period. LPL believes that these grandfathering issues could be substantial and may require systemic changes that may carry significant operational costs and we encourage FINRA to take these concerns into careful consideration. Finally, several industry initiatives had already begun prior to FINRA's proposal. Several of these initiatives address the very concerns raised in the Proposed Rule. LPL would encourage FINRA to permit these industry initiatives to develop and to preempt the progress that is occurring through this rulemaking. If you have any questions regarding this letter, please do not hesitate to contact me at (617) 897-4340.

Sincerely,

Stephanie L. Brown

Stephanie L. Brown

cc: Kathy VanNoy Pineda
Chief Compliance Officer

REISA™
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

Real Estate Investment Securities Association (REISA)
Two Meridian Plaza
10401 North Meridian Street
Suite 202
Indianapolis, IN 46290
main: 317.663.4180
fax: 317.815.0871
toll-free: 866.353.8422
www.reisa.org

November 12, 2011

Submitted via *pubcom@finra.org*

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: *FINRA Regulatory Notice 11-44: Customer Account Statements*

Dear Ms. Asquith:

On behalf of the Real Estate Investment Securities Association ("REISA"), this letter is submitted in response to the Financial Industry Regulatory Authority, Inc.'s ("FINRA") request for comments on Regulatory Notice 11-44: Customer Account Statements ("Regulatory Notice 11-44"). REISA is a trade association serving the real estate securities industry including all professionals active in offering, managing and distributing non-traded REITs, real estate partnerships, tenant-in-common interests (TICs), Delaware statutory trust interests (DSTs), real estate income and development funds, oil and gas interests, natural resources and alternative energy investments.

REISA works to maintain the integrity and reputation of the industry by promoting the highest ethical standards to its members and provide education, networking opportunities and resources. REISA connects members directly to key industry experts through intimate forums providing timely trends and education and helping create a diversified portfolio for their clients. The association was founded in 2003 and has over 800 members who are key decision makers that represent over 30,000 professionals throughout the nation including:

- Sponsors and managers of real estate and related offerings
- Broker-dealers
- Securities licensed registered representatives
- Registered investment advisers (RIAs)
- Investment adviser representatives (IARs)
- Accountants
- Attorneys
- Mortgage brokers
- Institutional lenders
- Qualified intermediaries
- Real estate agents
- Real estate brokers

REISA™
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

Real Estate Investment Securities Association (REISA)
Two Meridian Plaza
10401 North Meridian Street
Suite 202
Indianapolis, IN 46290
main: 317.663.4180
fax: 317.815.0871
toll-free: 866.353.8422
www.reisa.org

REISA believes in the importance of protecting the investing public while balancing the need for businesses and sponsors of quality real estate investment products, along with the FINRA members who sell these products, to be able to efficiently raise capital without an overly burdensome regulatory scheme.

In Regulatory Notice 11-44, FINRA has proposed amendments to NASD Rule 2340[1] (*Customer Account Statements*) (the "Proposed Amendments") to address how FINRA member firms report per share estimated values of publicly registered, non-traded direct participation programs (DPPs) and publicly registered, non-traded real estate investment trusts (REITs) on customer account statements. The Proposed Amendments would:

a) Limit the time period during which the initial offering price (usually $10 per share) may be used as the basis for the per share estimated value to the period provided under Rule 415(a)(5) of the Securities Act of 1933, as amended (the "Initial Offering Period")[2];
b) Require FINRA member firms to deduct all organization and offering expenses[3] from the per share estimated value during the Initial Offering Period;
c) Prohibit a firm from using a per share estimated value, from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that has come to the firm's attention; and
d) Allow a firm to omit a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT does not contain a value that complies with the disclosure requirements of Rule 2340.[4]

---

[1] As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. See SR-FINRA-2009-028. The amendments discussed in Regulatory Notice 11-44 would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of final approval of this Regulatory Notice.
[2] The initial offering period is defined in Regulatory Notice 11-44 and by Rule 415 under the Securities Act of 1933, as amended, as lasting up to three years plus an additional 180-day extension period if a follow-on public offering has been registered.
[3] Defined in Regulatory Notice 11-44 as expenses incurred in connection with registration and distribution, including all forms of compensation paid to broker-dealers and affiliates in connection with the offering and are generally limited to 15% of the gross offering proceeds. These organization and offering expenses have three components: (a) underwriting compensation, (b) issuer expenses that are reimbursed or paid for with offering proceeds and (c) due diligence expenses.
[4] REISA has no comment on this particular aspect of the Proposed Amendments.

REISA™
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

Real Estate Investment Securities Association (REISA)
Two Meridian Plaza
10401 North Meridian Street
Suite 202
Indianapolis, IN 46290
main: 317.663.4180
fax: 317.815.0871
toll-free: 866.353.8422
www.reisa.org

REISA joins FINRA in its focus on investor protection and transparency relating to non-listed REITs and other types of DPPs. REISA also understands FINRA's Corporate Financing Department's push for action to ensure enhanced transparency and accountability. However, it is important to also recognize that these investment programs have a unique place in the market for real estate securities and the offering documents for these programs make it clear that the underlying portfolio contains illiquid, hard real estate assets that will intrinsically neither increase nor decrease in value until actually monetized by virtue of a "liquidity event." There are multiple disclosures in the offering documents for these programs that reference the long-term, illiquid nature of the DPPs and REITs and their portfolios, the types of investors who should and should not be investing their money in these types of programs, and the arbitrary nature of the offering price.

REISA has the following comments and observations relating to the Proposed Amendments to NASD Rule 2340 regarding Customer Account Statements.

1. <u>Deducting Issuer Organization and Offering Expenses.</u> Requiring that during the Initial Offering Period, all organization and offering expenses, including issuer costs, be deducted from the gross offering price resulting in a "net estimated value" for the purposes of customer account statement reporting, has a number of shortcomings and unintended consequences, as set forth below.

    a. A valuation during the Initial Offering Period that deducts underwriting compensation (selling commissions and dealer manager fees), as well as all organization and offering expenses, including issuer expenses, fails to acknowledge that such "estimated value" is just as arbitrary as the stated $10.00 per share price.
    b. Especially during the early part of the Initial Offering Period, when a REIT or DPP is ramping up its operations and its capital raising activities, the organization and offering expenses will comprise a significant percentage of offering proceeds raised and will not provide an accurate depiction of the per share estimated value of the DPP or REIT. Issuer expenses estimated to be 1% to 3% of gross offering proceeds at the maximum offering amount could, in fact, comprise 15% to 30% of gross offering proceeds in the initial stages of the capital raise.[5]

[5] For example, in a $1,000,000,000 maximum offering, just the initial SEC and FINRA filing fees would equal almost $200,000. Assuming the issuer breaks escrow at $2,000,000, issues 2,000 shares at $10 per share and pays underwriting compensation equal to 10% of the gross offering proceeds, the per share estimated value for customer account statement purposes at that time would equal $8.00 per share (without taking into account any other issuer organization and offering expenses). When gross offering proceeds

REISA™
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

Real Estate Investment Securities Association (REISA)
Two Meridian Plaza
10401 North Meridian Street
Suite 202
Indianapolis, IN 46290
main: 317.663.4180
fax: 317.815.0871
toll-free: 866.353.8422
www.reisa.org

c. In 2008, FINRA changed what is now FINRA Rule 2310 to eliminate the 0.50% of gross offering proceeds cap on due diligence expense reimbursements in order to encourage adequate due diligence to be performed on DPPs and REITs.[6] In Regulatory Notice 10-22, Obligation of Broker-Dealers to Conduct Reasonable Investigations in Regulation D Offerings, FINRA reminded its members of its significant obligations to perform due diligence and provided detailed guidance on how to do so, which guidance is used as a roadmap for all types of products, including DPPs and REITs. If the cost of performing adequate due diligence is required to be deducted from the per share estimated value to be disclosed on customer account statements, many issuers may become reluctant to reimburse FINRA members for due diligence expenses and FINRA members may (1) be required to either pay their own due diligence expenses, (2) cut back on the due diligence they perform on these DPPs and REITs or (3) stop selling DPPs and REITs because they cannot meet their due diligence obligations. In any of these scenarios, by requiring issuer organization and offering expenses to be deducted in calculating the per share value of a DPP or REIT, FINRA is discouraging the very behavior it has been trying to encourage when it lifted the cap on due diligence expense reimbursements.

2. <u>Calculation of Net Estimated Per Share Values after the Initial Offering Period and Appraised Value.</u>

   a. After the Initial Offering Period, the per share estimated value to be "included on the customer account statement must be based on an appraisal of a DPP or REIT's assets, liabilities and operations." REISA believes that the proper method for determining the value of a DPP or REIT at any given time would be to appraise its assets deduct its liabilities and divide that by the number of shares outstanding. REISA believes that FINRA must clarify what it means to appraise "assets, liabilities <u>and operations</u>." (Emphasis added). If by including "operations" FINRA intends that the calculation include an "enterprise value" for the DPP or REIT, REISA believes that there are other considerations to be addressed,

---

equal $10,000,000, however, the same $200,000 in filing fees, 10% in underwriting compensation and 10,000 shares sold, the per share estimated value would equal $8.80. Nothing in the inherent value of the shares changed in the two scenarios except that the upfront, sunk issuer costs have been spread out over more shares. In either case, neither per share estimated value is a real reflection of the underlying value of the DPP, REIT or the shares, especially since the selling price remains $10.00 per share.

[6] See Notice to Members 08-35, effective August 6, 2008.

REISA™
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

Real Estate Investment Securities Association (REISA)
Two Meridian Plaza
10401 North Meridian Street
Suite 202
Indianapolis, IN 46290
main: 317.663.4180
fax: 317.815.0871
toll-free: 866.353.8422
www.reisa.org

such as whether the per share estimated value is equal to, greater than or less than its actual "net asset value" (i.e., the sum of the value of its individual assets, less its liabilities) for reasons relating to market perception, interests rates, liquidity needs, investor sentiment regarding the industry sector or the economy generally.

b. FINRA's requirement for current data, i.e., an appraisal must be no less current than the most recent annual report, could be viewed as actually requiring a DPP or REIT to appraise its assets on a monthly or quarterly basis. For example, a DPP or REIT appraises all of its assets for purposes of calculating the per share estimated value but then has to take an impairment charge on one or more of the assets in its portfolio in the first or second quarter of the year. Would the DPP or REIT be required to come up with a new per share estimated value for the remainder of the year or is it sufficient to have the per share estimated value that was reported in the annual report be used for the entire year? Similarly, if the DPP or REIT acquired a number of assets (or sold a number of assets) during the year, would a change in the per share estimated value be required to take into account the addition of the new assets or the absence of the sold assets? If the DPP or REIT would be required to update its per share estimated value every quarter, every month or every time it bought, sold or took an impairment charge on one of its assets, the publicly registered, non-traded DPP or REIT will start to look very similar to its publicly traded DPP or REIT brethren with a regular "market price" being determined. This would fundamentally change the nature of the DPP and REIT product.

3. Prohibiting the use of a per share estimated value if a FINRA member "knows or has reason to know the value is unreliable." Such a prohibition will bring uncertainty and potential liability to FINRA members and could cause significant chaos in the market for DPPs and REITs. Some of the issues raised by the prohibition include the following:

   a. How does a FINRA member make the determination that the per share estimated value is unreliable?
   b. Is each FINRA member required to perform its own analysis as to the per share estimated value of each DPP or REIT held by its customers?

REISA™
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

Real Estate Investment
Securities Association (REISA)
Two Meridian Plaza
10401 North Meridian Street
Suite 202
Indianapolis, IN 46290
main: 317.663.4180
fax: 317.815.0871
toll-free: 866.353.8422
www.reisa.org

c. If a FINRA member makes a determination that the per share estimated value is unreliable and therefore does not include the value on its customer account statement, what type of disclosure is required in place of such value?
d. Does the FINRA member note on its customer account statement that it knew or had reason to know that the value provided or reported by the issuer was unreliable?
e. If there is a large selling group for a DPP or REIT and some members of the selling group believe that the value is reliable and others do not, what is the potential liability to each of those who include and exclude the value on the customer account statement?
f. If an introducing FINRA member believes the value is unreliable but the clearing FINRA member produces the customer account statements, how does the introducing FINRA member alert the clearing FINRA member about the issues relating to the reliability of the value?
g. What role does the clearing FINRA member play in the determination to include or exclude the value on customer account statements?

4. Transition Period. REISA believes that FINRA should include a transition period for implementing the Proposed Amendments in Regulatory Notice 11-44 given the significant changes that would occur, especially for those DPPs and REITs that are currently in their Initial Offering Periods, as well as those that are currently in registration, if the Proposed Amendments are adopted.

Conclusion

REISA remains committed to collectively working to improve the industry from the standpoint of transparency and valuation. REISA believes that while Regulatory Notice 11-44 has the right goals in mind, there are some issues with the Proposed Amendments that require some adjustments. REISA appreciates the opportunity to comment on Regulatory Notice 11-44 and looks forward to a continued dialogue with FINRA on these and other important issues for the protection of investors and the capital markets.

Sincerely,

Richard B. Chess

Richard B. Chess
President, Real Estate Investment Securities Association

FRANKLIN SQUARE
CAPITAL PARTNERS

Franklin Square Holdings, L.P.
2929 Arch Street, Suite 675
Philadelphia, PA 19104

November 11, 2011

VIA E-mail <pubcom@finra.org> and Overnight Delivery

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street NW
Washington, DC 20006

Re: FINRA Regulatory Notice to Members 11-44

Dear Ms. Asquith:

On September 29, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") published Regulatory Notice 11-44 seeking comments on its proposal to amend NASD Rule 2340 regarding the reporting of per share estimated values on customer account statements (the "Proposed Amendment"). This comment letter is submitted on behalf of FS Investment Corporation and FS Energy and Power Fund (together, the "FS Entities") by Franklin Square Holdings, L.P., the sponsor of the FS Entities. The FS Entities are non-traded business development companies ("BDCs") that are offering shares pursuant to effective registration statements on Form N-2 filed with the Securities and Exchange Commission (the "SEC"). As direct participation programs ("DPPs"), and like non-traded real estate investment trusts ("REITs"), the FS Entities' organization and offering expenses, including selling commissions and dealer manager fees, are regulated by FINRA Rule 2310.

In this letter, we request that FINRA clarify the application of the Proposed Amendment to entities such as BDCs that are already **required** under the Investment Company Act of 1940 (the "1940 Act") to calculate and publish a net asset value ("NAV") per share. We request that FINRA address the following issues relating to the Proposed Amendment:

1) The Proposed Amendment has the unintended consequence of disproportionately impacting the different types of investment funds regulated under NASD Rule 2340 (such funds, collectively, "2340 Funds"). As a result, we respectfully request:

   - *Because (a) many 2340 Funds are not regulated under the 1940 Act and therefore are not required to establish an NAV, and (b) the NAV of BDCs is not equivalent to intrinsic value, BDCs (and other investment funds which periodically report NAV) should be allowed to use the net offering price rather than NAV on the same basis as other 2340 Funds on customer account statements during the Initial Offering Period.*

- *Because 2340 Funds would be encouraged to shift fees away from items required to be deducted from the net offering price on the customer account statement to other fees charged by them, including acquisition fees, the Proposed Amendment should require that such fees be deducted from the net offering price during the Initial Offering Period in the same fashion as offering expenses.*

- *Because many 2340 Funds are not required to disclose their NAV, FINRA and the SEC should require them to regularly and periodically calculate and disclose their NAV in a manner consistent with Accounting Standards Codification Topic 820, Fair Value Measurements and Disclosure ("ASC Topic 820"). We believe that this important information should be furnished to potential investors so that they may make an informed investment decision.*

2) The Proposed Amendment would require trail commissions to be deducted in full from the net offering price during the Initial Offering Period.

- *We request that FINRA modify the Proposed Amendment to reflect that an issuer is only required to deduct from the net offering price during the Initial Offering Period amounts paid by investors as commissions or other fees at the time of the purchase of the security. We believe that the better policy is to encourage trail commission structures.*

Set forth below is background information regarding BDCs, the Proposed Amendment and a more fulsome discussion of the issues described above.

Business Development Companies

BDCs are regulated under the 1940 Act and were created by Congress in order to facilitate the flow of capital to private businesses and smaller public companies and to allow individual investors to access investments in such enterprises. BDCs have become an attractive vehicle for investors as they are subject to the strong investor protections of the 1940 Act, including:

1) regular determination of NAV per share and reporting of this NAV per share in quarterly reports on Form 10-Q and annual reports on Form 10-K;

2) prohibition on issuing any shares at a price, net of selling commissions and dealer manager fees, below its then-current NAV per share;

3) limitations on the amount of leverage permitted to be incurred, with BDCs being limited to a debt-to-equity leverage ratio of no greater than 1:1;

4) prohibitions on many transactions among and between affiliated entities;

5) the requirement that the board of directors have a majority of independent members;

6) the requirement that the investment advisory contracts of externally advised BDCs be approved by shareholders or the independent directors of the board on a regular basis and such contracts be terminable without penalty and on not more than 60 days' notice;

7) the requirement to maintain investments with a third party custodian;

8) the antifraud provisions under the 1940 Act;

9) with respect to investment advisers of BDCs, the antifraud provisions and extensive regulation under the Investment Advisers Act of 1940; and

10) specific, standardized and significant public disclosure requirements with respect to investments, operations, and management.

Few, if any, of these investor protections are required of 2340 Funds that are not regulated by the 1940 Act. In addition to the requirements of the 1940 Act, BDCs are subject to the Securities Act of 1933 and the Securities Exchange Act of 1934, including regulation under the Sarbanes-Oxley Act of 2002, which require extensive and expansive disclosure of information to investors. As a result of their non-traded structure, public offerings by non-traded BDCs, including the FS Entities, are also subject to regulation at the state level, which provides investors with additional protections, including with respect to disclosure.

Proposed Amendment

The Proposed Amendment will revise NASD Rule 2340 to replace the existing language of NASD Rule 2340(c) with a new provision which states that during the Initial Offering Period (as defined in the Proposed Amendment), "any estimated per share value based on the offering price must reflect a deduction of the amount of organization and offering expenses, as defined by FINRA Rule 2310(a)(12)." FINRA Regulatory Notice 11-44 notes that "[i]f any organization and offering expenses are to be deducted from portfolio assets or income, then under the proposal the net estimated value would have to reflect those deductions that will be taken during the Initial Offering Period, in addition to the deduction for organization and offering expenses paid out of proceeds from the offering."

After the Initial Offering Period, the Proposed Amendment would (1) require that customer account statements reflect "a per share value estimated value calculated based on an appraisal of the assets, liabilities and operations of the DPP or REIT" and (2) permit, but not require, a customer account statement not to reflect "a per share estimated value if the most recent annual report of a DPP or REIT does not contain a per share estimated value that complies with the requirements in ...[Section 2340(c)(1)(C) of the Proposed Amendment]."

Footnote 9 of FINRA Regulatory Notice 11-44 acknowledges that some non-traded REITs calculate a daily NAV per share and offer to sell and purchase shares during the continuous public offering at prices based on the daily NAV calculation. It states, in relevant part, "under the proposal, the net estimated value required on customer account statements for such programs would be the NAV and could not include any commissions, nor any other organization or offering expense associated with the offering."

Comment to the Proposed Amendment

The FS Entities provide the following comments on the Proposed Amendment:

1) **Disproportionate Impact**. While many view "direct participation programs" and "non-traded REITs" as synonymous, in practice, multiple types of investment funds with differing structures, regulatory frameworks and investment mandates are governed by Rule 2340 and thus impacted by the Proposed Amendment. However, the Proposed Amendment would have a disparate impact on the differing products governed by Rule 2340.

   a) **Most 2340 Funds are not required to establish an NAV.** Since the Proposed Amendment contemplates the use of published NAV when available and non-1940 Act regulated 2340 Funds are not required to publish an NAV, BDCs would be forced to use NAV rather than net offering price during the Initial Offering Period. Additional complications arise as BDCs are prohibited by the 1940 Act from issuing shares at a net share price below NAV. The effect of the Proposed Amendment would result in shares of a BDC being marked at a lower price on customer statements than non-1940 Act regulated 2340 Funds even in a situation where 'value' was equivalent, simply due to BDCs being regulated under the 1940 Act and consequently having to disclose NAV on a regular basis.

      While certain non-1940 Act regulated 2340 Funds, namely daily NAV-priced REITs, do disclose NAV, non-traded BDCs (including the FS Entities) are fundamentally different and clearly distinguishable from these daily NAV-priced REITs. Footnote 9 states that the net estimated value required on customer account statements for daily NAV-priced non-traded REITs would be the NAV and could not include any commissions, nor any other organization or offering expense associated with the offering. This requirement seems appropriate for daily NAV-priced non-traded REITs, since they are intended to be perpetual-life entities and voluntarily provide liquidity not through a liquidity event but through daily redemptions made possible by the daily NAV pricing. Like an open-end fund, a daily NAV-priced REIT stands ready to redeem shares at the NAV price, and as a result it is appropriate for that value to be included on customer account statements. Non-traded BDCs, on the other hand, expect to provide a liquidity event to shareholders following the completion of the BDC's offering stage rather than through daily redemptions and, while non-traded BDCs may voluntarily offer to redeem a limited number of shares from time to time at a percentage (usually 90%) of the offering price per share (rather than NAV), any limited redemptions offered by non-traded BDCs to their shareholders are not meant to be the primary source of liquidity for investors.

      In addition, the Proposed Amendment provides no background or guidance on how NAV is to be calculated for non-traded REITs that use a daily NAV pricing structure for their offerings, as such daily NAV-priced REITs are not subject to the 1940 Act requirements regarding how NAV for BDCs is to be calculated. Rule 2a-4 of the 1940 Act sets forth the guidelines for a BDC's calculation of NAV. Assets must be valued on the basis of market value, if available; in the absence of a readily ascertainable market value for an asset, the board of directors must in good faith determine the "fair value." Since daily NAV-priced REITs are not subject to similar statutory requirements on how their NAV is to be calculated, such REIT-determined NAV values will likely result in different methodologies being used by different daily NAV-priced REITs. The FS Entities request that FINRA clarify this issue and require a uniform methodology for determining per share estimated value to be disclosed on customer account statements, taking into account the nuances of the various types of investment vehicles that would be covered by the Proposed Amendment.

Because of this, despite the superficial resemblance to daily NAV-priced REITs because of the periodic NAV calculation, non-traded BDCs more closely resemble a traditional non-traded REIT since they, like non-traded REITs, offer illiquid securities and intend to seek a liquidity event for investors to realize the ultimate market value of the shares offered. The NAV calculation done by BDCs, in contrast to daily NAV-priced REITs, is performed because of 1940 Act requirements, not for market-making purposes. *The FS Entities request that FINRA clarify that Footnote 9 should not be interpreted to include BDCs and that BDCs should be permitted to use the net offering price rather than NAV on the same basis as other 2340 Funds on customer account statements during the Initial Offering Period.*

b) **The NAV of BDCs is not equivalent to intrinsic value**. The NAV determined by BDCs is intended to approximate the value per share of the assets of the BDC that would be received following the satisfaction of all liabilities in the event of a liquidation of the BDC's assets. NAV does not include any value per share attributable to the BDC as a going concern. This is inconsistent with the policy behind FINRA Regulatory Release 09-09, which instructs issuers to determine the estimated per share value on a customer account statement based on an appraisal not just of the issuer's assets, <u>but also its ongoing operations</u>. Similarly, the Proposed Amendment expressly requires that a customer account statement include a per share estimated value based on an appraisal of the assets, liabilities <u>and operations</u> of an organization. With respect to the FS Entities, value attributable to the operations of the BDC could be significant given, for example, the prior performance of the funds and the investment sub-advisory relationships with subsidiaries of The Blackstone Group, L.P., namely GSO / Blackstone Debt Funds Management LLC and GSO Capital Partners LP, which provides the FS Entities with extensive experience and expertise in sourcing, evaluating and structuring transactions.

The calculation of NAV does not purport to be an approximation of the "intrinsic value" of the BDC, it is not a reflection of the future cash flows to be received by the BDC and it is not the equivalent of an appraisal of the assets, liabilities <u>and operations</u> of the BDC. Since March 31, 2000, a survey of 19 publicly listed BDCs shows that those BDCs have traded at a maximum premium of 107.5% and a maximum discount of 91.8% to their NAV. If a BDC's NAV as calculated under the 1940 Act represented the intrinsic value of the BDC's shares, their traded per share price would track NAV very closely, with material fluctuations resulting from systemic, market-wide events. As a result, the FS Entities submit it would be inappropriate to use the NAV determined by BDCs in accordance with the 1940 Act as a proxy for the estimated per share value of the BDC to be disclosed on customer account statements. *Therefore, the FS Entities request that FINRA allow BDCs to use the net offering price rather than NAV on the same basis as other 2340 Funds on customer account statements during the Initial Offering Period.*

c) **Certain fees charged by 2340 Funds should be deducted from the net offering price under the Proposed Amendment.** Some 2340 Funds pay significant regular acquisition fees. The Proposed Amendment does not address whether such regular fees should be included as a deduction to net offering price disclosed on customer account statements during the Initial Offering Period. By not including such regular fees, the Proposed Amendment might encourage certain 2340 Funds to shift fees away from items that are included in the Proposed Amendment (e.g., dealer manager fees paid to the affiliated dealer manager) to items that are not included in the Proposed Amendment (e.g., acquisition fees paid to the affiliated investment adviser). This could easily result in affiliated dealer managers running their operations as a loss leader, with the affiliated adviser obtaining increased funds from acquisition fees. *The FS Entities recommend that FINRA avoid this result and propose a comprehensive set of amendments to its rules that would fully address all such fees and ensure that such fees are included in the estimated per share value to be disclosed on customer account statements during the Initial Offering Period.*

d) **Non-1940 Act regulated 2340 Funds are not required to disclose their NAV**. The Proposed Amendment relies on the assumption that non-1940 Act regulated 2340 Funds will voluntarily make available, on a regular and periodic basis, their estimated value calculated based on an appraisal of their assets, liabilities or operations following the Initial Offering Period. Non-1940 Act regulated 2340 Funds are not subject to any requirement to periodically disclose the value of their assets, liabilities and operations or their NAV. Under the Proposed Amendment, the repercussion of a non-1940 Act regulated 2340 Fund failing to disclose such estimated value after the Initial Offering Period is that the investor's account statement would show no value for its holdings in the non-1940 Act regulated 2340 Fund. This result seems perverse given that one of the goals of the Proposed Amendment is to provide more information to investors. *As the SEC has the ability to require additional disclosure from non-1940 Act regulated 2340 Funds, the FS Entities request that FINRA work with the SEC in developing an appropriate periodic reporting requirement, including a uniform methodology for determining and disclosing the estimated value of non-1940 Act regulated 2340 Funds in a manner consistent with ASC Topic 820.* We believe that this important information should be furnished to potential investors so that they may make an informed investment decision. Without any such requirement, the Proposed Amendment would not as effectively serve its intended purpose.

2) **Trailing Commissions**. FINRA has previously approved "trail commissions," in which the selling commissions are paid over time instead of up-front at the time of investment to encourage FINRA members to share in their customers' investment risks. The FS Entities support both FINRA's decision to permit trailing commissions and the policy behind it. However, the Proposed Amendment would eliminate any incentive for an issuer to provide for a trailing commission. Trailing commissions, as FINRA has noted, are paid by the program from program cash flows during its operation. Further, certain trail commission structures could be "contingent" and based on performance requirements and/or investors not selling their shares. The Proposed Amendment would require that any organization and offering expenses, including the entire trailing commission, be deducted in full from the offering price per share in determining the estimated per share value on a customer account statement during the Initial Offering Period, since the trailing commission would be paid by the program from the program's portfolio assets or income. As a result, an issuer would not be incentivized to structure its selling commission as a trailing commission, despite the alignment of investment risks between the member and the customer that the trailing commission would create and which FINRA has previously acknowledged. In addition, contingent trails (which may never get paid) could be required to be deducted from the offering price without ever being paid. *The FS Entities therefore request that FINRA modify the Proposed Amendment to reflect that if an issuer uses a trailing commission structure, the issuer only be required to deduct from the net offering price during the Initial Offering Period amounts paid by investors as commissions or other fees at the time of purchase of the security.*

Finally, we request that if FINRA decides to move forward with implementing the Proposed Amendment, a reasonable transition period be included to provide affected issuers operating prior to the effective date of the Proposed Amendment sufficient time to develop appropriate processes, procedures and investor education tools to effectively address the final version of the Proposed Amendment. Existing 2340 Funds were developed, structured, marketed and sold under the current account statement rule. These 2340 Funds will not be in a position to promptly change their distribution methodology and fee structure to adequately address the final implementation of the Proposed Amendment. Without having a properly structured product to sell to investors that takes into account the final implementation of the Proposed Amendment, existing 2340 Funds would likely not be able to effectively compete with new products that were developed taking into account the nuances of the Proposed Amendment. *The FS Entities request that FINRA revise the Proposed Amendment to permit 2340 Funds operating on the effective date of the Proposed Amendment to have a period of no less than 18 months following the effective date to comply with the new rule.*

*****

We appreciate the opportunity to provide input on the Proposed Amendment. As there are only 4 non-traded BDCs that have registered and been declared effective by the SEC to sell securities, with an additional 7 non-traded BDCs that have pending registrations but have not yet been declared effective by the SEC, we do not believe that FINRA will receive many substantive comments that identify the issues with the Proposed Amendment as it relates to BDCs. We have provided alternative arguments regarding various facets of the Proposed Amendment and believe that BDCs present a unique instance where alternative and clarifying treatment would be appropriate.

Thank you for your consideration.

Sincerely,

Franklin Square Holdings, L.P.

By: ______________________
Name: Ryan D. Conley
Title: Senior Vice President

cc: Mr. Michael C. Forman, Franklin Square Holdings, L.P.
Mr. Gerald F. Stahlecker, Franklin Square Holdings, L.P.
Mr. Stephen Sypherd, Franklin Square Holdings, L.P.
Ms. Adrienne Hart, FS^2 Capital Partners, LLC

Advocacy
Collaboration
Education

Advocating Direct Investments
Through Education

IPA
Investment Program Association

November 11, 2011

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 11-44

Dear Ms. Asquith,

The Investment Program Association (the "IPA") appreciates the opportunity to comment on Regulatory Notice 11-44 published by the Financial Industry Regulatory Authority, Inc. ("FINRA") on September 29, 2011. The Notice seeks comments to FINRA's proposal to modify NASD Rule 2340 (the "Proposed Amendment"). Rule 2340 governs reporting of per share estimated values on customer account statements. 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").

The Proposal

The Proposed Amendment is described in FINRA Regulatory Notice 11-44 ("RN 11-44"). We understand that FINRA is proposing the changes in an effort to, among other things, assist investors in understanding the value and relative performance of non-listed REITs and DPPs over time. If adopted, the Proposed Amendment would modify existing NASD Rule 2340. This rule 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 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

The Proposed Amendment would revise NASD Rule 2340 by:

- requiring member firms to deduct, during the offering period, all "organization and offering expenses," including issuer expenses ("O&O Expenses"), from the gross offering price resulting in a "net value" for purposes of customer account statement reporting;

- limiting the time period during which member firms may use the offering price on customer account statements;[1]

- requiring estimated per share valuations after the offering period to be determined and reported sooner than the rules and RN 09-09 currently require; and

- prohibiting member firms from using a per share estimated value if the firm knows, or has reason to know, that the estimated value is unreliable.

Discussion

The IPA shares and supports FINRA's interest in disclosure that furthers an investor's understanding of the value and performance of the investments. SEC, "blue sky" and FINRA rules and regulations impose significant disclosure obligations on offerings conducted by non-listed REITs and DPPs. For example, the prospectuses for offerings of non-listed REITs and DPPs clearly disclose all of the O&O Expenses, including selling commissions, to be paid in connection with the offering. In fact, FINRA requires these disclosures to be made assuming the highest possible selling commissions and dealer manager fees. This information is typically discussed at length under the estimated use of offering proceeds, management compensation and plan of distribution sections of the prospectus. Moreover, the cover page of the prospectus clearly sets forth, in tabular format, the price to the public, selling commissions, dealer manager fee and net proceeds before other expenses so that a prospective investor is able to clearly understand the net amount available to be invested.

During and after the offering period, SEC rules and interpretations also require extensive disclosure regarding the nature of each property acquired, including the purchase price and capitalization rate as well as information regarding significant tenants, lease rates and expirations, audited financial statements for all "significant" acquisitions, and extensive disclosure regarding the amounts and sources of distributions paid to investors. All of these disclosure requirements are designed to provide investors and others such as due diligence firms or other analysts, with the information that can be used to evaluate an investment in a non-listed REIT or DPP. Further, RN 09-09 and new SEC interpretations regarding disclosure of estimated share values reported after the end of the offering period provide investors with additional knowledge of an entity's performance after it has completed its initial capital raising phase. Through the comment and review process, the SEC has begun requiring additional extensive disclosure regarding the

[1] The initial offering period is defined in your notice and by Securities Act Rule 415 as lasting up to three years plus an additional 180 day carryover period.

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

methods used by non-listed REITs and DPPs to estimate share value, including disclosure of all key assumptions and the range of values arrived at in the process of estimating value.

Presently, a member firm is not required to report an estimated value based on any metric other than the offering price until the issuer has completed its primary public offering or offerings. Most issuers typically engage in both an initial offering and a follow-on offering. Thus, the period before a member firm reports an estimated value not based on the offering price can be quite long. The IPA understands that this period may be too long. The IPA supports FINRA's desire to shorten this timeframe and, subject to further understanding of the interplay between follow-on offerings and the ability of non-listed REITs and DPPs to achieve their objectives, including providing a liquidity event or events to their investors, would support a shorter period of time during which a customer account statement may report a value based on the offering price.

The IPA does not, however, believe that the changes in the Proposed Amendment that would require the reporting of a "net value" on the customer account statement during the initial offering period will further an investor's understanding of an investment in a non-listed REIT or DPP and should not be adopted. Also, if one of the objectives of the Proposed Amendment is to change the commission structure associated with the sale of non-listed REITs and DPPs, we do not believe the Proposed Amendment should be used for that purpose.

I. The customer account statement value should be equal to the gross offering price during the initial offering period.

In raising capital, non-listed REITs and DPPs have generally used a fixed pricing method, typically $10.00 per share. This offering price has been selected because it provides a transparent and easily understood manner for determining the number of shares to be issued to an investor and calculating returns. The fixed offering price is also consistent with the fact that each non-listed REIT or DPP typically starts as a "blind pool," raises money and invests proceeds in assets over a period of time. During an offering period, capital is raised, subsequently deployed, income grows with the growth of the program's portfolio, and the underlying asset values themselves may go up or down. An important component of this process is a follow-on offering. A follow-on offering typically commences immediately after the initial offering expires or is terminated. Because many member firms do not actually begin their due diligence investigation and sign selling agreements until sometime after the initial offering is declared effective, most non-listed REITs and DPPs receive the bulk of their offering proceeds during the last few months of the initial offering period and during the follow-on offering. The amount of capital raised largely influences whether the non-listed REIT or DPP will have the necessary size to effect a successful liquidity event such as a listing, merger or sale of the portfolio for an attractive return to investors.

Needless to say, the ultimate value of a security is impacted by many variables, including an issuer's policy regarding leverage, the nature of the assets purchased by the issuer, the quality of the issuer's management, as well as other macro and micro economic factors. The IPA believes that many of the SEC's disclosure rules and initiatives result in investors receiving information

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

regarding many of these variables so that the investors may understand the value and relative performance of their investment, particularly during the offering period or periods.

With respect to an illiquid security such as a non-listed REIT or DPP, FINRA acknowledges that the estimated value "may be derived from several sources." FINRA goes on to note that an "appraisal of the issuer's assets and operations will assist investors in understanding the value and relative performance" of the entity over time. The IPA agrees with FINRA's assessment.

Unfortunately, FINRA goes on to state that "in the earlier stages of an offering," as the issuer accumulates assets, "the net offering price <u>can be a suitable alternative</u>, particularly since an appraisal would involve recently acquired assets and cash that is yet to be invested during the ramp-up period" (emphasis added). FINRA does not, however, cite any recognized authority for estimating the value of a security in this manner. Despite the lack of any such authority, FINRA proposes to amend Rule 2340 to require that, during the offering period, all per share estimated values reflect a deduction of all O&O Expenses, resulting in what FINRA calls a "net value" for customer account statement purposes.

The IPA does not believe this approach furthers an investor's ability to understand an investment in the non-listed REIT or DPP and the relative performance of the investment over time. The calculation of "net value" is not based on any new information or analysis. We believe the change, if adopted, will likely confuse investors and may have the unintended consequence of negatively impacting capital formation in the United States.

A. *<u>Transparency</u>*

If the Proposed Amendment is adopted, member firms will be required to report an artificial price that may confuse investors into thinking the "net value" is a real value. Existing disclosure, contained on the cover page of each prospectus and in the risk factors of the prospectus, among other places, clearly explains the initial offering price and related O&O Expenses, including selling commissions. Reducing the offering price by the amount of O&O Expenses simply results in a smaller number. Reporting this "net value" on a customer account statement could very well confuse investors into thinking that the "value" of their investment had immediately dropped, causing investor consternation, frustration with their registered representatives and a reluctance to invest in this type of security. All of this despite the fact that all investors had been provided with transparent disclosure, cleared by the SEC and various state regulatory authorities, disclosing the offering price, and more importantly, the fees and expenses associated with the offering and the net proceeds to be realized by the issuer.

Using a "net value" as proposed by FINRA also runs the risk of creating other issues or consequences that FINRA should further consider and evaluate. In addition to understanding the impact that the Proposed Amendment would have on follow-on offerings and the ability to effect a successful liquidity event, the Proposed Amendment could have far reaching negative consequences. For example, all offerings of shares through "distribution reinvestment plans" or "DRPs" are priced at a "discount" to the gross offering price. The "net value" approach taken by the Proposed Amendment will, at a minimum, create a question of whether investors are or are not purchasing at a discount and may result in negative tax consequences, albeit unintended, for

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

Advocating Direct Investments
Through Education

IPA
Investment Program Association

these DRP programs. The Proposed Amendment is unclear as to whether O&O Expenses would be subtracted only on shares sold in the primary offering on which commissions are paid or must be allocated across all shares that may be offered such as DRP shares. Not everyone participates in DRP programs and existing FINRA rules prohibit sales loads on these shares. Thus, it seems the likely outcome would be to allocate these costs only to the shares issued in the primary offering and thus investors who do participate in the DRP will end up believing they have paid a premium, not a discount, for DRP shares which would likely reduce the proceeds raised through DRPs. Also, a statement of "net value" will cause confusion regarding redemption programs. Most non-listed REIT and DPP programs provide share redemption programs, in which the redemption price is equal to a percentage of the gross offering price (typically between 90% and 100% of the offering price). If the Proposed Amendment is adopted, in many cases, the stated redemption price will be higher than the reported "net value" during the pendency of the offering, suggesting that the redemption would in fact result in a profit to the investors and possibly resulting in "a run on the bank." The more funds that an issuer must use to fulfill redemption requests, the less it will have to purchase properties.

There are other issues as well that raise concerns that merit further study and review. For example:

(a) In calculating "net value," the requirement that issuers deduct variable, as opposed to fixed, O&O Expenses is problematic. Under FINRA and state regulations, these variable expenses can be as much as an additional 5% of the gross offering proceeds even if they are generally much less. For example, under the Proposed Amendment, it is not clear whether the amount of O&O Expenses reflected on the customer account statement should be equal to the maximum 15% of gross offering proceeds at the outset of the offering and then reduced as more shares are sold or whether the member firm should use an estimated percentage assuming the maximum amount of proceeds are sold. The Proposed Amendment also does not address how offerings with caps on O&O Expenses are to be treated and, in particular, the treatment of O&O Expenses that may exceed the cap as is often the case in the early stages of an offering.

(b) The Proposed Amendment does not make clear whether O&O Expenses that are charged after the date as of which a post-offering estimated value for the program shares is published should be included in any net value that is reported on a customer account statement during the offering.

(c) The Proposed Amendment does not make clear whether member firms must include any particular disclosure to their customers in respect of distribution and yield percentages based on the gross offering price versus the figures reported on customer statements. Using something other than the $10.00 offering price will eliminate the current uniformity of approach which will be a step backward from the goal of enhancing investor understanding.

(d) The Proposed Amendment does not address whether member firms may report, in the case of an issuer that voluntarily reprices its shares during the pendency of a follow-on offering, this new price as the estimated value for the remainder

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

of the offering, whether member firms must require the issuer to publish a new estimated value on an annual basis and whether member firms must continue to deduct O&O Expenses throughout the term of the follow-on offering.

(e) Current rules do not require a member firm to ascribe a customer account statement value to non-listed REITs and DPPs that are privately offered. The Proposed Amendment could be read to require them to do so and should be revised to make it clear that the Proposed Amendment does not impact the treatment of, or apply to, privately offered non-listed REITs or DPPs.

(f) Footnote 10 of the Proposed Amendment states that issuers that deduct O&O Expenses from income or assets must still reduce the gross offering price for these costs. It is not clear why costs which are funded from income should nevertheless be subtracted from the gross offering price for customer account statement purposes. In addition, if this footnote is intended to capture deferred commissions during the initial offering period, there would be no uniform way of calculating these commissions because the amount that would be paid during the offering period depends on when investors purchase shares, which occurs over a period of time.

(g) The difference in the mandatory prohibition on providing a per share estimated value in Proposed Rule 2340(c)(2)(A) and the permissive approach in Proposed Rule 2340(c)(2)(B) is not clear. If the annual report does not contain a per share estimated value that complies with Proposed Rule 2340(c)(1)(B) or (C), it would seem a member "knows or has reason to know" the value is unreliable and would therefore be required, not merely permitted, to refrain from providing the value. The Proposed Amendment should make clear that FINRA member firms will have the option of not including an estimated value on customer statements when the member reasonably believes that it cannot rely or make any such estimate. Further, the Proposed Amendment should provide greater clarity on when a member firm will be deemed to "know or have reason to know." The Proposed Amendment should also make clear that member firms are not required to conduct an independent analysis of the estimated value.

Rather than require reporting of a "net value," the IPA believes that FINRA can achieve its objectives by requiring delivery of a customer purchase confirmation that reflects the gross per share offering price, the selling commissions paid in connection with the sale as well as the net offering proceeds realized by the issuer. The IPA does not believe it makes sense to show either due diligence costs or issuer costs on this separate document. As noted above, these costs are variable during the offering period.

The investor purchase confirmation would function together with the issuer's prospectus and would best assist FINRA in achieving its objectives because it would ensure that each investor is provided with information regarding the offering price of the shares in connection with the purchase along with the selling commissions and the net proceeds realized by the issuer.

B. *Unintended Economic Consequences*

There is ample evidence that the U.S. is losing its competitiveness in capital formation with a growing percentage of this important economic driver moving overseas. Regulation that could exacerbate this trend in these difficult times should be carefully considered before being implemented. Non-listed REITs, in particular, serve an important role in both providing investors with a method to diversify their portfolio and in providing capital to the commercial real estate industry ($5 to $10 billion annually) which in turn impacts real estate value and performance as well as job creation.

In the decade preceding the decline in real estate values that began abruptly in 2008, real estate values generally increased in all major categories each year. During this period, in accordance with then prevailing regulations, the vast majority of members of the IPA maintained the fixed offering price in their valuations and they appeared as such on client statements issued from FINRA member firms. This underscores the longstanding consistency of approach the industry has taken.

The Proposed Amendment could negatively impact the amount of capital raised by non-listed REITs and DPPs to the detriment of the U.S. economy. As noted above, the Proposed Amendment is especially problematic for follow-on offerings which could impact the ability of non-listed REITs or DPPs to raise adequate capital in order to achieve their investment objectives. Careful study and analysis is needed to understand these potential impacts.

II. Changes in customer account statement reporting rules should not be used to change commission practices.

As noted above, an underlying objective of the Proposed Amendment may be to create greater competition regarding selling commissions and to ultimately reduce the amount of these commissions paid in connection with public offerings by non-listed REITs and DPPs. The need for changes to the commission structure used in the sale of non-listed REITs and DPPs is beyond the scope of this letter. We do not believe, however, that changes to commissions arrangements should be a motivating factor underlying the Proposed Amendment. The selling commissions currently paid in these offerings conform to existing FINRA limits. We believe that market forces should dictate the outcome on this issue.

III. The IPA supports more frequent estimates of share value.

As noted above, the IPA agrees with FINRA that the present 18 month post offering timeframe set out in RN 09-09 is too long. The IPA supports more frequent estimates of share value which may very likely impact the issuer's business decisions such as distribution coverage and perhaps selling commissions. The IPA, however, urges FINRA to study the impact that a shorter timeframe may have on follow-on offerings and the ability of non-listed REITs and DPPs to achieve their objectives.

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

The IPA also believes that the timeline should be tied to the completion of the offering and not the filing of an annual report by the issuer. This latter approach leaves too much room for unintended results and "management" of the offering termination.

Further, the Proposed Amendment should make clear that no change in the published estimated value is required for customer account statement purposes until the time that the issuer publishes an estimated per share value. Until this is clarified, member firms will seemingly have an untenable level of uncertainty as to whether they will be entitled to rely on the offering price during the offering period and in periods between annual estimated valuations. While there are notional fluctuations in value during these periods, day-to-day perfection cannot be achieved and disclosure must be sufficient to keep investors informed that such fluctuations can occur during these periods.

IV. Transition issues.

The non-listed REIT and DPP industry and member firms have operated under the historical paradigm described herein for many years. The Proposed Amendment contains no considerations of transitioning to its new methodologies, many of which will be highly disruptive to the industry and its investors. As an example, under current regulations, non-listed REITs and DPPs in offering are currently reported on customer statements at their gross offering prices. The consequences of suddenly changing this paradigm may unfairly impact these non-listed REITs and DPPs and may result in other unintended consequences such as the impact on follow-on offerings. A sudden change of this magnitude bears further study by FINRA. At the least it seems that FINRA, if it were to adopt new methodologies along the lines of those described in the Proposed Amendment, should provide that the effectiveness of the new rule be set at a reasonable time into the future after they are finalized and officially adopted, both so that FINRA member firms can prepare their customers for the effect of the new rules, but also so that existing programs are not prejudiced, new programs can incorporate the new rules into their structures and that all industry participants can create compliant systems. A reasonable timeframe for this delayed effectiveness may be eighteen months.

Thank you for your consideration of these very important concerns.

Respectfully submitted,

Martel Day
Chairman

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

With regards to the proposed changes to Customer Account Statements pursuant to NASD 2340, please consider the following thoughts:

1. I believe it would be prudent and I support better disclosure to clients of the Organizational & Offering expenses and how they are charged and how they could negatively affect the perceived value of the investment.
2. I think that trying to portray an estimated value in a statement, net of fees, would not be a feasible decision. These investments are non-listed and trying to determine a value is very difficult. If a REIT for example has 15% of Org. and Off expenses, so the statement would reflect an $8.50 value per share, I don't believe that his is an accurate value. The REIT could still be sitting on a lot of cash that has yet to be deployed, meaning the value would most likely be less than $8.50, or the REIT could have purchased a property(s) at a significant discount and the value could be more than $8.50. I agree that this is the case in the current $10.00 per share reflection as well. In addition, investors participating in the DRIP programs, in which REIT companies promote a discounted $9.50 purchase price, it would be confusing to an investor to determine how that is valued net of fees and how to portray the overall value in this structure given some shares were purchased at $10.00 and others at $9.50. I would actually be a proponent of not indicating any kind of value (including the $10.00 value), but simply having statements that indicate how much an investor contributed and what the determined share price was of those contributions but then disclosing that the share price is a "predetermined value and does not reflect the actual value of the REIT shares, which could fluctuate based upon factors including, but not limited to, the value of the underlying assets and the organizational and offering expense."
3. I believe that this issue is similar to that of an investor buying stock of a private company. The shares are not valued daily, they are not liquid, commissions are often paid to brokers and investors pay a predetermined share price, but they understand that that share price can be somewhat arbitrary as the company value could be fluctuating on a daily basis based upon the performance of the company. These investors understand that until the private stock liquidates through another private transaction or until it goes public, the value of those shares were based upon a predetermined amount and they hope that at liquidation that they are getting back more than that dollar amount. I agree that this too is a difficult scenario for investors as they want to know the value of their investment but that is difficult under certain structures and I think we need to do a better job of educating on those structures.
4. I would propose a statement that indicates the amount invested and the per share price paid for those shares and then perhaps another line in the same statement that indicates the per share price paid net of fees (so indicates two share prices on the statement). With both of those however, I think it is necessary to disclose that those values are arbitrary and predetermined.
5. Another thought is to not reflect a "value" in a statement, but reflect a dollar amount invested and a price per share paid for that dollar amount and then disclose in that statement, that the amounted invested and share price paid could fluctuate based upon the performance of the underlying assets and the fees paid.
6. On the signature pages of most REIT paperwork, there are disclosures that investors initial before they sign. I would propose another disclosure that indicates that share prices do not necessarily reflect the value of the investment and that they are paying org. and off expenses that could be as high as 15% and could negatively affect the value of their shares. With this disclosure requiring investor initials in the sub docs, and then another disclosure in the actual quarterly or transaction statements, that indicates that the share value of $10.00 per share my

> not reflect the actual value of the shares, I believe we could address the concerns at hand and not negatively impact the industry.

I like the direction being taken with this proposed change, but I think it needs to be done more through disclosure format rather than trying to continue determining a value of shares. I do not think that is good for the industry, but I do believe that more needs to be done to educate investors on how REITs are valued (or not valued) and how their fees are structured and how they affect the overall return on the investments.

With regards to 09-09, I like the 18 month valuation as REIT's that are completed the initial offering period have less moving parts and a real valuation at that point can be closer had. I would propose this be done more frequently and perhaps be done annually as part of the annual filing of a REIT.

Thank you,

DFPG Investments, Inc.
406 W South Jordan Pkwy, #240
South Jordan, UT 84095
ph. (801) 838-9999
Member FINRA/SIPC

NorthStar
REALTY FINANCE

November 11, 2011

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 11-44

Dear Ms. Asquith:

NorthStar Realty Finance Corp. ("NRF"), NorthStar Real Estate Income Trust, Inc. ("NSREIT") and NorthStar Realty Securities, LLC ("NorthStar Realty Securities") appreciate the opportunity to comment on Regulatory Notice 11-44 (the "Notice") published by the Financial Industry Regulatory Authority, Inc. ("FINRA") on September 29, 2011. The Notice seeks comments to FINRA's proposal to modify NASD Rule 2340, which governs reporting of per share estimated values on customer account statements (the "Proposed Amendment"). NRF is NSREIT's sponsor and is a NYSE-listed finance real estate investment trust ("REIT") that primarily originates, acquires and manages portfolios of commercial real estate debt, real estate securities and net lease properties. NSREIT is a public, non-listed REIT that was formed to originate, invest in, and manage a diversified portfolio of commercial real estate debt, commercial real estate debt-related securities and select commercial real estate equity investments. NorthStar Realty Securities is a FINRA registered broker-dealer, NSREIT's dealer manager and an affiliate of NRF. Together, we offer a unique perspective on the Notice given that (i) to our knowledge, NSREIT was the first public non-listed REIT with a core focus on commercial debt related investments, (ii) NSREIT is one of only a few public, non-listed REITs sponsored by a publicly traded company and (iii) we have the benefit of perspectives held by three important constituencies, namely the sponsor of a public non-listed REIT, a public non-listed REIT issuer and a captive broker-dealer focused in the industry.

We commend and share FINRA's commitment to providing transparency and clear disclosure to investors. We advise FINRA that we have reviewed and support in principle the comment letter on the Notice submitted by the Investment Program Association (the "IPA Letter"). Among the matters raised in the IPA Letter, and the primary focus of this letter, is whether it would be prudent, as proposed by FINRA, to require brokerage statements to reflect per share estimated values based on the offering price during the Initial Offering Period (as defined in the Proposed Amendment) as reduced by organization and offering expenses (the "Net Value Proposal"). We strongly believe that FINRA should not pursue the Net Value Proposal.

Underlying the Net Value Proposal is the proposition that during the Initial Offering Period, the initial offering price less organization and offering expenses is an appropriate reflection of the value of the securities held by the investors or, at a minimum, is a better reflection than the initial offering price itself. There are many factors that influence the value of a going concern during the Initial Offering Period, such as, among other matters, the strength of management, the ability to identify and realize upon market opportunity, brand awareness, market perception, market conditions, the ability to effectively implement a business plan, underlying asset values of the growing portfolio and expected future cash flows. We stress our belief that the initial public offering price reduced by organization and offering expenses is not an appropriate valuation metric and offers no basis for determining the intrinsic value of the subject securities. In our view, the adoption of the Net Value Proposal will only serve to confuse investors, leading to potential significant unintended consequences.

Among the unintended consequences that could flow from the Net Value Proposal is that investors may conclude that the “value” of their investment in the subject going concern is immediately less than their initial investment. This is an erroneous assumption even in the short term and such error is exacerbated with the passage of time. We believe that public, non-listed REIT investors generally seek long term investments and the true “value” of the initial investment could, even in the short term, well be in excess of the initial investment as a result of many of the factors referenced above. The Net Value Proposal lacks foundation and could negatively impact capital formation in the United States without providing investors any enhanced protection. As such, we suggest that FINRA abandon the Net Value Proposal for the Initial Offering Period and instead continue to work with the Securities and Exchange Commission (“SEC”) and the state securities commissions to ensure that investors are provided with clear and accurate disclosure of all organization and offering expenses in the applicable prospectus.

We believe that reflecting the initial public offering price on investor statements is the most prudent course until such time as the initial public offering is complete and sound valuation methodologies may be deployed. In addition, we urge FINRA to conduct further research and studies to determine the potential impact of the Net Value Proposal on follow-on offerings, which may be an essential continuation of capital raising activity that is necessary to achieve long term business objectives and the highest possible return to investors.

We fully support the prudent regulation of the United States capital markets by FINRA, the SEC and the state securities commissions. We appreciate the opportunity to comment on the Proposed Amendment and Net Value Proposal so we can work in a collaborative manner to protect investors and support a well-functioning capital markets system in the United States.

Very truly yours,

NorthStar Realty Finance Corp.
Daniel R. Gilbert
Co-President and Chief Investment Officer

NorthStar Real Estate Income Trust, Inc.
Daniel R. Gilbert
President and Chief Investment Officer

NorthStar Realty Securities, LLC
W. Timothy O’Toole
President

Partnership Consultants, Inc.

A LEADER IN PARTNERSHIP RESEARCH

2477 Stickney Point Road
Suite 301-B
Sarasota, Florida 34231-4071
941-923-5836 Fax 941-923-8769

November 11, 2011

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

Via email: pubcom@finra.org

Ms. Asquith:

We are submitting this letter of comment to voice our concerns of the proposed changes as noted in the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 11-44 ("11-44"). The changes to FINRA Rule 2340 attempt to address the values of unlisted Direct Participation Programs ("DPPs") and Real Estate Investment Trusts ("REITs") as they are to be reported on customer account statements. It appears that 11-44 contradicts existing valuation requirements as set out by the Financial Accounting Standards Board ("FASB") and Accounting Standards Codification ("ASC") 820.

As stated in 11-44, *"FINRA proposes to permit valuations based on the offering price during the Initial Offering Period when the program is acquiring assets and firms are selling shares at a stable value on a best-efforts basis. However, FINRA proposes to amend the rule to require that all per share estimated values, including those that are based on the offering price, reflect a deduction of all organization and offering expenses* ***(net value).****"*

It is our understanding that the FASB partnered with the Securities and Exchange Commission ("SEC") and developed "Fair Value" rules as explained in ASC 820. However, this should not be confused with "Fair **Market** Value" in the Internal Revenue Service's ("IRS") Revenue Ruling 59-60. The FASB has incorporated the provisions of ASC 820 in Generally Accepted Accounting Principles ("GAAP"). In addition, in ASC 825 the FASB and the **SEC demand that, once a method of valuing assets has been selected, the firms are required to continue to utilize that same method for the life of the asset.** ASC 825 (formerly FAS 159) specifies that the initial choice of valuation method is up to the reporting entity, but once selected it cannot be changed.

As referenced above, another key factor that appears to not be taken into consideration is the IRS Revenue Ruling 59-60. In Section 1 of 59-60 it states, "The purpose of this Revenue Ruling is to outline and review in general the approach, methods and factors to be considered in valuing shares of the capital stock of closely held corporations for estate tax and gift tax purposes. The methods discussed herein will apply likewise to the valuation of corporate stocks on which market quotations are either unavailable or are of such scarcity that they do not reflect the fair market value." (The IRS's Fair Market Value vs FASB and SEC's Fair Value vs FINRA's Net Value)

When taking ASC 820 and IRS Rev Ruling 59-60 into consideration, it appears the proposed changes to FINRA Rule 2340 may cause serious issues for firms reporting values. The proposed changes identified in 11-44 also do not address redemption prices and secondary market trades. So our primary concern is whether there is empirical evidence to support FINRA 11-44 (Rule 2340) over ASC 820 or Rev Ruling 59-60. Also, it is questionable whether the IRS would accept the 11-44 approach in place of Rev Ruling 59-60 for estate valuations.

In addition, it appears that issuers will have to value assets one way for their SEC filings and provide a potentially different value to the Broker-Dealers and other reporting firms. It is hard to imagine a situation where the FINRA value, as described in 11-44 and the ASC 820 value would be the same. This has the potential of increasing the confusion, rather than reducing the confusion. For example, would anyone at the Broker-Dealers be able to explain the relevancy of the different values for the same time period?

With that said, we have used a method similar to 11-44 if the valuation date is during the offering period and if the offering period is relatively short and other indicators are not available. However, once the redemption price kicks in, the method prescribed by 11-44 becomes meaningless, so the proposed changes will cause confusion for multiple-year offerings. In addition, can FINRA convince the FASB and the SEC of the need to amend ASC 825 to allow changes in method?

About Partnership Consultant, Inc. ("PCI")

PCI has been providing pricing and valuation services for non-exchange securities for financial services industry clients since the 1980s. We compiled the only known directory of limited partnerships and we have worked for years to help client understand their non-exchange assets.

Respectfully,

Partnership Consultants, Inc.
By: Jon Hale, President
Sarasota, Florida

Partnership Consultants, Inc.
A LEADER IN PARTNERSHIP RESEARCH
2477 Stickney Point Road
Suite 301-B
Sarasota, Florida 34231-4071
941-923-5836 Fax 941-923-8769

November 11, 2011

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

Via email: pubcom@finra.org

Ms. Asquith:

It would seem that FINRA should discuss this issue with the FASB, the SEC, the IRS and the program sponsors to reduce the valuation confusion. Such discussions could include ASC 820, ASC 825, IRS Rev Ruling 59-60, IRC 2031, NASD 2710 and the proposed FINRA 11-44. The discussions could also include the terms "fair value", "fair market value" and "net value".

An actual example might help demonstrate the confusion-

American Realty Capital Trust – IPO dated Feb 2008 – July 2011 (Source – Edgar filings)
Shares at $10 each in the regular offering or $9.50 per share in the DRIP program.
Offering expenses approx. 11.5%. Redemptions available after 1 year.
The $10 per share offering was still open on June 30, 2011

Value estimates for shares of American Realty Capital Trust as of June 30, 2011 -

Method	Estimated Price per share on 6-30-11	Comment
Current offering price	$10.00	This could be an ASC 820 Level 1 "active market" price.
FINRA 11-44 "Net Value"	8.85	Offering price less approx. 11.5% of offering expenses.
DRIP program offering price	9.50	Per reports filed with SEC Edgar system
Capital Account or "Tax Value"	8.2878	Reflects approx. average capital account – per Form 10-Q
NASD Rule 2710(f)(2)(M) value	10.00	Per manager, as reported in the Form 10-K
Redemption values -		
Investors from 2-2008 to 6-2008	10.00	Per agreement – This is an ASC 820 Level 3 approach.
Investors from 7-2008 to 6-2009	9.75	Per agreement – This is an ASC 820 Level 3 approach.
Investors from 7-2009 to 6-2010	9.625	Per agreement – This is an ASC 820 Level 3 approach.
Investors from 7-2010 to 6-2011	No redemption yet	Redemption available after 1 year.
Rev. Ruling 59-60	Most of the above.	"Willing buyer and willing seller"
IRC 2031	Usually the redemption	"Highest and best" price available to the seller
Partnership Secondary	Unknown	We did not find any recent secondary trades.

Respectfully,

Partnership Consultants, Inc.
By: Jon Hale, President

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

NASAA

November 18, 2011

Via electronic submission to pubcom@finra.org

Ms. Marcia E. Asquith
Senior Vice President and Corporate Secretary
FINRA
1735 K Street, NW
Washington DC 20006-1506

RE: Comments in Response to Regulatory Notice 11-44

Dear Ms. Asquith:

NASAA jurisdictions review DPP offerings to assess whether disclosure is adequate and the terms are fair to investors. We support the efforts of FINRA in Regulatory Notice 11-44 and the proposed amendments to Rule 2340, which enhance all disclosures for the benefit of issuers, FINRA member firms, and investors.

The valuation of DPP securities in customer account statements is important to investors in many financial planning decisions. Investors will naturally assume that the disclosed value accurately reflects the true value of their holdings, and investors will review the valuations to assess the performance of the investment. Asset allocation decisions that include additional purchases or redemptions may be made based upon this disclosed value.

NASAA is concerned about inconsistent valuation methods by both member firms and issuers. We believe proposed Rule 2340 improves the valuation of unlisted direct participation programs or real estate investment trusts in customer accounts. We support this rule and any future measures to enhance the understanding of these valuations.

The past practice of using the standard offering price ($10 per share) as the valuation of these DPP/REIT securities for up to seven and one-half years after effectiveness (two registration statements of three year offerings plus 18 months) is a wholly inadequate method for determining the current value of these securities in customer account statements. The proposal to value the securities from the initial effective date and offering period by Rule 415(a)(5) (three years and 180 days) is supported by NASAA as a significant improvement. NASAA also supports the deduction of the organizational and offering expenses from the valuation during the offering period as an improvement over the industry practice of a constant $10 per share.

Most importantly, NASAA supports proposed Rule 2340(c)(2), which would require the member firm to not report a value if it knows or has reason to know that the value is unreliable. To enhance the quality and consistency of the valuations, NASAA encourages FINRA to provide additional guidance to member firms to comply with this provision. This would include a review of the financial statements and a US GAAP or IFRS (as allowed by law) analysis in assessing the appropriate valuation. If adopted, the FASB proposal, *Proposed Accounting Standards Update 2011-210-Real Estate-Investment Property Entities (Topic 973)*, would require a fair market value for certain real estate holdings in financial reporting. This would further support the obligation of members to exercise appropriate due diligence in reviewing the financial statements under proposed Rule 2340(c)(2).

NASAA thanks FINRA for the opportunity to provide comments on Regulatory Notice 11-44 and proposed Rule 2340.

Sincerely,

Jack E. Herstein

Jack E. Herstein
NASAA President and
Assistant Director, Nebraska Department of Banking and Finance, Bureau of Securities

CENTER FOR CAPITAL MARKETS COMPETITIVENESS
OF THE
UNITED STATES CHAMBER OF COMMERCE

DAVID T. HIRSCHMANN
PRESIDENT AND CHIEF EXECUTIVE OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062-2000
202/463-5609 • 202/955-1152 FAX
david.hirschmann@uschamber.com

November 11, 2011

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc
1735 K Street NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice to Members 11-44; Proposed Amendment to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements

Dear Ms. Asquith:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation representing the interests of over three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective it is an important priority of the CCMC to advance an effective and transparent system for capital formation. The CCMC welcomes the opportunity to comment on Regulatory Notice 11-44 published by the Financial Industry Regulatory Authority, Inc. (FINRA) on September 29, 2011 regarding amendments to NASD Rule 2340 to address how firms report the per share estimated value of unlisted Direct Participation Programs (DPP) and unlisted Real Estate Investment Trusts (REITs) on customer account statements.

The CCMC supports the efforts of FINRA to provide protections and greater transparency to investors through amendments to NASD Rule 2340. We believe it is appropriate to require the use of appraisal value for the unlisted DPP or unlisted REIT's assets, liabilities, and operations at the end of the initial offering period as the basis for a per share estimated value on a customer account statement. We also believe that a member firm should remove or amend a per share estimated value if it "knows or has reason to know the value is unreliable."

Ms. Marcia E. Asquith
November 11, 2011
Page 2

However, we have serious concerns with the proposal to require that all per share estimated values, including those that are based on the offering price, reflect a deduction of all organization and offering expenses. We believe that adopting the proposed amendment with this mandate will have serious repercussions to the commercial real estate market and the broader U.S. economy without any commensurate benefits, and therefore, we recommend that FINRA withdraw its proposal to mandate that all organization and offering expenses be deducted for purposes of providing per share estimated values during the offering period. This concern is more fully discussed below.

Arbitrary Price Less Organizational and Offering Expenses Does Not Equal Intrinsic Value

Historically, unlisted DPPs and unlisted REITs have used an arbitrary $10.00 per share price during the offering period because it allows for ease and simplicity in determining the number of shares to be issued. This offering price, however, does not represent the book or net asset value of a share in the unlisted DPP or unlisted REIT, the amount of proceeds an investor would receive in the event of liquidation, or the price at which the shares would be traded if they were listed on an exchange. These factors are all clearly disclosed in the unlisted DPP or unlisted REIT's prospectus. Because the $10.00 offering price does not reflect actual value, deducting organization, and offering expenses from the offering price will do nothing to change the arbitrary nature of the price or bring it to a closer approximation of intrinsic value.

The value of an investment in an unlisted DPP or unlisted REIT is based on a variety of factors, including the DPP or REIT's ability to manage assets and implement the entity's business plan effectively and efficiently over a long holding period. During the offering period, such execution cannot be readily quantified and translated into the intrinsic value during such an early stage of the investment. Therefore, deducting organization and offering expenses from an arbitrary starting price that does not reflect intrinsic value will leave investors confused, as the net amount is a misrepresentation of what investors may believe is an intrinsic value.

Proposed Amendment Could Have Adverse Impact on Commercial Real Estate Market and the Broader Economy

Like many other financial/commercial sectors in the U.S. economy, the unlisted DPP and unlisted REIT markets experienced tremendous turmoil over the past three years. As the industry recovers from the economic downturn and commercial real estate activity picks up again, financial regulators should use caution when considering rules that could hamper capital formation. If investors conclude that the value of their unlisted DPP or unlisted REIT investment has experienced an immediate loss because the amount listed on the customer account statement is the offering price less all organizational and offering expenses, it could deter future potential investors from considering unlisted REITs and unlisted DPPs as a viable investment alternative. The effects of such actions could be devastating to capital formation in the commercial real estate market as well as the diversification profiles for investors.

Moreover, the lack of capital flowing into the unlisted DPP and unlisted REIT markets will have repercussions for the broader economy. These products have played a key role in the recovery of distressed markets since the economic collapse, providing tens of thousands of Americans with employment directly and indirectly through the development, management, and maintenance of assets held by these unlisted DPPs and unlisted REITs. Only by FINRA and other regulators proceeding judiciously in a manner that promotes transparency without unduly inhibiting growth and capital formation will the U.S. economy return to its former vibrancy.

Conclusion

To summarize, we believe that, given the nature of these products as long term investments, the mandate to deduct organization and offering expenses from the offering price as the basis for an estimated value during the initial offering period is not reflective of the investment's actual value. This requirement may place significant difficulties on the ability of unlisted DPPs and unlisted REITs to raise capital, thus restricting liquidity in the commercial real estate market. Therefore, we believe that FINRA should modify its proposed amendment accordingly. If FINRA chooses to move forward with the proposal as presented, at a minimum it should conduct a cost

Ms. Marcia E. Asquith
November 11, 2011
Page 4

– benefit analysis, subject to public comment, and proceed with the proposal only if there is a significant net benefit for implementing such an amendment.

We appreciate the opportunity to submit these comments and would be happy to discuss these issues with you or your staff.

Sincerely,

David Hirschmann

David Hirschmann

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

Re: FINRA Request for Comment on Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements

Ms. Asquith,

We support FINRA's proposed amendments to NASD Rule 2340 regarding both valuation of Real Estate Investment Trusts (REITs), and disclosure of deductions of fees and operating expenses in customer account statements; however, FINRA should also more closely examine disclosure of account maintenance fees charged by brokers, and establish a mechanism for investors to receive fair value for their investments after a reasonable period of years.

We currently own two non-publicly traded REITs, and the only mechanism we have of determining their value comes from mini-tender offers or quotes for their sale on the secondary market, i.e., these investments are worth only what someone is willing to pay for them, and certainly not the fixed share prices currently reported on the account statements. We suspect the actual performance of these investments has fallen far short of their publicly traded counterparts, but without an accurate valuation we have no guidance about whether we should sell on the secondary market to cut our losses or hold on to the investments in hopes that they someday become liquid. We support the proposed amendments requiring more current and accurate valuation of these investments.

We were unaware of the magnitude of the up-front loads, fees or commissions deducted from our initial investments in the REITs made several years ago, until only recently when we read news articles about these investments. Allowing companies to deduct fees in such a non-transparent manner is equivalent to allowing them to steal money directly from a checking or savings account. So, we applaud FINRA's efforts to make these up-front expenses more readily apparent.

When we made the initial investments we assumed the investments were held directly by the REITS, similar to a stock dividend reinvestment plan. Our financial advisor did not make it apparent that we would have to pay for an annual account maintenance fee and an "Alternative Investment Custody and Valuation Fee" for each REIT to a brokerage firm. These fees continually erode the value of what appear to be questionable investments.

Last, when we invested in the non-publicly traded REITs, we understood they were relatively illiquid, but anticipated liquidity after a period of years, about five years according to our financial advisor. Shortly after making our initial investments, both REITs discontinued their share repurchase programs and we are unaware of any incentive for management to do anything other than allowing the REITs to run on indefinitely "continuing to collect fees, rather than trying to find the maximum value for the portfolio of properties" to quote a recent

MarketWatch article. FINRA should establish a mechanism for investors to recover fair value for their investments after a reasonable period of years.

Thank you for the opportunity to provide input.

Charlie Howell
Laura Stankosky

Cornell University
Law School

Lawyers in the Best Sense

WILLIAM A. JACOBSON
Associate Clinical Professor of Law

G57 Myron Taylor Hall
Ithaca, New York 14853-4901
T: 607.255.0293
F: 607 255 12[illegible]
E: wai24@cornell.edu

November 11, 2011

Via E-mail (pubcom@finra.org)

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

Re: Regulatory Notice 11-44 (Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements)

Dear Ms. Asquith:

The Cornell Securities Law Clinic (the "Clinic") submits this comment to support the proposal (the "Rule Proposal") of the Financial Industry Regulatory Authority ("FINRA") to amend NASD Rule 2340 relating to customer account statements. The Clinic is a Cornell Law School curricular offering, in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. For more information, please see: http://securities.lawschool.cornell.edu.

The Clinic supports the Rule Proposal because it provides investors with greater transparency and a better understanding of the true value of their investment. NASD Rule 2340 currently requires that member firms ("firms") send account statements to customers at least quarterly. With respect to unlisted Direct Participation Programs ("DPP") and unlisted Real Estate Investment Trusts ("REIT"), NASD Rule 2340(c) also addresses how firms should report the per share estimated value of an unlisted DPP or REIT. NASD Rule 2340(c) specifies, among other things, that when a firm reports the per share estimated value of an unlisted DPP or REIT on a customer account statement, the firm must use data that is not more than 18 months old.

FINRA proposes to amend NASD 2340(c) to permit valuations of the per share values of unlisted DPPs and REITs based on the offering price during the Initial Offering Period (as defined in the Securities Act of 1933), net of all organizational and offering expenses. After the Initial Offering Period, the per share estimated value of a DPP or

REIT must be based on an appraisal of a DPP or REIT's assets, liabilities, and operations. Firms must base their appraisal on data that is no less current than the data in the most recent annual report.

Additionally, the proposed amendments prohibit firms from using a per share estimated value if the firm "knows or has reason to know the value is unreliable." Finally, the proposed amendments allow a firm to omit reporting the per share estimated value on an account statement if the most recent annual report of the unlisted DPP or REIT does not comply with the disclosure requirements of NASD Rule 2340.

The Clinic supports this Rule Proposal because it increases transparency and facilitates a better understanding of the true value of an investment.

First, requiring firms to report the estimated per share value net of fees provides greater transparency to investors about the cost of their investment. The fees to invest in unlisted REITs and DPPs are sometimes as high as 15%.[1] To recoup the amount lost by fees, investors must receive a substantial return. Forcing firms to disclose the customer's estimated per share value net of fees highlights the true portion of an investor's initial principal that is actually getting invested.

Additionally, requiring that the estimated per share value after the Initial Offering Period be based on data that is no less current than the most recent annual report of the REIT or DPP ensures that the information provided to an investor is timely. The 18-month grace period allowed under the current rule often meant that firms could wait as long as four to five years before having to report an estimated per share value that differs from the initial offering price. This gives some investors the mistaken impression that unlisted REITs and DPPs are less volatile and more stable than other investments, when in reality firms are deferring reporting of the true per share value of the investment. The Clinic supports the proposed amendment because it eliminates the grace period to ensure that investors receive more current information about the value of their investment.

We acknowledge that some commentators have noted the difficulty of preparing a fair valuation of the per share value of an unlisted REIT or DPP. This should not, however, excuse firms from providing information that provides some indication of how an investment is faring. Omitting the valuation process from the Rule Proposal leaves investors without any information to help them understand the value of their investment and make informed investment decisions, which is a greater danger than the commentators suggest.

---

[1] Gail Liberman, *Private REIT Explosion*, FIN. ADVISOR MAG., June 2010, http://www.fa-mag.com/component/content/article/5637.html?issue=146&magazineID=1&Itemid=73.

For the foregoing reasons, the Clinic supports FINRA's Rule Proposal.

Respectfully Submitted,

William A. Jacobson, Esq.
Associate Clinical Professor of Law
Director, Cornell Securities Law Clinic

Brittany Ruiz
Cornell Law School '13

Research and Due Diligence Association, Inc.
membership@raddassoc.org

November 11, 2011

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

Re: Regulatory Notice 11-44: Proposed Amendments to NASD Rule 2340

Dear Ms. Asquith,

The Research and Due Diligence Association, Inc. (RADD) is pleased to submit this letter in response to FINRA's request for comments on proposed amendments to NASD Rule 2340 to address values of unlisted direct participation programs and real estate investment trusts in customer account statements. RADD is an association of individuals involved in research and/or due diligence functions who are either employed by independent broker-dealers or by firms retained by broker-dealers to assist in those functions.

RADD is commenting on paragraph (c)(2)(A) of Rule 2340, as proposed to be amended, which states that "[a] member must refrain from providing a per share estimated value, from any source, if it knows or has reason to know the value is unreliable, based upon publicly available information or nonpublic information that has come to the member's attention[.]" RADD has two concerns relating to this provision: first, it would subject broker-dealers to an ambiguous standard that would be extremely difficult to satisfy, and second, it would have a chilling effect on their ability to conduct due diligence on the program that publishes a valuation or subsequent offerings by the sponsor of the program that publishes a valuation.

Ambiguous Standard

The standard set forth in this clause is ambiguous primarily due to the use of the term "unreliable." Valuations are conducted in a variety of ways – some are conducted entirely by individuals employed by the issuer or an affiliate, and some are conducted with the input from an outside firm. If an outside firm is utilized, its role can vary, from merely providing input to management or the board of the issuer to producing the actual value to be reported by the issuer. In addition, there are a number of valuation methodologies that might be utilized, including those based upon net asset value, discounted cash flow analysis, public company comparables, or a dividend discount model. The use of each methodology in turn involves making a number of assumptions, such as assumptions relating to current and future capitalization rates, the choice of market comparables, and the choice of an appropriate discount rate.

The "reliability" of a given valuation therefore could be challenged on a number of fronts. For example, would a valuation be unreliable if it were conducted entirely by internal staff due to potential conflicts of interest? Similarly, would it be unreliable to rely upon valuation information provided by a valuation firm retained by the issuer? Would it be unreliable if the issuer utilized a valuation firm with conflicts of interest due to providing other services to the issuer or its affiliates? Would broker-dealers be charged with determining the appropriateness of the methodology chosen, and the reasonableness of each assumption made in the calculation of value? If so, the broker-dealer could be required to conduct a comprehensive evaluation of all aspects of a valuation, including the qualifications of the individuals or firms conducting the valuation, any conflicts of interest that may be present, the appropriateness of the methodology utilized, and the reasonableness of every assumption made in conducting the valuation.

Potentially Chilling Effect upon Due Diligence

RADD is also concerned that the proposal could have a chilling effect upon due diligence. Because offering of direct participation programs and non-traded REITs are typically conducted on a continuous basis, broker-dealers often conduct ongoing or periodic due diligence of these offerings. And because these programs are typically "blind pools," due diligence may include an investigation of prior performance and an evaluation of related disclosure. A review of the information relating to the valuation of a current or prior offering therefore could be appropriate as part of due diligence, as it could be relevant to the performance of a current program or that of a prior program, respectively.

During the course of such due diligence, a broker-dealer will typically review public and non-public information. A review of non-public information is generally called for, since a principal objective of due diligence is to ensure that all material facts pertaining to an issuer are adequately and accurately disclosed in the offering document, a determination that often cannot be made by reviewing only public information. RADD believes that broker-dealers conducting due diligence generally should obtain and review non-public information relating to valuations of current and prior programs, as well as other non-public information concerning the issuer, the sponsor, and the sponsor's prior programs.

RADD is concerned, however, that the proposed amendment could provide disincentive for broker-dealers to request non-public information, or for sponsors to provide it to them. Many pieces of information, both significant and insignificant, could arguably have a bearing on the reliability of a valuation. This includes not only information directly related to the valuation, but the issuer's property-level information, financial models and projections, financial statements and anything else that could affect the value of a company or its assets. If a broker-dealer is required to consider the potential impact on the reliability of a valuation of all non-public information received in the course of its due diligence, it may be reluctant to request as much non-public information as it otherwise would, and the sponsor may be more reluctant to provide it.

Conclusion

In light of the forgoing, we would urge FINRA to modify (c)(2)(A) of Rule 2340, as proposed to be amended, to either (1) include specific language that would make it clear what would constitute an "unreliable" valuation or (2) choose a more objective standard with a higher threshold for culpability. In light of the inherent complexity in defining what might constitute an "unreliable" valuation, RADD believes that adoption of a more objective standard with a materiality standard and a higher threshold of culpability would be appropriate, so that the requirement is manageable and not unduly burdensome. In this regard, RADD believes that it also would be appropriate for FINRA to provide guidance, either in the rule or in a proposing or adopting release, as to the expected level of inquiry by broker-dealers in evaluating a published valuation. RADD believes that this or a similar approach would be more appropriate, as it would continue to hold broker-dealers accountable with respect to published valuations, but would provide them with a more objective standard of accountability and greater clarity as to their duty of inquiry.

Please contact the undersigned at 410-964-2500 if you have any questions.

Very truly yours,

John F. Kearney

John F. Kearney
General Counsel

I am in full support of any rule which gives investors more transparency and clarity into the actual value of an investment. To give broker-dealers the option of showing an incorrect security value on a client statement for 3-5 years seems to contradict the fairness, transparency and investor protection that FINRA stands for.

With any other security, the commissions, sales charges, organization and offering expenses are all deducted, thereby providing the transparency and truthfulness investors deserve. For some reason, the non-traded REIT industry has been allowed for years to operated outside of this standard convention. The non-traded REIT industry has always “hoped” that the value of the underlying assets would one day “catch up or exceed” their client’s initial purchase price, but as we all know, that is speculation. (Note: Behringer Harvard was forced to go mark-to-market on their real estate portfolio and their NAV dropped from $10 per share to $4.25 IN ONE DAY. We all know that the degradation in value occurred over many years, but investors were kept in the dark. On top of that, many registered representatives were touting non-traded REITs as “non-volatile” and “non-correlated”, clearly two misleading statements.)

Non-traded REITs should be shown on client’s statement NET of all upfront expenses, just like any other investment. Retail investors should not be kept in the dark as to the true value of their investment, not initially, and surely not for 3+ years. I would want to see the value on the client’s statement reflect the purchase price less all fees and charges, and then require the underlying assets be appraised at least annually (and preferably quarterly) by and **INDEPENDENT 3RD PARTY MAI** appraiser. Allowing the REIT sponsor to do their own appraisals seems to be allowing the proverbial fox into the hen house.

This is what the investors deserve with regards to transparency. Just because this investment is illiquid does not provide the justification hide an investments actual market value from the retail investor.

Randy Lewis | President
Ascent Real Estate Securities, LLC
Member FINRA / SIPC

5251 DTC Parkway, Suite 935
Greenwood Village, CO 80111
303.220.3863 main
303.220.3866 direct
720.272.6500 cell

rlewis@JamesAlpha.com

Invested in America

November 10, 2011

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

Re: FINRA Regulatory Notice 11-44
Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct_Participation Programs and Real Estate Investment Trusts in Customer Account Statements

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA") Clearing Firms Committee[1] is pleased to have the opportunity to comment on FINRA's recently proposed amendments to NASD Rule 2340 involving per share estimated values of unlisted Direct Participation Programs (DPPs) and Real Estate Investment Trust (REITs)[2] on customer account statements (the "Proposed Amendments"). Rule 2340 "applies to members that self-clear or clear for other members." (See NASD NTM 01-08).

The SIFMA Clearing Firms Committee is well positioned to comment on the Proposed Amendments because it represents the interests of fully-disclosed clearing

---

1 SIFMA is a non-profit industry association that represents the shared interests of participants in the global financial markets. SIFMA members include more than 600 international securities firms, U.S.-registered broker-dealers, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. More information about SIFMA and its members and activities is available on its website www.sifma.org.

2 Unlisted DPPs (including LLCs and LLPs) and REITs do not trade on a national securities exchange. See FINRA Regulatory Notice 11-44 at n.1; see also NASD NTM 01-08 (adopting amendments to NASD Rule 2340 effective 4/16/01).

firms that clear and settle millions of securities transactions each day for thousands of introducing firms.[3]

The Proposed Amendments would impose new limits on the time period the initial offering price could be used as a basis for the estimated valuation of unlisted DPPs and REITs, and would require issuers to deduct certain fees and expenses from the calculation of estimated value during the initial offering period. While SIFMA fully supports FINRA's efforts to design rules intended to improve customer protection and provide greater transparency, SIFMA is concerned the language of the Proposed Amendments may be broadly read to impose new and far-reaching obligations upon clearing firms, which are inconsistent with the clearing firms' specialized role as "back office" providers of clearing and settlement services. This role has long been recognized both under the law and in FINRA's own rules, as most recently reflected by FINRA's enactment of Rule 4311 and the continuing recognition that responsibilities respecting customer accounts may be allocated between clearing firms and introducing firms.

Specifically, SIFMA is concerned about three proposed substantive changes set forth in the Proposed Amendments:

1. A new requirement that the clearing firm "must refrain from providing a per share estimated value, *from any source*, if it knows <u>*or has reason*</u> *to know* the value is *unreliable*, *based upon publicly available information or nonpublic information that has come to the member's attention"*). (See Proposed Amendments at 2340c(2)(A); italics and underscore supplied).

2. A new requirement that the clearing firm must disclose the reason why an estimated valuation "does not appear in, or has been removed from, the account statement." (See Proposed Amendments at 2340c(3)(iv)).

3. A new requirement that the clearing firm must include an estimated valuation for unlisted DPPs and REITs on the account statements – even if the annual report itself contained no valuation – and even if the DPP or REIT is listed "below the line" on the account statement (in which case the clearing firm does not provide custody or clearing services for the position on behalf of the

---

[3] Because many introducing firms (aka "correspondents") do not have the net capital, resources, technology, personnel or expertise to clear and settle its own trades, the introducing broker-dealer often contracts with a third-party clearing firm to carry it accounts and perform its back office functions on a fully-disclosed basis (i.e., disclosed to the introducing firm's end customers). In fact, approximately 90% of all broker-dealers registered with the SEC utilize fully disclosed clearing firms. According to the SEC Office of Economic Analysis (as of January 31, 2004, the most recent date available), there were a total of 5,218 broker-dealers doing business with the public and registered with the SEC. Of that total, 573 broker-dealers were self-clearing firms -- and 4,645 broker-dealers utilized the services of fully-disclosed clearing firms.

introducing firm and/or its client). (See Proposed Amendments at 2340c(1)(A)(i) & n. 5).

Industry practice has long been that the clearing firm would either rely upon the information provided to it by the issuer (or sponsor) of the unlisted securities, such as DPPs and REITs – which have no public market – or contract with a recognized third party provider of independent valuation services (IVS) to provide estimated valuations.[4]

The Proposed Amendments explicitly allow the clearing firm to continue to rely on an IVS (or any other source) to provide it with estimated valuations – a practice which SIFMA fully supports. SIFMA also agrees that a clearing firm should not post an estimated valuation received from a source if it knows – i.e., has actual knowledge—that the valuation is inaccurate. This is the current standard under Rule 2340 (i.e., the clearing firm can "demonstrate" the inaccuracy).

However, the Proposed Amendments extend well beyond the actual knowledge standard ("if it knows") and appear to impose an additional requirement that the clearing firm also refrain from posting an estimated valuation if it "has reason to know" – based, not just on its own records -- but on publicly available or non-public information that has come to the member's attention – that the price information may be unreliable. SIFMA is concerned that this broader language may impose on clearing firms a new and on-going affirmative duty to monitor and confirm the reliability of the valuations received from the IVS (or other source) for thousands of unlisted DPPs and REITs. The broad language of the Proposed Amendments would in essence require the clearing firm to act as an insurer or guarantor of estimated valuations received from third parties who have far more expertise in providing valuations – or face regulatory exposure and potential civil liability after the fact. Clearing firms handle hundreds of thousands of trades daily on behalf of millions of end customers of introducing firms. If clearing firms were required to continuously monitor the "reliability" of estimated pricing received for millions of introduced accounts to determine if it had "reason to know" of unreliability, then the speed and efficiency demanded in the contemporary securities markets would not be possible.[5] As further explained below, in 2000 the NASD rejected the "has no

---

[4] Rule 2340 specifically recognizes that an IVS "is intended to refer to a company, independent of a member, that is in the business of providing estimated values for DPP and REIT securities." See NTM 01-08 at n. 5. There are a handful of industry recognized IVS for DPPs and REITs. Rule 2340 also recognizes that the clearing firm may receive estimated values for DPPs and REITs from the annual report or "any other source" (which may include issuers who may – or may not be—affiliated with the introducing firms). See NTM 01-08

[5] Nothing in this Comment Letter is intended to suggest or imply an avoidance of FINRA guidance on outsourcing activities as set forth in NTM 05-48 and its progeny. Clearing firms recognize that they must have in place specific policies and procedures that will monitor the IVS' compliance with the terms of any agreements and assess the IVS' continued fitness and ability to perform the covered activities being outsourced. The Proposed Amendments however, seek to impose obligations on the clearing firm far beyond this outsourcing guidance, as well as FINRA's current rule proposal on third-party service providers (proposed FINRA Rule 3190).

reason to believe" standard for clearing firms. As set forth below, we believe the "has reason to know" standard should be similarly rejected here.

SIFMA respectfully submits that FINRA should delete the new requirements set forth in items 1-3 above, and should retain the standard of "actual knowledge" under the current version of Rule 2340 which requires that a clearing firm refrain from posting an estimated valuation received from a third party only in those cases where the clearing firm can "demonstrate" the "inaccuracy" of the estimated value.

I. Existing Case Law and Regulations Have Long Recognized the Specialized Role of Clearing Firms

Clearing firms do not sell securities, nor do they exercise investment discretion. Rather, a fully-disclosed clearing firm provides "back office" processing services: clearance and settlement and custody services to other introducing broker-dealers. (See FINRA Rule 4311 (effective August 1, 2011, and consolidating former NYSE Rule 382 and NASD Rule 3230)).

The relationship between the clearing firm and the introducing broker-dealers is set forth in a Fully Disclosed Clearing Agreement ("FDCA"), which is filed with and approved by FINRA. FINRA Rule 4311 *requires* the allocation of certain responsibilities between a clearing firm and introducing firm be set forth in the FDCA and, for practical reasons, other responsibilities for which the rule does not require specific allocation are typically allocated in the FDCA.[6]

Under industry standards, all the customer-facing or "front office" responsibilities are allocated exclusively to the introducing broker-dealer – including account opening, due diligence, suitability and supervision of accounts, account activity, and registered reps. Because the relevant front office duties are formally allocated to the introducing firm and confirmed in a written agreement, which is approved by the regulators, the clearing firm is *relieved* of those duties. (See NYSE Information Memo 82-18 (Mar. 5, 1982)).

Because of the clearing firm's back office role, statutory and common law claims are routinely dismissed under a long-line of precedent holding that, absent red flags, no liability arises from a clearing firm's mere performance of its routine and ministerial clearance functions.[7] It is also black-letter law that a clearing firm owes no fiduciary

---

[6] As part of the clearing arrangement, each end customer of the introducing firm receives a disclosure letter (known in the industry as a "Rule 382 letter") at the beginning of the clearing relationship notifying them of the specialized role of the clearing firm and the allocation of duties between the clearing firm and their introducing broker-dealer.

[7] *See, e.g.,* Fezzani v. Bear Stearns & Co., 592 F. Supp. 2d 410 (S.D.N.Y. 2008) (clearing firm not liable for correspondent's misconduct since clearing firm merely cleared the transactions); Greenberg v. Bear, Stearns & Co., 220 F.3d 22 (2d Cir. 2000) (The simple providing of normal

duty to the end customers of the introducing broker-dealer and cannot be held liable for the acts of an introducing firm. See, e.g., McDaniel vs. Bear, Stearns & Co., Inc. and Bear Stearns Securities Corp., 196 F. Supp.2d 343 (SDNY 2002); Rozsa v. May Davis Group, Inc., 187 F. Supp.2d 123 (S.D.N.Y. 2002) (finding that a clearing firm performing ministerial back office functions did not owe a duty to the plaintiff and therefore was not liable to him for his broker's misdeeds), *aff'd*, 2006 U.S. App. LEXIS 2131 (2d Cir. 2006).

As set forth below, the broad language of the Proposed Amendments appears to be inconsistent with these regulations and precedent because they may be applied in a manner that transforms the clearing firm into something it is not -- and could never be – i.e., an insurer, a guarantor or a fiduciary to the end-customers of introducing firms as to the reliability of estimated valuations received from third-party valuation services.

II. NASD Has Previously Recognized that a Clearing Firm Should Not Be Required to Confirm the Reliability of an Estimated Valuation Received from an IVS, an Annual Report (or other source) Under Rule 2340

The current version of NASD Rule 2340 states that a clearing firm may rely on an estimated price for an unlisted DPP or REIT received from an IVS – and explicitly states under a section entitled "Reliability of Estimated Values" that Rule 2340 "does not obligate a general securities member to confirm the accuracy of an estimated value provided in a DPP or REIT's annual report or provided by any other source external to the member." (See NASD NTM 01-08 at 34). The current version of Rule 2340 further states that if the member "can demonstrate (i.e., to the NASD) that the estimated value was inaccurate as of the date of the valuation or is no longer accurate as a result of a material change in the operation or assets of the [DPP or REIT]", the member must "refrain" from including that estimated value on the statement. (See Id.). SIFMA submits that this current standard that requires "actual knowledge" should be retained.

It appears that the inclusion of the words "demonstrate" and "inaccuracy" as found in the current version of Rule 2340 likely resulted from a comment letter received by the SEC during the comment period for amendments to NASD Rule 2340 that were proposed in 2000. In particular, the commenter was concerned then – just as SIFMA is today -- that the proposed rule, as then drafted "would have required members to make an affirmative determination about the reliability of estimated values provided through an annual report of a DPP or REIT, by an independent valuation service, or through any

---

clearing services to a primary broker who is acting in violation of the law does not make out a case of aiding and abetting against the clearing broker).

other source." (See Securities Exchange Act Release No. 432601 (November 21, 2000); 65 F.R. 71169 at pp. 4-5 (November 29, 2000)).[8]

Specifically, the commenter asserted that as then drafted, the rule "would impose an unfair obligation on a member to consider the accuracy of an estimated valuation, even if the member had obtained the estimated value from the DPP or REIT's annual report or from an independent valuation service that the member had retained to provide a valuation." The commenter recommended that NASD Regulation amend the rule to include a provision from the 1997 Proposal that would prohibit a member from including on an account statement "an estimated value that the member believes is inaccurate as of the date of the valuation or is no longer accurate as a result of a material change in the operations or assets of the program or trust." The commenter believed that the revised language would prohibit a member from providing an estimated valuation that the member believes is inaccurate -- without imposing an affirmative duty on the member to determine that it has no reason to believe that the estimated value is inaccurate. (See Id., 65 F.R. 71169 at pp. 5-6 (November 29, 2000)).

NASD Regulation responded to the concerns raised by other commenters, by deleting the "no reason to believe" language and adopting the current language of the rule which states that a member may refrain from including a per share estimated value for a DPP or REIT security on an account statement only if the member can "demonstrate" that the value was "inaccurate" as of the date of the valuation or is no longer accurate as a result of a material change in the operations or assets of the program or trust. In so doing, NASD Regulation explicitly stated in 2000 that NASD Rule 2340 "was not intended to impose an obligation on members to guarantee the accuracy of an estimated value obtained from a third party source." (See NASD NTM 01-08). Clearing firms have long relied upon the NASD's statement in the presentation of estimated values to end customers on account statements.

SIFMA respectfully submits that the key words in the current version of Rule 2340 are "demonstrate" and "inaccuracy" -- and that this is the proper objective standard for a clearing firm to follow – i.e., if the clearing firm has actual knowledge such that it can "demonstrate" the "inaccuracy" of the estimated valuation received from a third party, the clearing firm should not post that estimated valuation on an account statement. The current language sets a bright line objective test which is sufficient to encompass both actual knowledge of an inaccurate price as well as red flags which come to the clearing firm's attention suggesting an inaccuracy.

---

[8] It is important to note that the draft of the rule which the commenter was commenting on in 2000 provided that a member could use an estimated valuation for a DPP or REIT on an account statement if "after considering any relevant information about the market and the particular investment in its possession, the member *has no reason to believe* that the estimated valuation is inaccurate." Id.. 65 F.R. 71169 at p. 5 n.18 (November 29, 2000) (italics supplied). Thus, the draft of the rule as commented on by the commenters was even narrower than the scope of the Proposed Amendments being considered today.

Under industry practice, if a clearing firm receives red flags that come to its attention as to accuracy of estimated pricing, it generally makes that information available to the IVS and asks the IVS to reconsider the valuation in light of this information. If the IVS changes the valuation in light of the information, then all clearing firms who may use that same IVS will receive the same amended valuation for that CUSIP. And if the IVS retains the same valuation for that CUSIP even after considering the new information brought to its attention, then the clearing firm should be able to reasonably rely on the IVS' expertise in this area and not face regulatory exposure for posting that valuation – unless of course it has "actual knowledge " and can "demonstrate" that the IVS valuation is "inaccurate." Similarly, it is industry practice for clearing firms to convey price challenges to the IVS. Sometimes the IVS will change a price in light of a challenge, and sometimes it will not. If the IVS does not change its valuation in light of the price challenge, the clearing firm should be able to continue to rely on the IVS' expertise in this area and it should not have to change the IVS valuation on its own volition unless it has enough facts and information relating to the security at issue so as to have actual knowledge of the inaccuracy – i.e., where it can "demonstrate" the estimated value received from the IVS is inaccurate. SIFMA agrees that a clearing firm should not post an estimated valuation "if it knows" that the estimated value is inaccurate.

What the NASD recognized in 2000 the last time similar changes to Rule 2340 were proposed remains true today: a clearing firm should not be obligated to guarantee an estimated value that is obtained from a third-party source. However, by imposing a standard in the proposed rule that is based not just on actual knowledge -- but knowledge the member "has reason to know" -- FINRA is codifying an affirmative duty of inquiry upon the clearing firm that is inconsistent with the previously recognized specialized role of the clearing firm and is tantamount to stating that no valuation provided by a third-party source can ever be accepted on its face. In effect, it eliminates any of the efficiencies that arise from using a third-party expert to obtain such valuations. Further, the "reason to know" standard appears to be an even broader standard than the "has no reason to believe the value is inaccurate" standard that was summarily rejected by the NASD back in 2000.

The Proposed Amendments also appear to require clearing firms to affirmatively monitor "public or non-public information" for thousands of DPPs and REITs to determine if there is a "reason to know" of unreliability or face regulatory liability. While there is seemingly qualifying language in the proposal that it is information that "has come to the attention" of the member, the practical reality is that it is not very difficult for anyone – regulator or litigant – to establish that information that was publicly available "came to the attention" of someone employed by a clearing firm or by an affiliate of a clearing firm. And it is difficult, if not impossible, for a person to prove that he or she did not see something when the allegation is that the information was readily available to the general public. "Public information" in the context of a REIT may include something as generic as the current state of the commercial real estate market. It would not be correct to impose an obligation on the clearing firm to question the valuations presented by a third-party expert in valuations simply because the clearing firm is aware of the general state of the real estate market. This is very different than if the clearing firm has been advised directly of issue concerning the performance of a specific REIT issuer.

Clearing firms custody thousands of different DPPs and REITS and they lack the expertise or the operational resources to be able to confirm the reliability of estimated valuations received from an IVS (who are in the very business of providing such valuations). As the valuations appear on monthly (or, if applicable, quarterly) statements, it would impose an incredible burden on the clearing firm to do this kind of affirmative investigation and monitoring review into thousands of unlisted DPPs and REITS held by end customers prior to transmitting each monthly (or quarterly) account statement. Such a standard would inappropriately shift the burden of providing accurate information to the investor from the issuer of the investment to the clearing firm. It would cause the clearing firm to act as the gatekeeper and guarantor.

Similarly problematic is the requirement that "non-public information" may act as a trigger for the "reason to know" standard. Many clearing firms are part of larger entities that are involved in many different aspects of the securities business. Firms are required to "wall off" the various businesses to prevent the improper communication and use of certain confidential information across those businesses. Yet, as the proposed language uses the phrase "has come to the attention of the member", information that is received on one side of the "wall" may be imputed to the whole member and may be viewed as information the clearing firm (or business of the member) should have considered before publishing prices on an account statement. Not only does this proposal violate the concept of the "Chinese Wall", it could lead to inconsistent results for the same DPP or REIT. Consider the following scenario which will occur under the Proposed Amendments: Clearing Firm A declines to post an estimated value received from an IVS on a DPP or REIT based on nonpublic information that permissibly came to the clearing firm's attention (but which information it cannot disclose to the IVS or other third party because of confidentiality). However, Clearing Firm B -- holding the exact same DPP or REIT for its introducing firms -- continues to post the estimated value received from the same IVS used by Clearing Firm A because Clearing Firm B is not privy to that nonpublic information. The Proposed Amendments will create an inconsistency in account statement disclosures for the exact same security held at two different clearing firms – all depending upon the subjective facts available -- or not -- to a particular clearing firm.[9]

[9] It should be noted that virtually all non-disclosure agreements often impose restrictions that the recipient may only use such confidential information for a specific and limited purpose. The Proposed Amendments, however, would impose an obligation on clearing firms to use such confidential information lawfully in its possession to evaluate the reliability of an estimated valuation for a DPP or REIT – and to reject such valuation if the clearing firm "should have known" based on the nonpublic information that such valuation was unreliable. Using non-public information in this way may expose the firm to liability for breach of the non-disclosure

Additionally, applying the "reason to know" standard as the basis for requiring clearing firms to remove estimated valuations would appear to directly conflict with the separate IRS standards which require IRA custodians to provide fair market valuations at year end. In this circumstance, the member firm's compliance with FINRA's standard would likely result in the display of one valuation on account statements -- and potentially a different valuation on IRA documentation due to the difference in the IRS' requirements. It appears that the application of the "actual knowledge" standard by FINRA would result in a less conflicting standard on member firms who must also comply with IRS regulations.

In sum, the Proposed Amendments will place the clearing firm in an untenable position: if the clearing firm receives an estimated valuation from an IVS – but becomes concerned that it is unreliable, it can provide the information which may affect the reliability to the IVS and ask the IVS to re-consider its valuation. If the IVS – who has far more expertise than the clearing firm -- says it is retaining the estimated value as is and will make no change, the clearing firm is faced with an impossible choice under the Proposed Amendments. If the clearing firm continues to rely on the IVS' estimate – and that estimate turns out to be "unreliable" after the fact, then the clearing firm will be exposed to liability from FINRA for posting that IVS supplied value and violating the new Rule 2340. But if the clearing firm decides to ignore the IVS supplied value – and the clearing firm's decision turns out to be in error -- the clearing firm may be exposed to potential liability from the issuer of the DPP or REIT, the introducing firm who sold it, and the end customer who bought it for impairing the value of their holdings.[10]

A. Clearing Firms Should Not Be Required To Publish the Reason an Estimated Valuation Does Not Appear in an Account Statement

The Proposed Amendments replace the current language of Rule 2340 which requires disclosure "if applicable, that accurate valuation information is not available" with a more substantive disclosure explaining the "reason why the value does not appear in, or has been removed from, the account statement." (See Proposed Amendments 2340c(3)(iv)). If the reason for removal of the valuation was due to "non-public information" lawfully in the possession of the clearing firm, the Proposed Amendments would require the clearing firm to post that reason on the statement—thereby exposing the clearing firm to potential liability. Compliance with an SRO rule should not expose a clearing firm to civil liability. Similarly, even where public information provides the

---

agreement – yet not using the non-public information in that way may expose the firm to regulatory liability from FINRA for not complying with the Proposed Amendments to 2340. SIFMA respectfully submits that this cannot have been FINRA's intent.

[10] Although Rule 2340 only applies to account statements and not IRS required statements, see RN 11-44 at n.2, there may be potential tax consequences to the end customer resulting from the clearing firm not posting an available IVS price on the account statement -- especially if the DPP or REIT is held in a retirement account. Potential tax implications flowing from the Proposed Amendments are beyond the scope of this Comment Letter.

basis for the purported "unreliability" of the estimated valuation, and its removal, the Proposed Amendments require that that specific reason be disclosed on the account statement. A clearing firm should not be required to provide such an explanation to the introducing firm's end customers about products sold by them (especially where a DPP or REIT sponsor is affiliated with the introducing firm). Such a communication is exclusively an introducing firm's obligation allocated to the introducing firm under FINRA Rule 4311. Indeed, such a requirement is unnecessary and inconsistent with industry practice. There are many other kinds of factual circumstances in which a clearing firm is required to remove or does not include a value on an account statement – for example, bankruptcy, illiquid markets, trading halts, unavailability of pricing – and no specific explanation from the clearing firm is required (other than a general disclosure on the statement backer consistent with the current language of Rule 2340).

B. The Proposed Amendments Should Not Apply to DPPs or REITS Prior to the Issuance of an Annual Report or Which are Listed "Below the Line"

Current Rule 2340 states that a member may voluntarily provide a price for a DPP or REIT on an account statement prior to the issuance of an annual report, subject to the requirements of the rule, but must provide a price beginning with the monthly statement that follows the month in which the DPP or REIT has produced an annual report that contains a valuation. The Proposed Amendments would require a member to provide a price from the time the DPP or REIT first is received in the account, which could be from the date the REIT is first offered for sale. With the additional requirements imposed by the rule (even if such requirements are modified consistent with SIFMA's requests in this letter), the pricing of a REIT or DPP on a statement should remain permissive but not mandatory prior to the issuance of an annual report that contains a value. If a member wishes to provide a price in the period prior to the annual report, it may do so as long as the price information is provided consistent with the other requirements of Rule 2340.

The Proposed Amendments as currently drafted also appear to apply the requirements of Rule 2340 to the display of DPPs and REITs that are held "below the line" on account statements – i.e., to those securities for which the clearing firm performs no clearing or custody services – and which are custodied elsewhere. Most clearing firms will accommodate introducing firms by including on the account statement certain securities held "below the line" for informational purposes only with numerous disclaimers. In such instance, the estimated value of that security (if any) held below the line is not included in the total market value shown on the account statement sent by the clearing firm.

The first sentence of the Proposed Amendments states that a clearing firm "that *holds* a [DPP or REIT] *in a customer's account* must provide a per share estimated value …" (See Proposed Amendments 2340(c)(1); italics supplied). The words "hold" and "in a customer's account" means that the clearing firm has possession and control and thus the security is held "above the line" – included in total account value on the account statement because it is custodied by the clearing firm. Thus, the statutory language itself appears to limit the Proposed Amendments to only those DPPs and REITs held above the line.

However, footnote 5 of RN 11-44 also says that the Proposed Amendments will apply to DPPs and REITs "regardless of whether they are listed or itemized 'above the line' or 'below the line.'" SIFMA submits that such an extension of Rule 2340 to below the line securities is overbroad and unworkable.[11]

If the clearing firm does not have possession or control of the DPP or REIT (which is custodied elsewhere), the clearing firm does not have SEC Rule 15c3-3 (customer protection) obligations for those holdings (nor will there be SIPC coverage for below the line securities). In cases where the clearing firm is not responsible for possession or control, in other words, where it does not "hold" the security, it should not be required to ensure the reliability of valuations noted for such a security – and where those securities are not even included in total account value. SIFMA submits that Rule 2340 should only apply to securities held above the line – i.e., those securities in the possession and control of the clearing firm and for which the clearing firm provides clearing or custody services. (FINRA has separately addressed its expectations regarding "below the line" – or "assets held away" – securities in Regulatory Notice 10- 19.)

** * *

SIFMA appreciates the opportunity to comment on the Proposed Amendments. Our comments above are intended to reflect industry practice, and to foster consistency between the Proposed Amendments and the regulatory guidance and well-established body of case law long governing the clearing industry. SIFMA would welcome the opportunity to discuss these comments with FINRA. If you have any questions, please reach out to me at (212) 313-1260.

Sincerely,

Thomas F. Price
Managing Director

cc: Financial Industry Regulatory Authority, Inc
Marc Menchel, Executive Vice President and General Counsel for Regulation

[11] There is no indication in any of the past guidance on Rule 2340 that FINRA intended to apply Rule 2340 to below the line securities. The current version of Rule 2340 appears to have limited its application to above the line securities by defining "account activity" to involve "securities or funds in possession or control of the member." See NASD Rule 2340(d)(1)

Grace B. Vogel, Executive Vice President, Member Firm Regulation
Joseph E. Price, Senior Vice President, Corporate Financing/Advertising Regulation
Gary Goldsholle, Vice President and Associate General Counsel, Office of the General Counsel

November 11, 2011

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

Ms. Asquith:

We are submitting this letter of comment to voice our concerns of the proposed changes as noted in the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 11-44 ("11-44"). The changes to FINRA Rule 2340 attempts to address the values of unlisted Direct Participation Programs ("DPPs") and Real Estate Investment Trusts ("REITs") as they are to be reported on customer account statements.

As stated in 11-44, *"FINRA proposes to permit valuations based on the offering price during the Initial Offering Period when the program is acquiring assets and firms are selling shares at a stable value on a best-efforts basis. However, FINRA proposes to amend the rule to require that all per share estimated values, including those that are based on the offering price, reflect a deduction of all organization and offering expenses (net value)."* It appears 11-44 and the changes proposed in Rule 2340 do not take into consideration key elements such as the Financial Accounting Standards Boards ("FASB") and Accounting Standards Codification ("ASC") 820.

It is our understanding that the FASB partnered with the Securities and Exchange Commission ("SEC") in their construction of the "Fair Value" rules as it pertains to ASC 820. However, this should not be confused with "Fair Market Value" in the Internal Revenue Service's ("IRS") Revenue Ruling 59-60 as described below.

Pursuant to Generally Accepted Accounting Principles (GAAP) and FASB, once a method of valuing assets has been selected, firms are required to continue to utilize that same method for the life of the asset. ASC 825 (formerly FAS 159) specifies that the choice of valuation method is up to the reporting entity. In order to determine "fair value" ASC 820 (formerly FAS 157 "Fair Value Measurements and Disclosures") specifies three levels in which a determination may be made. They are as follows:

Level 1: prices for the same asset from an active market. (If a stock trades on an exchange, then the trade price is the fair value.)

Level 2: observable inputs, such as the active market price for similar assets, or a redemption price for the subject asset. (If the client holds a note, then it would seem that the principal redemption price is an observable input and the interest is to compensate the note holder for the time value of money.)

Level 3: unobservable inputs, such as an income approach or a market data approach or a cost approach.

4745 Independence Street, Suite B, Wheat Ridge, CO 80033 Phone: 303-716-7234 Fax: 303-716-7239

Therefore, once a method for valuing the assets has been chosen, it must continue to provide a value within those standards identified above until the asset is sold, paid off or becomes impaired. Furthermore, FASB ASC 820 requires firms to independently evaluate the fair value measurement process utilized by the fund managers to accurately calculate the NAV.

As referenced above, another key factor that appears to not be taken into consideration is the IRS Revenue Ruling 59-60. In Section 1 of 59-60 it states, “The purpose of this Revenue Ruling is to outline and review in general the approach, methods and factors to be considered in valuing shares of the capital stock of closely held corporations for estate tax and gift tax purposes. The methods discussed herein will apply likewise to the valuation of corporate stocks on which market quotations are either unavailable or are of such scarcity that they do not reflect the fair market value.”

According to 59-60 there are eight components which must be taken into consideration when arriving at a fair market value.

1. The nature of the business and the history of the enterprise from its inception.

2. The economic outlook in general and the condition and outlook of the specific industry in particular.

3. The book value of the stock and the financial condition of the business.

4. The earning capacity of the company.

5. The dividend-paying capacity.

6. Whether or not the enterprise has goodwill or other intangible value.

7. Sales of the stock and the size of the block of stock to be valued.

8. The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

When taking ASC 820 and IRS Rev Ruling 59-60 into consideration, it appears the proposed changes to FINRA Rule 2340 may inherently cause potentially serious tax problems to owners of alternative investments. The proposed changes identified in 11-44 also do not address redemption prices and secondary market trades. Rule 2340 does not address the concerns of giving considerations to changes in asset values with respect to valuations. So our primary concern is whether there is empirical evidence to support FINRA 11-44 (Rule 2340) over ASC 820 or Rev Ruling 59-60. As such, the question as to whether the IRS would accept the changes with respect to Rule 2340 approach over 59-60 for estate valuations remains to be answered.

With that said we have used a similar method if the valuation date is during the offering period and if the offering period is relatively short and other indicators are not available. However, once the redemption price kicks in, the method prescribed by Rule 2340 will essentially become meaningless, so the proposed changes will cause confusion for multiple-year offerings.

We would be open to discuss this matter and our thoughts as to what we believe would be the most appropriate and prudent methods and solutions to address the concerns described above.

About Prodigious

Prodigious has been providing pricing and valuation services as well as transfer services for alternative investment securities on behalf of the financial services industry since the 1990s. It has a strong knowledge and intimate understanding of these securities and it is our desire to ensure the integrity of the marketplace is maintained while providing complete transparency for both the industry participant firms and the general public.

Respectfully,

Prodigious, LLC
Wheat Ridge, Colorado

Business Law Section
AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654
(312) 988-5588
Fax: (312)988-5578
www.ababusinesslaw.org
businesslaw@americanbar.org

November 16, 2011

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 11-44

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 11-44 (September 2011) (the "Proposing Notice"), with respect to proposed amendments to National Association of Securities Dealers, Inc. ("NASD") Rule 2340 (to be renumbered FINRA Rule 2231) to revise the per share estimated value required by Section (c) thereof to be included 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 "Proposal").

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. Background of NASD Rule 2340 and Recent Regulatory Initiatives

We believe it relevant to refer to the background of the regulatory initiatives that relate to valuations on customer account statements for non-traded DPP and REIT securities. The Securities and Exchange Commission (the "Commission" or "SEC") approved the NASD's adoption of the current version of NASD Rule 2340(c) on

November 21, 2000,[1] which the NASD had proposed in response to the request of the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives (the "House Subcommittee") and the Commission's Division of Market Regulation (now, the Division of Trading and Markets) (the "Division"). The House Subcommittee "expressed concern to the NASD regarding the sufficiency of information provided on customer account statements with respect to the current value of illiquid partnership securities. The House Subcommittee noted that investors in non-traded partnerships should be able to know how their investments are performing and expressed a belief that [there] might be shortcomings in current valuation reporting to that group of investors." In addition, the Division suggested that a member should, at a minimum, disclose the illiquid nature of DPP securities, that any disclosed valuation may not reflect a value at which customers can liquidate their positions, and information on the methodology used to determine the value and the date on which the value was last determined.[2]

The concerns of the House Subcommittee and the Division arose as a result of the real estate market decline at the end of the 1980s following the 1987 stock market crash and subsequent Commission enforcement actions against certain broker/dealer firms for continuing to list DPP securities at the offering price or "par value" long after completion of the offering, which valuations did not reflect the subsequent significant decline in the value of the real estate portfolios of the DPPs. We have recently experienced a similar period of significant decline in the real estate market and we agree that it is important that customer account statements for REITs and DPPs reflect the value of a portfolio of real estate assets they hold.

II. General Comments

We support FINRA's efforts to enhance disclosure on customer account statements regarding the illiquidity and valuations of non-traded DPP and REIT securities. The current terms of NASD Rule 2340(c) significantly responded to the original concerns of the House Subcommittee and Division for rulemaking following the real estate market decline in the late 1980s. 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

[1] SEC Release No. 34-43601 (November 21, 2000); 65 F.R. 71169 (November 29, 2000). Currently, NASD Rule 2340(c) requires that each general securities member that carries customer accounts and holds customer funds or securities include on account statements a per share estimated value for any public non-traded DPP or REIT security and provide (1) a brief description of the estimated value, its source, and the method by which it was developed and (2) disclosure that DPP or REIT securities are generally illiquid and that the estimated value may not be realized when the investor seeks to liquidate the security. If a FINRA member does not include a per share estimated value on an account statement, the account statement must include disclosure that: (1) the DPP or REIT securities are generally illiquid; (2) the value of the security will be different from its purchase price; and (3) if applicable, accurate valuation information is not available. The rule requires that the per share estimated value used by a FINRA member on an account statement must be developed from data that is not more than 18 months older than the date the account statement is issued. Finally, a FINRA member is obligated to refrain from using an estimated per share value on an account statement if the member can demonstrate that the estimated value is inaccurate. FINRA has acquiesced in the industry practice of FINRA members using the offering price or par value on customer account statements for the duration of the securities offering (which generally is at least four years, using two or more consecutive registration statements) until 18 months after completion of the offering.

[2] SEC Release No. 34-43601 (November 21, 2000); 65 F.R. 71169 (November 29, 2000), at 71170.

securities of a DPP or REIT program (together, the "Program") as the per share estimated value on customer account statements after an Initial Offering Period, as the Program will then be in a position to develop a more relevant per share estimated value based on an appraisal of Program assets, liabilities, operations and other relevant factors.

However, the disclosure of values for non-traded Program securities on customer account statements during the Initial Offering Period does not raise the same concerns regarding the continued use of aged valuations that we believe led the House Subcommittee and the Division to request that the NASD adopt the current requirements of NASD Rule 2340(c). Therefore, we believe that the Proposal to require that FINRA members use a value other than the offering price for non-traded Program securities on customer account statements during the "Initial Offering Period" as defined in the proposed rule (discussed below) would not provide useful information to investors that is not already available through the prospectus and would not advance investor protection interests. To the contrary, as further discussed below, we believe that the Proposal would result in disclosure of an artificial value for non-traded Program securities during the Initial Offering Period that is (in comparison to the offering price) misleading to investors, difficult to calculate, and artificially low.

We also have comments on other aspects of the Proposal. In outline, this letter will recommend that FINRA:

1. specify that the time period covered by the Initial Offering Period is a fixed period of three-and-one-half years, regardless of whether the issuer registers the offering on more than one registration statement during that time;

2. continue to permit FINRA members to disclose the offering price on customer account statements during the shorter of the Initial Offering Period or the Program's publication of an Estimated Appraisal Value, with enhanced disclosure that the listed value is the current offering price of the security and that the value of the security is different from its offering price and may be less than the offering price;

3. permit FINRA members to rely on the issuer's disclosure of an Appraised Estimated Value in any SEC filing or submission – not only in the Program's annual report;

4. clarify the implications for FINRA members if an issuer publishes more than one updated Estimated Appraised Value in a calendar year;

5. provide appropriate periods for transition from Net Offering Price disclosure to Estimated Appraised Value disclosure on customer account statements and, as well, from one Estimated Appraised Value disclosure to the next; and

6. provide an implementation period for the amendments to Rule 2340, which amendments will only apply to offerings that are declared effective by the SEC one year after SEC approval of the amendments.

III. Per Share Estimated Value Disclosure

FINRA is proposing amendments to NASD Rule 2340 that would require that a general securities member that "holds" a DPP or REIT security in a customer's account provide a per share estimated value for the security on the firm's customer account statement that:

1. during the "Initial Offering Period," is based upon the offering price reduced by the amount of organization and offering expenses, as defined in FINRA Rule 2310(a)(12) (the "Net Offering Price"); and

2. after the Initial Offering Period, is based on an appraisal of the assets, liabilities and operations of the DPP or REIT and derived from data no less current than the data in the issuer's most recent annual report (the "Appraised Estimated Value").

The Initial Offering Period

The Proposal would define the "Initial Offering Period" to be no longer than the three-year period permitted under Securities Act Rule 415 and the up-to-six-month "carryover" period permitted under that rule from the initial effective date of the first registration statement under which the DPP or REIT is offered and sold (the "Initial Offering Period").

We agree in general with the principle underlying the Proposal that it is in the interest of a Program's current and potential investors that FINRA members not continue to disclose a Program's offering price as the per share estimated value on customer account statements after an Initial Offering Period, as the DPP or REIT should have completed its initial ramp-up period during which it will have invested funds raised in the offering and will be in a position to develop a value based on an appraisal of Program assets. This principle is consistent with the views of the House Subcommittee and the Division, which were focused on aged valuations long after completion of a Program offering, so that investors have information on how their investments are performing during the post-Initial Offering Period.

As currently proposed, the Initial Offering Period for a Program may vary depending on whether the offering is closed before the end of three years[3] or a new registration statement is filed and, if a new registration is filed, whether it is declared effective before the end of the six-month carryover period. We believe it would be preferable to have a single Initial Offering Period of uniform length for all Programs. Under this approach, the Initial Offering Period would be defined as the first three-and-a-half years that the securities are offered and sold, regardless of whether the offering is registered on more than one registration statement. The advantage of fixing the Initial Offering Period is that Programs are more likely to have a sufficient time period during which to invest the initial capital raised by the Program and to

[3] It is the state securities regulators who determine whether a Program is permitted to continue to offer on the same registration statement after an initial two-year period. In the past, the state securities regulators have been reluctant to approve the continued registration of a Program offering for a third year, thereby requiring that the issuer register a continuation of the offering on a second registration statement after two years. Recently, however, there have been a number of Program offerings that have been able to obtain state registration for a third year and even for the Rule 415 carryover period.

conduct an appraisal of Program assets that will result in a meaningful Estimated Appraised Value for FINRA members to include on customer account statements.

The Per Share Estimated Value Based on the Offering Price[4]

We support FINRA's efforts to enhance the information provided to investors in Program securities as to the value of the non-traded DPP and REIT securities held in the investor's account after conclusion of an Initial Offering Period. The provisions of the current rule (which would be retained in the revised rule) that most clearly protect investors are those which require disclosure on customer account statements of the source and manner in which the per share estimated value was calculated, that the DPP or REIT securities are illiquid and that the per share estimated value may not be realized when the customer seeks to liquidate the security, which requirements were originally requested by the Division. In comparison, the Proposal that FINRA members list Program securities during a limited Initial Offering Period with a Net Offering Price that reflects a deduction of organization and offering ("O&O") expenses from the public offering price does not provide a similar level of relevant investor information nor does it enhance investor protection. Moreover, the proposed Net Offering Price is not related to the concerns of the House Subcommittee and the Division, which we believe were focused on preventing aged valuations for DPP securities on customer account statements long after completion of a Program offering.

<u>Account Statement Disclosures of Security Valuations Are Inherently Imperfect</u>: We recognize that security valuations on customer account statements are inherently imperfect in that they can only include a value for each security that provides some guidance to the investor as to the security's valuation at a particular point in time and consistent with the characteristics of the security. While the offering price of a non-traded Program security may not be a perfect value, the market value for a listed security is also flawed in that it represents only the last sale price of the security on the last day of the prior month to one purchaser, which does not imply that the customer will achieve a similar price should the investor determine to sell the security nor that the price reflects the intrinsic value of the security.

<u>The Net Offering Price Would Be an Artificial Price That Is Misleading to Investors</u>: Contrary to FINRA's statement in the Proposing Notice that the Net Offering Price "is more likely to be a closer approximation to the intrinsic value" of Program securities, we have concluded that the proposed methodology for calculating the Net Offering Price results in a valuation that is artificial and more likely to be misleading than the offering price because it appears to be a "real" value. FINRA has not taken a similar position with respect to any other

---

[4] FINRA states in footnote 2 of the Proposing Notice that Rule 2340 does not apply to the issuer's obligation to provide a valuation for retirement account trustees and custodians under Employee Retirement Income Security Act ("ERISA") annual report valuation requirements for retirement assets. We believe it unlikely that a Program would disclose different valuations in its annual report to assist FINRA members to comply with FINRA Rule 2340 and for once-per-year ERISA valuation purposes because this would result in the same Program securities being assigned a different valuation depending on whether the securities are held in a customer's retirement account or regular brokerage/advisory account. Thus, while Rule 2340 may not technically apply to the issuer's ERISA valuation, as a practical matter we believe that a Program issuer will use the valuation developed in compliance with Rule 2340 as the valuation required to be disclosed for ERISA annual valuation purposes.

security that the customer account statement should include a price that reflects the intrinsic value of the security, which in most cases would be materially different from the security's purchase or market price. FINRA may wish to consider whether it is appropriate for FINRA, as a regulator of broker/dealers, to impose by rule a valuation on customer account statements for a category of securities that it characterizes as reflecting an approximation of the security's intrinsic value.

Customer Account Statements Should Not Be Used to Disclose O&O Expenses: We also do not believe that customer account statements should be the vehicle to provide post-investment supplemental disclosure to investors regarding the issuer's O&O expenses and do not agree with FINRA's statement in the Proposing Notice that "Requiring net values on customer account statements during the Initial Offering Period will provide greater transparency to investors about the fees and expenses that would benefit investors."

Investors will have received at the time of investment and may continue to access during the Initial Offering Period current information on the O&O expenses of the offering that is disclosed on the cover page of the prospectus and in the prospectus summary, the "Estimated Use of Proceeds" section, the "Summary of Fees, Commissions and Reimbursements" section, and the "Plan of Distribution" section of the prospectus. These disclosures must be made in compliance with SEC regulations and FINRA Rule 5110. Therefore, the proposed indirect disclosure of O&O expenses through the Net Offering Price is more likely to be confusing to investors during the Initial Offering Period and introduce costs and complexities to the customer account statement process without any demonstrable investor benefit.

The Net Offering Price Calculation Results in an Artificially Low Valuation That Would Be Inconsistent With Prospectus Disclosure: Moreover, the proposed calculation of the Net Offering Price is problematic as a practical matter. Unlike the commission and dealer manager fee, which are calculated on a per share basis, a Program's O&O expenses are not a fixed number and are estimated for the life of the registration statement, actual expenses are not known until the offering is terminated, and actual expenses may be less than the maximum O&O that is estimated for purposes of prospectus disclosure and compliance with FINRA Rule 2310. We are particularly concerned that the provision's reference to the definition of O&O in FINRA Rule 2310(a)(12) would require that anticipated payments from any source of the issuer's O&O expenses, the reimbursement of FINRA member due diligence expenses and underwriting compensation be deducted from the Program's offering price to arrive at the Net Offering Price, *i.e.*, the text of the Proposal and the referenced definition do not limit the deduction from the offering price to those O&O expenses that will be paid solely from offering proceeds.

As a result, the Net Offering Price disclosed on customer account statements would be artificially low in deducting both estimated expenses and any O&O expenses (including any underwriting compensation) that are paid by the sponsor or advisor or from the operations of the program as "back-end" fees (including "trail commissions"). We believe that the resulting Net Offering Price disclosed on customer account statements would be misleading and confusing to investors, since it will not be consistent with disclosure in the prospectus. For example, a Program offered at $10 per share may estimate that maximum O&O will not exceed 15%, of which 9% represents underwriting commissions deducted directly from offering proceeds and up to 1% paid by the Program to reimburse FINRA member expenses, with the Advisor paying the remaining 5% of O&O expenses. The Proposal would require that customer account statements list a per share estimated value of $8.50, whereas issuer proceeds disclosed on the cover page and in the "Use of Proceeds" section (and other sections) of the prospectus would be $9.10 per share and the prospectus would disclose that the Program would only be obligated to pay up to 1% for expense reimbursements (all of which expenses may not be incurred).

<u>FINRA Members Will Not Be Able to Obtain the Net Offering Price from the Prospectus</u>: In addition, although the offering price is disclosed in the prospectus, the prospectus would not similarly disclose an easily identifiable Net Offering Price for FINRA members to include on customer account statements. We believe that FINRA members may, therefore, reach different determinations as to the calculation of the Net Offering Price.

<u>Issuer Organization Expenses Benefit Investors</u>: As a policy matter, we also disagree with the conclusion inherent in the FINRA Proposal that investors do not benefit from the expenses incurred by the issuer (or advisor or sponsor) in effecting the organization of the Program, its distribution to investors and in reimbursing the expenses of broker/dealers to conduct due diligence on the offering, as well as paying FINRA members for raising funds for the operation of the Program. We believe it to be particularly inappropriate for FINRA to require the netting of a Program's organizational expenses because the funds spent on organizational expenses enhance the value of the enterprise to the benefit of investors.

<u>Alternative Proposal for Valuation During the Initial Offering Period</u>: We recommend that FINRA continue to permit FINRA members to disclose the offering price on customer account statements during the shorter of the Initial Offering Period or the Program's publication of an Estimated Appraisal Value, with enhanced disclosure that: (1) the listed value is the current offering price of the security and (2) the value of the security is different from its offering price and may be less than the offering price.[5] We believe that this clear disclosure of the source[6] and meaning of the listed value when combined with disclosure on the customer account statement that the Program securities are illiquid and that the value may not be realized when the customer seeks to liquidate the security, will provide relevant information to investors during the Initial

[5] The latter two disclosures are drawn from the proposed disclosure requirements in Section (c)(3)(ii), which refer to the "purchase price" rather than the "offering price" of the security. We recommend that the disclosure should refer to the offering price rather than the individual investor's purchase price so that the value included on account statements is the same for all investors, since some investors purchase securities with discounted or no commissions as a result of volume purchases, purchases through an advisory account, and when purchasing dividend reinvestment plan ("DRIP") shares. In comparison, we believe that it is appropriate to reference the investor's purchase price in the case of disclosure when no value is provided on a customer account statement, as proposed in Section (c)(3)(ii). We also note that the text of proposed Section (c)(3)(ii) contains an inadvertent error in that it is missing the word "price" following the first reference to "purchase."

[6] Although proposed Section (c)(1)(A)(1) requires that FINRA members disclose on account statements the source of the per share estimated value and the manner in which the value was calculated, we are unsure as to whether this requirement would always result in disclosure that the listed value is the current offering price. Therefore, we are recommending that FINRA amend the Proposal to provide the specific text that FINRA members should include on customer account statements to identify that a listed value is the current offering price during the Initial Offering Period.

Offering Period that the listed value does not represent a "valuation" of the security for any purpose. We believe that this is a better approach than creating a theoretical valuation that investors may rely on inappropriately as an indicator of the intrinsic value of a Program security during the Program's limited Initial Offering Period.

To the extent that FINRA determines to require the listing of an offering price net of certain O&O expenses on customer account statements during the Initial Offering Period notwithstanding our arguments in opposition thereto, we recommend that FINRA revise the proposed calculation of the "Net Offering Price" to be the "proceeds to the issuer" figure that is disclosed in the chart on the cover page of the Program's prospectus, which reflects the proceeds to the issuer after deduction of front-end commissions paid from the offering proceeds (the "Proceeds to the Issuer Value"). The Proceeds to the Issuer Value is not an estimate, accurately reflects proceeds received by the issuer on a per share basis (regardless of any discount to or elimination of the commissions for sale of DRIP shares and sales to institutional accounts) and would be easily available to all FINRA members. In such case, we also recommend that disclosure be included on the customer account statement that the listed value is the amount of proceeds received by the Program issuer from the sale of each security so that investors are given the source of the value and are not misled to believe that the value may be relied upon as an indicator of the intrinsic value of the security.

The Per Share Estimated Value Based on an Appraisal

Under proposed Section (c)(1)(C) would require that, after the Initial Offering Period, FINRA members will be required to provide a per share estimated value based on an appraisal of the assets, liabilities and operations of the DPP or REIT that is derived from data no less current than the data in the most recent annual report.

<u>Source of Publication of Appraised Estimated Value</u>: Although the Proposal would obligate a FINRA member to list the security's Appraised Estimated Value on customer account statements at the end of the Initial Offering Period based on the issuer's most recent annual report, the issuer is likely to have published the Net Offering Price as the per share estimated value in the annual report immediately prior to the end of the Initial Offering Period as required by FINRA Rule 2310(b)(5) and Rule 5110(f)(M), as well as to comply with ERISA requirements. If the Proposal is structured in a manner that would indirectly obligate an issuer to publish the Appraised Estimated Value in the annual report prior to the end of the Initial Offering Period in order to assist FINRA members to comply with their obligations under Rule 2340, issuers of Program securities will not have the full benefit of the proposed Initial Offering Period in order to invest capital raised by the Program prior to having to conduct an appraisal of program assets. In the absence of publication of an Appraised Estimated Value in the Program's prior annual report, the Proposal would allow FINRA members to refrain from including a valuation for the securities on its customer account statements after termination of the Initial Offering Period – which is not the best result for investors.

This gap between the issuer's Net Offering Price disclosure in the Program's most recent annual report prior to the end of the Initial Offering Period and the need for FINRA members to obtain an Appraised Estimated Value from the issuer for disclosure on customer account statements upon the expiration of the Initial Offering Period must be resolved. One approach is to permit FINRA members to rely on the issuer's disclosure of an Appraised Estimated Value in the issuer's second registration statement or in an amendment to its current registration statement (or in any other SEC filing or submission, such as a Form 8-K), depending on how the Initial Public Offering is defined – not only in the Program's annual report. Moreover, the Proposal should be revised to provide the issuer with an adequate period of time upon completion of the Initial Offering Period in which to conduct an appraisal of the Program assets, liabilities, and operations and other relevant factors in order to publish the first Appraised Estimated Value for the Program securities. [7]

Clarify FINRA Members' Obligation to Update Disclosure: We would also appreciate clarification of the implications for FINRA members if an issuer publishes more than one updated Estimated Appraised Value in a calendar year. For example, an issuer may publish its first Estimated Appraised Value in a follow-on registration statement that becomes effective on October 1st. The issuer will then publish an updated Estimated Appraised Value in its annual report in compliance with FINRA Rules 2310(b)(5) and 5110(f)(2)(M), which will be filed with the SEC the following April. We would appreciate clarification from FINRA as to whether FINRA members would be obligated to include that valuation on customer account statements. Moreover, if a Program determines to publish an updated Estimated Appraised Value due to, for example, acquisition of a valuable property or properties, we would appreciate clarification as to the obligations of members to include the updated valuation on customer account statements.

Clarify That FINRA Members May Disclose an Estimated Appraised Value on Customer Account Statements During the Initial Offering Period: We also request that FINRA clarify that Section (c)(1)(B) does not require that FINRA members continue to provide the Net Offering Price on customer account statements during the Initial Offering Period if the issuer publishes an Estimated Appraised Value in compliance with Section (c)(1)(C) during that period. Given that the objective of the Proposal is to provide current and potential investors with updated valuation information as soon as possible, we believe that FINRA members should be permitted to transition to disclosure of an Estimated Appraised Value on customer account statements if the issuer publishes an Estimated Appraised Value in any filing with or submission to the Commission.

Transition Periods Are Needed: As discussed above, we recommend that the Proposal be revised to provide the issuer with an adequate period of time upon completion of the Initial Offering Period in which to conduct an appraisal in order to publish the first Appraised Estimated Value for the Program securities. We also believe that FINRA members will have some difficulty in timely converting their customer account statement software to reflect the first Appraised Estimated Value on the next customer account statement after expiration of the Initial

[7] In addition to providing a transition period for the issuer to publish its first Appraised Estimated Value and for FINRA members to include that value on customer account statements, as discussed below, the Proposal should provide a transition time period between the issuer's publication of an Appraised Estimated Value in the annual report or other SEC filing or submission in order for FINRA members to revise their customer account statements to reflect the new value and should also address the situation where an issuer publishes an interim updated Appraised Estimated Value.

Offering Period and to reflect any update to the Appraised Estimated Value that is published any SEC filing or submission, since the process for obtaining that value from each Program's SEC filing or submission and adding it to the firm's customer account statement is a manual one, unlike the inclusion of security market values.

We recommend that FINRA obtain information from Program sponsors and clearing firms that provide customer account statements on an appropriate period for the preparation of the first appraisal by the Program at the end of the Initial Offering Period and for FINRA members to transition from the Net Offering Price to the Estimated Appraised Value disclosure and, as well, from one Estimated Appraised Value disclosure to the next.

Clarify the Factors That an Appraiser May Consider: We recommend that FINRA clarify the Proposal to reflect FINRA's explanation in the FINRA October 4, 2011 "Investor Alert on Non-Traded REITs"[8] that an appraisal may also take into account other factors not set forth in proposed Section (c)(1)(C), including the issuer's overhead expenses, the cost of capital "and more." We anticipate that different appraisal companies will consider different factors in developing an appraisal and, therefore, recommend that the Proposal should not appear to limit the factors that should be considered in arriving at a valuation and that language should be added to proposed Section (c)(1)(C) to provide that the appraisal may consider "any other factors that are relevant to developing a valuation."

IV. Exceptions From the Obligation to Disclose a Per Share Estimated Value

FINRA is also proposing to amend the provision in Rule 2340 that currently requires a FINRA member to remove or amend the per share estimated value based on the value provided by the issuer in its annual report only if the firm can demonstrate that the value was inaccurate as of the date of valuation or is no longer accurate as a result of a material change in operations. Instead, FINRA is proposing in Section (c)(2)(A) to prohibit a FINRA member from including a per share estimated value from any source on the firm's customer account statements if the member knows or has reason to know (based on public or nonpublic information) that the value is unreliable.

We are concerned that the absence of a materiality standard in proposed Section (c)(2)(A) means that a FINRA member may be obligated to refrain from including the issuer's published Estimated Appraised Value as a result of the Program's ordinary acquisition or sale of a property or portfolio of properties between the issuer's required annual publication of a per share estimated value. Therefore, we recommend that FINRA revise the text of proposed Section (c)(2)(A) to add a materiality standard so that a member is only obligated to refrain from providing a per share estimated value if the member knows or has reason to know that the value is materially unreliable.

[8] In "Investor Alert on Public Non-Traded REITs," dated October 4, 2011, FINRA pointed out 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. The Boards and managers of non-traded REITs might even rely on third-party sources to estimate a per-share value."

We also believe that FINRA members should understand the difference between the current provision requiring a determination that a value is "inaccurate" and the proposed provision that would require a determination that a value is "unreliable." Therefore, we would appreciate a fuller explanation or definition that would clarify the standards that a FINRA member should use to determine that a per share estimated value is "unreliable."

Proposed Section (c)(2)(B) would also allow a FINRA member to omit the per share estimated value provided by the issuer in its most recent annual report if the firm concludes that the value does not comply with the requirements of the rule. In cases where a FINRA member has omitted the per share estimated value, the member must disclose the reason for such omission on the account statement. FINRA states in the Regulatory Notice that a FINRA member is nonetheless permitted to provide a per share estimated value from a source other than the DPP's or REIT's annual report that meets the rule's requirements.

We support FINRA's position that a FINRA member is not obligated to develop a per share estimated value in lieu of the issuer's published value, which the FINRA member has determined does not comply with the requirements of the rule. The development of such valuations by individual FINRA members would be costly and impractical because each firm's appraiser would have to be provided access to the Program's assets, liabilities and operations, which may not be readily available. Further, different appraisers will likely provide different valuations, which would result in different valuations being included on the customer account statements of different FINRA members for the same securities. We believe it would be preferable for FINRA members to put customers on notice as to the basis for the omission of a per share estimated value on the customer's account statement.

However, we would appreciate clarification of the enforcement implications of the permissive approach of this provision, which would permit a FINRA member to include a per share estimated value on customer account statements in compliance with the rule even though the FINRA member concludes that the issuer's per share estimated value is not in compliance with the requirements of Sections (c)(1)(B) or (c)(1)(C).

We also recommend that proposed Section (c)(2)(B) be revised to reference a per share estimated value that is published by the issuer in any filing with or submission to the Commission, not just in the annual report. As discussed above, Program issuers may include the first Estimated Appraised Value in an amendment to its current registration statement or in a follow-on offering registration statement following the Initial Offering Period, depending on how that term is defined. There may be other situations where a Program issuer may issue an updated Estimated Appraised Value by means of a press release that is submitted to the Commission as an exhibit to a Form 8-K or as may be permitted on Form 10-Q.

We also request that FINRA revise the Proposal to clarify the obligations of FINRA members to list on customer account statements an Estimated Appraised Value that is more frequently updated than in the Program's annual report and, as previously discussed, provide for transition periods between publication and inclusion of an initial or updated Estimated Appraised Value in the next customer account statement.

V. Scope of Amended NASD Rule 2340

Current NASD Rule 2340(a) requires that each general securities member send a statement "containing a description of any securities positions... to each customer whose account had a security position." Current 2340(c)(1)(B) requires that FINRA members include a per share estimated value for Program securities on a customer account statement "if the annual report of a DPP or REIT includes a per share value for a DPP or REIT security that is held in the customer's account or included on the customer account statement . . . ."

In comparison, the introduction to proposed Rule 2340(c) states that the provision will apply to Program securities that a “general securities member holds” in a customer's account. Moreover, FINRA states in footnote 5 to the Proposing Notice that Rule 2340 applies to the securities regardless of whether listed above or below the line on customer account statements. For Exchange Act Rule 15c3-3(b) purposes, a FINRA member can carry a security in a customer account in two ways: by possessing the security or by controlling the security via the establishment of a good control location under Rule 15c3-3(c). Thus, it appears that NASD Rule 2340, as proposed to be amended, would only apply to Program securities listed on a customer account statement if the FINRA member has possession "above the line" or control "below the line," but in each case, the security is being "held" or "carried" by the member in the customer's account consistent with Exchange Act Rule 15c3-3.

We would appreciate clarification as to whether FINRA intends to change the scope of NASD Rule 2340 from applying to securities “held in the customer's account or included on the customer account statement” to securities that a “general securities member holds” in a customer's account. If FINRA did not intend to change the scope of NASD Rule 2340, we believe it would be better for FINRA to revise the text of the rule for this purpose rather than provide an external interpretation, as is done in footnote 5.

VI. Implementation of the Proposal

The Proposing Release does not discuss FINRA’s plans to implement the proposed rule change with respect to Programs under which securities are being offered at the time of Commission approval of the proposed rule change. We recommend that FINRA clarify the implementation of the anticipated amendments to Rule 2340.

There are two categories of Program offerings that will be significantly affected by the Proposal: those deemed to be in the Initial Offering Period and those that are continuing to offer securities following the Initial Offering Period by means of a follow-on registration statement. Since issuers and sponsors of currently outstanding Programs will not have had an opportunity to take the final version of the Proposal into account when structuring the current Program offering, we believe that the better approach would be to provide that the amendments to Rule 2340 will only apply to offerings that are declared effective by the Commission one year after the Commission’s approval of the amendments.

VII. Burden on Competition and Capital Formation

This letter raises a number of significant concerns regarding the Proposal. For all of the reasons stated previously, we believe that the Proposal to require the listing of the Net Offering Price on customer account statements during the Initial Offering Period will result in regulations that would be contrary to the requirements of Exchange Act Sections 3(f) and 15A(6) in that the Proposal:

(1) will not promote just and equitable principles of trade nor enhance the protection of investors and the public interest; and

(2) would impose a significant burden on competition and capital formation by Program issuers that is not in furtherance of any purposes of the Exchange Act.

In particular, we believe that the Proposal would unfairly discriminate between issuers contrary to the requirements of Exchange Act Section 15A(6), because the proposed requirement for the listing of Net Offering Price valuations for non-traded securities is not consistent with the regulation of valuations for other non-traded securities.

*　　　*　　　*

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

AMERICAN REALTY CAPITAL
405 PARK AVENUE, 12TH FLOOR
NEW YORK, NY 10022

November 11, 2011

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

RE: *Regulatory Notice 11-44 regarding Customer Account Statements*

Dear Ms. Asquith,

Please accept this letter in response to Regulatory Notice 11-44 (*FINRA Requests Comment on Proposed Amendments to NASD Rule 2340*[1] *to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements*) ("Regulatory Notice 11-44"). This letter should also be considered a separate supplement to the NAREIT public nonlisted REIT committee comment letter to which we are also a signatory.

In Regulatory Notice 11-44, Financial Industry Regulatory Authority, Inc. ("FINRA") has proposed amendments to NASD Rule 2340 (*Customer Account Statements*) (the "Proposed Amendments") to address how firms report per share estimated values of unlisted Direct Participation Programs ("DPPs") and unlisted Real Estate Investment Trusts ("REITs") on customer account statements. The Proposed Amendments would:

(a) limit the time period that the offering price may be used as the basis for per share estimated value to the period provided under Rule 415(a)(5) of the Securities Act of 1933 (the "Initial Offering Period");
(b) require firms to deduct organization and offering expenses from per share estimated value during the Initial Offering Period (for purposes of the Proposed Amendments, organization and offering expenses are generally defined in Regulatory Notice 11-44);
(c) prohibit a firm from using a per share estimated value, from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that has come to the firm's attention; and
(d) allow a firm to omit a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT does not contain a value that complies with the disclosure requirements of NASD Rule 2340.

[1] As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. See SR-FINRA-2009-028. The amendments discussed in Regulatory Notice 11-44 would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of SEC approval.

American Realty Capital and its FINRA member subsidiary, Realty Capital Securities, LLC applaud FINRA's Division of Corporate Financing for proposing the above-referenced actions to ensure enhanced transparency and accountability that would place unlisted DPPs and unlisted REITs on competitive footing with more mainstream investment products. However, in certain respects, we believe FINRA's proposals may not go far enough, and the Proposed Amendments, properly augmented, could prove transformative to the unlisted DPP and unlisted REIT industry.

Regulatory Notice 11-44 proposes three changes to NASD Rule 2340 regarding account statements, set forth below. (Our comments are indicated immediately following in bolded type)

- *First*, in the case of unlisted DPPs and unlisted REITs, valuations would be required to be communicated to the investor based on offering price net of all organization and offering expenses[2] (*net value*).[3]

  We support this proposal (and will provide further commentary on the importance of a date certain implementation later in this letter) for investment programs that become effective after October 1, 2011, to the extent that the valuation is shown net of underwriting compensation. Such action simply acknowledges what the industry has always known, i.e., underwriting expenses are dilutive to the share price. However, we do not believe that valuation during the Initial Offering Period should be reflected net of: (i) traditional organization and offering issuer expenses, reimbursed from offering proceeds; or (ii) due diligence expenses (exclusive of underwriting compensation), which are amortized over a five (5) year period and are therefore already accounted for. In fact, one of our current product offerings, American Realty Capital Daily Net Asset Value Trust, Inc., reports share price net asset value (NAV) at $9.00 plus commissions from "Day 1." Another offering we have recently filed, American Realty Capital Global Daily Net Asset Value Trust, Inc., will also report share price NAV from inception in the same way. Both programs will value 25% of their portfolios every quarter, using an independent, third-party valuation firm, employing published valuation criteria applied under the supervision of the programs' management and respective boards of directors.

- *Second*, the period during which a per share NAV can be based on net offering price would be limited to the Initial Offering Period only. After the Initial Offering Period, per share NAV would be based on a calculation valuing assets less liabilities.

  We fully support this proposal, but believe it fails to go far enough. We believe that there need to be specific transitional dates established. For the purposes of this letter, we will suggest that investment programs effective prior to October 1, 2011, would continue to be shown at $10 per share, and would be valued on a date certain suggested immediately

---

[2] These organization and offering expenses have three components: (1) issuer expenses that are reimbursed or paid for with offering proceeds, (2) underwriting compensation, and (3) due diligence expenses.

[3] Under the proposal as currently drafted, the net estimated value required on customer account statements for such programs would be the NAV and could not include any commissions, nor any other organization or offering expense associated with the offering.

below. This valuation should be governed by published criteria applied by an expert, disinterested third party, supervised by the program's management and board of directors, and should be asset based, rather than reflective of an enterprise or strategic valuation. Programs effective after October 1, 2011, would be shown at $10 less underwriting compensation and then valued on a date certain suggested immediately below. The dates certain would vary depending on whether a program was already effective or still in registration, as follows:

Type of Offering	***Implementation Deadline for Valuation***
Effective Offerings (effective prior to October 1, 2011)	***Earliest to occur of:*** • ***Three years from effective date of offering;*** • ***Closing of offering plus six months; and*** • ***December 31, 2013.***
New Offerings (effective after October 1, 2011) and Subsequent Offerings	***Earliest to occur of:*** • ***$500 million in equity raise;*** • ***Three years from effective date of offering; and*** • ***Closing of offering plus six months.***

- *Third*, the current requirements of NASD Rule 2340 would be adjusted to prohibit a firm from using a per share estimated value, from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that has come to the firm's attention.

  Although this proposed change seems reasonable, it is worth mentioning that this would create an additional requirement that member firms perform due diligence on the legitimacy of the per share valuation. From this perspective, we would recommend that the proposed amendments be reviewed to determine any potential unintended consequences to clearing firms and selling group participants.

American Realty Capital and Realty Capital Securities respectfully suggest that FINRA consider taking the Proposed Amendments a step farther. In particular, we believe that FINRA should more comprehensively address the following:

- **"Follow-on" Offerings.** Follow-on offerings are not in the best interest of investors, especially if sold at a stated share price that does not accurately reflect current NAV. Moreover, size matters, and too large an offering creates an inherent barrier to exit, depriving stockholders of a reasonably timed full-cycle liquidity event. Therefore, we believe follow-on offerings should be prohibited, except to the extent: (1) an offering fails to reach its target equity raise during its Initial Offering Period and such follow-on offering would allow a program additional time to reach its target equity raise (for example, if a $1.0 billion offering raised only $500 million during its Initial Offering Period, it would be permitted to file a follow-on offering for the remaining $500 million only); plus (2) any over-allotment or "green shoe" option, limited to a maximum of 15% of the originally-contemplated offering amount. Notwithstanding the foregoing, and regardless of whether a follow-on offering occurs, a current valuation should be conducted consistent with the valuation guidelines suggested above, based on a third-party's opinion of value and subject to published valuation criteria. American Realty Capital presently prohibits follow-on offerings for all companies on our platform, consistent with these guidelines.

- **"Grandfathering."** We believe that "grandfathering" must be utilized judiciously in order to provide a consistently applied standard for all currently effective offerings and to minimize market disruptions resulting in potential harm to investors. We believe that offerings now effective should be "grandfathered" and permitted to continue to show a net share price of $10 until the valuation dates set forth above. Newly effective offerings (after October 1, 2011), as well as any offerings currently in registration which become effective, should be required to immediately adopt a net share price of $9 plus commissions until the evaluation date set forth above.

American Realty Capital and Realty Capital Securities remain committed to ensuring we conduct ourselves and our companies in accordance with industry "best practices." We embrace this principle for our entire suite of investment programs. By collectively working to improve the industry from the standpoint of reporting, valuation and transparency, we believe unlisted REITs will become more competitive with other investments, making them better investments, and growing the unlisted REIT market larger, so that it might assume its rightful place in the investment hierarchy.

Thank you in advance for your repeated courtesies and your consideration.

Respectfully,

Michael Weil

CEO, Realty Capital Securities, LLC, Dealer Manager for:

American Realty Capital Trust, Inc.
American Realty Capital New York Recovery REIT, Inc.
American Realty Capital Trust III, Inc.
American Realty Capital Daily Net Asset Value Trust, Inc.
American Realty Capital Healthcare Trust, Inc.
American Realty Capital – Retail Centers Of America, Inc.
Phillips Edison – ARC Shopping Center REIT, Inc.
United Development Funding IV, Inc.

Nicholas S. Schorsch

Chairman & CEO, American Realty Capital, parent company to Realty Capital Securities and sponsor of American Realty Capital public non-traded real estate offerings

VSR
FINANCIAL SERVICES INC.
MEMBER FINRA / SIPC

November 11, 2011

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

RE: FINRA Regulatory Notice 11-44

Dear Ms. Asquith,

We appreciate the opportunity to comment on Regulatory Notice 11-44. This Firm is a 26 year old Broker Dealer which has significant experience in offering non-listed REITs and DPPs to our clients.

Industry rules and regulations already require prominent disclosure of selling commissions, dealer management fees, and other organizational costs so that the prospective investor is clearly shown the net amount available for investment. This firm does not believe that the proposed changes in valuations shown on customer statements will increase an investor's understanding of their investment's value.

Our firm always emphasizes the longer anticipated holding period for non-traded REITs and DPPs to our investors. Additionally, most of the non-traded REITs and DPPs that we offer continue to raise money from investors and purchase assets over an extended time frame. During that period, market values of acquired properties may go up or down. Generally, money raising increases as an offering reaches its maximum size or its official closing date. As a result, we do not believe that continuing to report the investment's value at the initial offering price is misleading to our clients.

We believe the proposed rule would unfairly single out non-traded REITs and DPPs for price adjustments which are not required for other investments. For example, when a client buys a five year CD, we are not required to lower the CD's value on our statements by the amount of any early withdrawal penalty. And on variable annuities, we are not required to adjust the variable annuity's value by any surrender penalty that may be in effect at the time the statement is prepared. On those products (and others), the point of sale and prospectus disclosures are deemed adequate disclosure to investors. We do not think that non-traded REITs and DPPs should be treated differently than other investments.

FINANCIAL SERVICES INC.
MEMBER FINRA / SIPC

We have long believed that real estate is an important asset class that should be part of a diversified portfolio for most clients. Industry research has consistently shown that many investors' performance suffers from bad timing – buying near tops and selling near bottoms. The projected long term holding periods (and illiquidity) of non-traded REITs and DPPs gives each investor a better long term opportunity to realize the capital appreciation potential of a portfolio of professionally managed real estate. We do not consider it an advantage to our investors to give them any impression that these are liquid investments that can be sold at any time.

Some industry observers believe that the purpose of Regulatory Notice 11-44 is to reduce the selling commission paid by non-traded REITs and DPPs. We believe that the current level of commissions is not inappropriate given the projected long holding period for these investments.

Thank you in advance for your consideration of our comments.

Respectfully submitted,

Mike Stanfield

James M. Stanfield
Chief Executive Officer

DIVIDEND CAPITAL®

November 17, 2011

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 11-44

Ladies and Gentlemen:

This letter is submitted by Dividend Capital Securities LLC ("Dividend Capital Securities"), a broker/dealer registered with the Securities and Exchange Commission ("SEC" or "Commission") and a Financial Industry Regulatory Authority, Inc. ("FINRA") member firm, in response to the request for comments published by the FINRA in Regulatory Notice 11-44 (September 2011) (the "Proposing Notice"), with respect to proposed amendments to National Association of Securities Dealers, Inc. ("NASD") Rule 2340 (to be renumbered FINRA Rule 2231) to revise the per share estimated value required by Section (c) thereof to be included 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 "Proposal").

Dividend Capital Securities currently operates solely as a Dealer Manager for offerings of real estate securities including public non-traded REIT offerings and, as such, we have a significant interest in this Proposal and appreciate the opportunity to comment. Dividend Capital Securities is currently offering one non-traded REIT and has filed a proposed follow-on offering with FINRA for review under FINRA Rule 2310 with respect to another non-traded REIT that completed its initial capital-raising approximately two years ago.

We, like most FINRA member firms, support FINRA's continued efforts to increase regulatory protections for investors and, in this case, enhance disclosure on customer account statements regarding the illiquidity and valuations of non-traded DPP and REIT (together, "Program") 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 as the per share estimated value on customer account statements after an "Initial Offering Period", as that term is defined in the Proposal, as most REITs will then be in a position to develop a more relevant per share estimated value based on an appraisal of REITs' assets, liabilities, operations and other relevant factors.

However, we feel as do other commenters, that the disclosure of values for non-traded Program or REIT securities on customer account statements during the Initial Offering Period should not raise the same concerns as providing a value after the Program or REIT has had the opportunity to invest the proceeds of its initial capital-raising. Therefore, we oppose FINRA's Proposal to require that FINRA members include a per share estimated value during the Initial Offering Period that is calculated by deducting the organization and offering expenses of the offering, as defined in FINRA Rule 2310(a)(12), from the offering price. We believe that including any value other than the offering price for non-traded Program or REIT securities on customer account statements during the Initial Offering Period would not provide information to investors that was not not already disclosed prior to investment through the prospectus and would not advance investor protection interests.

We believe that these views are aligned with comments submitted to FINRA by the Committee on Federal Regulations of Securities of the Section of Business Law of the American Bar Association (the "ABA"), the Investment Program Association (the "IPA"), and others. We support the arguments submitted by these commenters in opposition to the Proposal regarding the listing of a per share estimated value other than the offering price. In particular, we agree with the conclusion of the ABA that "[T]he Proposal would result in disclosure of an artificial value for non-traded Program securities during the Initial Offering Period that is (in comparison to the offering price) misleading to investors, difficult to calculate, and artificially low."

We also ask that FINRA clarify certain matters both outlined and omitted from the Proposal. Most important to us would be a clarification that FINRA member firms may disclose a per share estimated value based on an appraisal of the Program or REIT's assets, liabilities, operations and other relevant factors on customer account statements both during the Initial Offering Period and during any follow-on offering period once the Program or REIT issuer publishes such a value in any filing with or submission to the Commission. As discussed above, Dividend Capital Securities is the Dealer Manager for a non-traded REIT offering nearing the end of its initial offering period as well as a follow-on non-traded REIT offering currently in registration that would provide for increased liquidity and greater frequency of valuations. Therefore, this clarification would be important to not only us, but others in the same position or are considering underwriting non-traded REIT offerings with the same or similar structures.

We also request that FINRA clarify that FINRA members would be obligated to use the appraised value published by the Program or REIT issuer on customer account statements after the Initial Offering Period, regardless of the offering price of a follow-on offering by the Program or REIT issuer.

In addition, we would like to point out that the Proposing Release does not discuss FINRA's plans to implement the proposed rule change with respect to securities already being offered at the time of Commission approval of the proposed rule change. As discussed above, Dividend Capital Securities is currently offering one non-traded REIT offering and we have one in registration. Therefore, the timing of any proposed rule change would affect one or both of these offerings as well as plans for any future offerings. While we are not suggesting a particular structure for the implementation of the amendments, we believe it is important that FINRA provide a clear explanation of the intended implementation of the anticipated amendments to Rule 2340 with respect to offerings that are not filed with the SEC, currently in registration but not yet effective, currently engaged in an offering and are either within or beyond the adopted definition for the Initial Time Period, or have terminated offerings of securities except for the Program or REIT's dividend reinvestment plan.

* * *

Once again, Dividend Capital Securities appreciates the opportunity to submit these comments. Thank you for your consideration of these very important concerns.

Very truly yours,

Gordon Taylor
Vice President, Chief Compliance Officer
Dividend Capital Securities LLC

CC:

Charles Murray, President, Dividend Capital Securities LLC

NATIONAL
ASSOCIATION
OF
REAL ESTATE
INVESTMENT
TRUSTS®

REITS:
BUILDING
DIVIDENDS
AND
DIVERSIFICATION®

November 11, 2011

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

Re: FINRA Regulatory Notice 11-44: FINRA Requests Comment on Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements

Dear Ms. Asquith,

This letter is in response to FINRA Regulatory Notice 11-44 (the Proposed Amendment) 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 (DPPs) and unlisted Real Estate Investment Trusts (REITs) are reported on customer account statements.

NAREIT, the National Association of Real Estate Investment Trusts, is the worldwide representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with an interest 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.

Our members identified as Equity REITs own, lease and often operate all types of real estate, while our members identified as Mortgage REITs finance housing and commercial real estate by originating mortgages or by purchasing whole loans or mortgage backed securities in the secondary market.

In addition, REITs in the U.S. may be public companies whose securities are registered with the 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 (PNLRs)); or private companies.

As of June 30, 2011, 225 REITs were "public" through registration with the SEC, 159 of which are Listed REITs (predominantly listed on the NYSE) and 66 of which are PNLRs. Equity REITs own over 30,000 properties in all 50 states, with a value of approximately $700 billion, with about $80 billion of that amount attributable to PNLRs. These investments are estimated to comprise approximately 10-15% of investment-grade commercial real estate in the United States, and they include all property types, including retail, office, multifamily, health care, lodging, industrial, self storage and timber.

Given the nature of FINRA Regulatory Notice 11-44, this letter and its attachment are focused solely on PNLRs, which participate at NAREIT through its Public Non-Listed REIT Council, consisting of all 37 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.

The PNLR Council, led by its Executive Committee representing leading sponsors of PNLRs, has carefully reviewed the Proposed Amendment. As a result, it developed the attached comment letter for submission to and consideration by FINRA. In short, as reflected in the attached letter, the position of PNLR Council with respect to the Proposed Amendment is as follows:

Close of Initial Offering Period and Appraised Value

The PNLR Council supports limiting the period during which a per share estimated value based on the net offering price may be included on a Customer Account Statement to the Initial Offering Period, as proposed by FINRA.

Presenting Per Share Net Offering Price, Net of Certain Organization and Offering Expenses

The PNLR Council supports publication of the net offering price on the Customer Account Statement during the Initial Offering Period (when the program is acquiring assets and firms are selling shares at a stable value on a best-efforts basis); it supports the deduction of certain organization and offering expenses (O&O Expenses) characterized by FINRA as underwriting compensation (pursuant to FINRA Regulatory Notice 08-35) as proposed by FINRA; and it does not support the deduction of certain O&O Expenses characterized by FINRA as issuer expenses or due diligence expenses (pursuant to FINRA Regulatory Notice 08-35) which it contends are expenses intrinsically connected to the customer's investment in the REIT.

In addition, given the fact that the per share amount on the Customer Account Statement during the Initial Offering Period reflects a per share net offering price rather than a per share estimated value, the PNLR Council recommends to FINRA that the Customer Account Statement label the amount determined, after deduction of underwriting compensation, to be the per share net offering price. The PNLR Council supports disclosure of such expenses to the customer through the investor confirmation statement.

Transition Period

The PNLR Council notes that the Proposed Amendment does not address a transition period for implementation of the new rule. The PNLR Council strongly urges FINRA to include a transition rule with its final proposal to ensure that inappropriate disruption does not occur in the market, and so that unnecessary confusion is not created for broker-dealers or their customers.

NAREIT and its PNLR Council look forward to continuing to work with FINRA on the issues raised by the Proposed Amendment. The Proposed Amendment 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 with further questions.

Respectfully submitted,

Steven A. Wechsler
President & CEO

November 11, 2011

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

Re: FINRA Regulatory Notice to Members 11-44; Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts (hereafter, together referred to as DPPs) in Customer Account Statements (the Proposed Amendment)

Dear Ms. Asquith,

This comment letter regarding the Proposed Amendment 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 members, each of whom represents an established sponsor in the PNLR industry. Together, the members of the PNLR Council and NAREIT play a vital role in helping to provide a substantial portion of the overall transaction volume for the alternative asset and real estate markets. As a part of NAREIT, 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 legal inception nearly thirty years ago. We thank you for the opportunity to provide our comments on this rule proposal prior to its submission to the SEC.

Regulatory Notice 11-44 seeks to modify NASD Rule 2340[1], the Customer Account Statement Rule, in two specific areas we address in this comment letter:

- To allow for the use of a fixed net offering price only if published per share estimated values on investor statements deduct all organization and offering expenses (net value); and,
- To limit the use of a net value per share on an investor statement to the Initial Offering Period[2] of an investment offering program.

[1] We understand that, as part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340, and that the Proposed Amendment would be effective within NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of SEC approval of the rule in its final form.
[2] The Initial Offering Period, defined in your notice and by Securities Act Rule 415 as lasting up to three years plus an additional 180 day carryover period.

We commend FINRA for recognizing the Customer Account Statement Rule as a tool for providing new approaches to investor protection and disclosure, and we support the majority of both the elements of and analysis in your notice.

In particular, we understand that FINRA is concerned with the length of time that a fixed public offering price is reported on a customer account statement. Presently, throughout even a multiple-offering capital formation process for a DPP, the dollar amount an investor sees on a customer statement does not represent a book or net asset value of a share of stock in a DPP, nor is it indicative of the proceeds that an investor would receive if the entity was liquidated. Your proposal would require a calculated estimated valuation on customer account statements to be published much earlier, at the end of an Initial Offering Period. We fully support this proposal and feel this will do much to improve, and to assist investors in understanding, the ultimate value and relative performance of DPPs over time. We also affirm our view that the Initial Offering Period is a reasonable period of time during which a non-valuation based fixed offering price can be both appropriate and consistent with the nature of DPPs as long-term investment vehicles.

Regarding the customer account statement during the Initial Offering Period, we are concerned that your rule amendment, if adopted as proposed, would lead investors to conclude that the "value" of their investment during the Initial Offering Period is equal to the offering price less any organization and offering expenses. The term "net value" or any other value construct on an initial statement is subject to many interpretations as a concept, as there is no external value measure associated with an Initial Offering Period share price. Blending any concept of approximation to objective value with a fee grossed down approach during an initial offering results in a potential disconnect for the investor, combining a form of value analysis into an acknowledged time in a product life cycle where formal value analysis does not yet occur. Should FINRA require additional disclosure during the Initial Offering Period regarding up-front investor costs, we support not referring to any resultant price as a "value."

In addition, the process of moving the Initial Offering Period customer account statement toward a new form of pricing and fee disclosure, if adopted as presently proposed, will pose significant implementation challenges including capital account, yield calculation and discounted share pricing issues. This occurs because the proposed rule alters the baseline for these calculations from $10 to the grossed down number "net value." We feel an investor can be led to better understand the price they pay for a share, as well as related selling commissions and fees, if there is disclosure clarifying these fees relative to a "net offering price" placed on the ultimate investor statement. This may require additional fee transparency, but it does not require a value construct. Using this approach, individual issuers can continue to determine their own public offering price per share. For example, an issuer could opt to establish a fixed public offering price resulting, after removal of underwriting fees, in net proceeds per share of $10, which it would deem its net offering price. Investor confirmations could then show fees paid on top of this net offering price in disclosure that is clear, while investor capital accounts and the Initial Offering Period statement price per share could remain at $10. We feel this can be a preferable and easier-to-implement alternative to the existing FINRA statement proposal.

Regarding implementation, we strongly encourage FINRA to affect its ultimate rule proposal through an expansive transitional process that allows currently effective DPP programs to retain their existing customer statement models. We are concerned that, absent some form of staged rollout, a marketplace with multiple inconsistent pricing mechanisms will create investor confusion and hurt DPP's ability to raise capital. We also feel an appropriate time is needed after the rule is finalized, but prior to its adoption, to allow FINRA member firms to prepare their customers for the effect of the new rule and to allow new DPP programs to incorporate new pricing methodologies into their structures.

In further consideration of implementation of a new rule, we request that FINRA complete a full and reasoned assessment, with industry input, of the potential costs and capital formation impacts associated with placing the proposed "net value" on an initial offering period customer statement. We also are unclear as to how your proposal applies to private offerings, or to public non-traded business development companies.

Finally, we note you propose a pricing mechanism during an initial offering that recognizes and removes three distinct categories of issuer organization and offering expenses: issuer expenses that are reimbursed or paid for with offering proceeds; due diligence expenses; and underwriting compensation (commissions and all other compensation paid to a FINRA member in connection with a sale). Requiring the removal of organization and offering expenses beyond those included in the FINRA definition of underwriting from the initial offering customer statement price diverges the statement pricing mechanism of DPPs from that accepted by FINRA for other securities. These other categories of fees are not fixed costs like underwriting, and they are ultimately paid in total or in part using funds generated by an issuer's operations, and not at the point of sale. We suggest that disclosure at the time of purchase of underwriting charges alone is more practical and appropriate. Other non-underwriting issuer organization and offering costs vary widely as a percentage of capital raise over time, rendering the act of fixing and marking them down in a share price at the initial time of investment arbitrary and often impossible to calculate until the end of an offering.

The DPP industry and FINRA members selling DPP shares have operated under the current pricing and customer account statement model for many years. We welcome this comment period as an opportunity to now enhance the DPP industry and the process of investment in alternative and real estate assets. We are also 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

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

Robert S. Aisner, President & CEO
Behringer Harvard Holdings

Nicholas S. Schorsch, Chairman & CEO
American Realty Capital

Marc Nemer, CEO
Cole Real Estate Investments

Thomas K. Sittema, CEO
CNL Financial Group

Charles J. Schreiber, CEO
KBS Realty Advisors

We appreciate FINRA's desire to improve and clarify understanding of unlisted REITs in light of their continued growth and investor impact.

Unfortunately, we are very disappointed in the specific steps and general direction of proposed regulatioin. It appears FINRA is trying to turn unlisted REITs into traded REITs. As a brokerage firm, we appreciate and value the unique nature on unlisted REITs as we believe they facilitate the inclusion of an asset class in portfolios that is distinct and specifically differs from traded REITs. Trying to force unlisted REITs to become something they are not likely misleads investors further and potential removes a valuable asset from proper consideration.

More specifically, proposed pricing policies appear to be misleading and draconian. The focus is on near term accounting measures rather than on the investment's true value. As such, the pricing policies are grossly misleading.

If firms are forced to deduct all costs, then allow them to add back in expected liquidity and aggregation premiums routinely enjoyed by unlisted REITs when they are eventually sold or listed. The policy as proposed misrepresents the investment through forcing an immediate and up-front inclusion of all costs without a commensurate recognition of any of the value created. We believe it is unbalanced and would create inferior practices than exist under the current system.

Thank you for your consideration.

Daniel Wildermuth

Chief Executive Officer
Kalos Financial
Phone: 678.356.1100
Toll Free: 888.356.1950
Fax: 678.356.1105
www.KalosFinancial.com

KALOS FINANCIAL

W. P. CAREY

November 11, 2011

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

Re: FINRA Regulatory Notice to Members 11-44; Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements

Dear Ms. Asquith:

W. P. Carey & Co. LLC ("W. P. Carey") appreciates this opportunity to provide comments to the Financial Regulatory Authority, Inc. ("FINRA") regarding the recently released Regulatory Notice 11-44 ("Notice 11-44") containing a proposed amendment (the "Proposed Amendment") to NASD Rule 2340 (Customer Account Statements) and a request for comments concerning how unlisted direct participation programs ("DPPs") and non-traded real estate investment trusts ("REITs") report per share estimated values on customer account statements.

W. P. Carey is a New York Stock Exchange listed real estate advisory and investment management company that provides long-term sale-leaseback and build-to-suit financing for companies worldwide and manages a global investment portfolio approaching $11.5 billion (as of June 30, 2011). Member firm Carey Financial, LLC is an affiliate of W.P. Carey. W. P. Carey has previously sponsored and advised 16 DPPs, comprised of nine partnerships and seven real estate investment trusts, mostly under the Corporate Property Associates brand name during W. P. Carey's more than 35-year history. Of the 16 DPPs previously sponsored by W. P. Carey, 13 have completed liquidity events, all of which generated positive returns for investors.

As set forth in Notice 11-44, the Proposed Amendment would require FINRA's member firms to, among other things, (1) deduct organization and offering expenses from the estimated value per share of a DPP or REIT[1] included in its annual customer account statements, (2) limit the time period during which the offering price may be used in customer account statements to the Initial Offering Period[2] of an offering, and (3) remove or amend a per share estimated value, from any source, if the member firm "knows or has reason to know that the value is unreliable," based upon public or non-public information that has come to such member firm's attention.

We support FINRA's efforts to improve transparency for investors. W. P. Carey's historical practice has been to obtain and publish independent valuations of its DPP portfolios annually, beginning after

1 Unless otherwise specified, the terms "DPP" and "REIT" refer only to those issuers that are public, non-traded real estate investment trusts.

2 As used in this letter and consistent with the Proposed Amendment, the term "Initial Offering Period" means the three-year period under Rule 415(a)(6) of the Securities Act of 1933, as amended, and any "carryover period" under Rule 415(a)(5)(A) of the Securities Act of 1933, as amended.

W. P. Carey & Co. LLC, 50 Rockefeller Plaza, New York, NY 10020 212-492-1100 1-800-WP CAREY Fax: 212-492-8922

W. P. CAREY

Ms. Marcia E. Asquith
November 11, 2011

completion of a program's offering.[3] We agree with FINRA's proposal to shorten the delay between the end of the Initial Offering Period and the date of the first valuation. In addition, as discussed below, we believe it would be helpful if FINRA were to provide guidance to member firms on the characteristics of a reliable valuation. Finally, while we share FINRA's objective of improving transparency, we believe that certain aspects of the Proposed Amendment raise logistical questions that warrant further consideration.

Reliability of Estimated Values

The Proposed Amendment would prohibit a member firm from using a per share estimated value, from any source, if it "knows or has reason to know that the value is unreliable," based upon public or non-public information that has come to its attention. We appreciate that member firms may be in a better position than many investors to evaluate the reliability of a net asset value (referred to herein as "NAV"); however, we believe it would be very helpful for FINRA to provide member firms with guidance on how to assess what constitutes a reliable NAV because member firms are not necessarily experts in real estate valuations. We note that FINRA has provided guidance to member firms in similar contexts, such as in the area of due diligence for Regulation D offerings where member firms are required to perform an investigation that is reasonable. For example, in Regulatory Notice 09-09, FINRA reminded member firms of their due diligence obligations, prior to participating in a public offering of a REIT, to, among other things, ascertain all material facts relating to a sponsor's financial stability and experience.

The obligation to assess reliability requires an inherently subjective assessment, leaving it up to each member firm to determine what types of information and criteria would support knowledge or reason to know that a REIT's estimated NAV is unreliable. Given the variances in methodologies among REITs, it may be challenging for a member firm to navigate through these differences to distinguish the more reliable methods from those that are less reliable. With such a subjective assessment, and without more clarity on what constitutes a reliable NAV, the Proposed Amendment may result in significant variance among the methodologies used by REITs, making it very difficult for member firms to determine whether an NAV is reliable. Therefore, in an effort to provide member firms with more clarity as to the scope of its determination and minimize discrepancies in carrying out this obligation, we suggest that FINRA consider providing member firms with guidance on the factors and aspects of NAVs that FINRA deems indicators of reliability or unreliability.

For example, such guidance could highlight the following three aspects of NAV disclosure: (1) the process, (2) the methodology, and (3) comparative measures.

We believe that understanding the process a REIT utilizes in deriving its NAV is an important element to determining whether an NAV is reliable. While every REIT may use different valuation techniques (including the use of multiple techniques), a critical aspect of the valuation process is determining the parties who are involved, each party's role and responsibility, and in particular, whether external third-party advisors are used. When third-party valuations are obtained in addition to internal valuations performed by the REIT, it may provide a member firm with reasonable assurance that the NAV has been calculated without potential biases if that third-party is truly independent from the REIT. If FINRA were

[3] See Registration Statement on Form S-4 (Registration No. 333-171538) filed by Corporate Property Associates 16 —Global Incorporated for a description of W.P. Carey's customary valuation process.

W. P. Carey & Co. LLC, 50 Rockefeller Plaza, New York, NY 10020 212-492-1100 1-800-WP CAREY Fax: 212-492-8922

W. P. CAREY

Ms. Marcia E. Asquith
November 11, 2011

to provide guidance on the process of deriving NAVs, we request FINRA consider providing their views on third-party valuations, as well as conflicts of interest disclosure.

The methodology used to calculate NAV is another critical factor to understanding its reliability. However, in order for member firms to determine whether the methodology used is reliable, they must first have a proper understanding of the methodology used. This understanding may be achieved through disclosure. We believe that it is important for REITs to supplement the NAV provided with sufficient disclosure describing its methodology. We suggest that FINRA consider alerting member firms as to the types of disclosure that is particularly relevant or important to describing the methodology used, such as the key assumptions used, holding periods, discount rates, as well as the various components of the calculation (e.g., properties, cash, securities, other assets and liabilities).

We believe it would also be helpful for FINRA to provide guidance to member firms on certain aspects of NAV methodologies that may support a more accurate outcome. As previously discussed, we believe that certain aspects of a methodology may warrant more scrutiny than others. For example, we suggest that a methodology grounded in an asset-level valuation is more reliable than a methodology based on general overall factors of the REIT's business or comparisons with trading range multiples of listed REITs. An asset-level review involves the valuation of each asset separately, which allows the valuator to take into account the type and specific characteristics of each asset, which may ensure a more accurate and thorough analysis. In our view, an underlying real estate valuation is more insightful than a methodology that only measures aggregate asset performance, includes broad categories of a business' assets, such as goodwill and other financial projections, or relies on listed company multiples for support. Regardless of the methodology used, however, we believe that member firms would benefit from FINRA's guidance.

Comparative measures, such as historical NAVs of the REIT, showing how values have changed over time may provide an investor with useful information regarding trends as it seeks to evaluate the NAV of its investment. This type of information, especially when provided on an annual basis, may also help member firms better assess the reliability of NAVs in light of changing market conditions.

Each of the three aspects of NAV disclosure discussed above contains valuable insight into the overall calculation and methodology of NAVs. With guidance and clarity from FINRA as to the factors within each aspect that may or may not indicate an NAV's reliability, member firms will be better equipped to make the determination as to whether it "knows or has reason to know that the value is unreliable."

<u>Recommendation</u>: *Consider providing guidance or standards to member firms on the factors relating to the process, methodology and comparative measures in disclosures of NAV by DPPs and REITs.*

Timing and Frequency of Appraisals

We request FINRA to consider its rationale for the Proposed Amendment's requiring appraisals beginning on the very first day following the Initial Offering Period. As noted in Notice 11-44, appraisals of an issuer's assets and operations will be an extremely helpful tool for investors to gain a greater understanding of a REIT's value and performance.[4] However, we question the ability and feasibility of REITs to obtain an appraisal shortly after the end of the Initial Offering Period, and the usefulness of such an appraisal.

---

[4] See page 3 of Notice 11-44.

W. P. Carey & Co. LLC, 50 Rockefeller Plaza, New York, NY 10020 212-492-1100 1-800-WP CAREY Fax: 212-492-8922

Ms. Marcia E. Asquith
November 11, 2011

Significantly reducing the time by which a REIT must obtain an initial appraisal does not take into account the legitimate concerns of expense and difficulty in conducting appraisals at a time when assets may have been recently acquired and cash may not yet have been invested. In addition, the appraisals will be more relevant if they are done at a time when it is reasonably likely that a significant portion of the offering proceeds will have been invested.

We believe that 12 months (as opposed to 18 months) following the end of the Initial Offering Period will provide a sufficient amount of time for REITs to obtain appraisals, and at the same time, will benefit investors by ensuring that they receive this information six months earlier than they would under the current requirement of NASD Rule 2340(c)(2). Furthermore, we believe that shortening the time period from 18 months to 12 months strikes a balance among (1) the substantial time and expense necessary for a REIT to obtain an appraisal, (2) investors' need to receive the results of such appraisal, and (3) selecting an initial appraisal date that is after the REIT is likely to have invested a significant portion of its offering proceeds and, therefore, makes the appraisal more informative.

We also recommend that, once appraisals are obtainable (i.e., 12 months following the termination of the offering, as per our recommendation above), updated valuation information should then be provided to investors on a quarterly basis to reflect material changes that may have occurred since the annual appraisal arising from, among other things, updated appraisals that may have been obtained and changes in indebtedness, other liabilities, working capital, acquisitions and dispositions and other material items. While this modification to NASD Rule 2340(c)(1)(C) may be somewhat burdensome to REITs and DPPs, it is our opinion that the investors' need for the most current and up-to-date information regarding the value of its shares outweighs the potential burden to REITs of providing the information on a quarterly basis.

Recommendations:

1. *Consider reducing the 18 month period following the Initial Offering Period that a REIT has to provide an appraised value to 12 months.*

2. *Once appraisals are obtainable (i.e., 12 months following the termination of the offering, as per our recommendation above), consider requiring that updated information be provided to investors on a quarterly basis, prior to the next full annual appraisal.*

Presenting Per Share Estimated Value, Net of Organization and Offering Expenses

The Proposed Amendment assumes that there is a concrete amount of organization and offering expenses (including selling commissions) or at a minimum, that this amount is easily calculable. The reality, however, is that a REIT's organizational and offering expenses as well as the applicable underwriting compensation associated with its shares are constantly changing. The only certainty regarding the amount of a REIT's organization and offering expenses (including selling commissions) is that they will not, in the aggregate, exceed 15% of the gross proceeds of an offering.

The variables inherent in the amount of organization and offering expenses are numerous. For example, the specific portion of selling commissions that may be allocated to selected dealers varies considerably among shares sold in an offering. As each purchased share may be attributed a different amount of commission, it would be extremely difficult for member firms to calculate the commission on a per share

W. P. Carey & Co. LLC, 50 Rockefeller Plaza, New York, NY 10020 212-492-1100 1-800-WP CAREY Fax: 212-492-8922

W. P. CAREY

Ms. Marcia E. Asquith
November 11, 2011

basis. We observe that these varying levels of commissions would result in different estimated net values for each share of a particular REIT. Furthermore, the portion of selling commissions paid to selected dealers may change over the course of the Initial Offering Period. This inserts an additional layer of complexity into any attempt to calculate the value per share net of commissions. We respectfully request FINRA to consider whether the Proposed Amendment was intended to result in presenting different estimated net values to each investor and, even more importantly, how firms are expected to overcome the operational difficulties they face in calculating and disseminating information lacking uniformity. We respectfully note that neither the Proposed Amendment nor Notice 11-44 provides any guidance on these critical aspects.

Organization and offering expenses are continuously being incurred. As a result, estimated net values per share as of a certain date in a REIT's offering period may be rendered stale and potentially inaccurate almost immediately after the net value's appearance in an annual statement. Additionally, there is no particular point in time during an Initial Offering Period when organization and offering expenses stop being accumulated or incurred, until the point at which the REIT reaches the maximum amount of expenses permitted to be incurred under the FINRA rules. We respectfully request FINRA to consider whether the goal of helping investors better understand and appreciate a REIT's value and fee structure is truly served by providing them with an arbitrary, estimated net value per share that, while accurate as of a certain date, is guaranteed to change (potentially dramatically) in the next statement. We respectfully note that neither the Proposed Amendment nor Notice 11-44 provides any insight as to whether this concern has been considered.

Recommendation: Consider continuing to allow DPPs and REITs to use the offering price, or "par value," as the basis of the per share estimated value required under NASD Rule 2340.

Conclusion

The importance of transparency and full disclosure to investors cannot be overstated. We believe that it would be useful for FINRA to expand its Proposed Amendment by giving member firms guidance on the characteristics of a reliable valuation. While we have expressed concerns on the timing of preparing an initial valuation, as well as some technical issues regarding the "net value" portion of the Proposed Amendment, we believe that improving DDPs' valuation processes will ultimately provide the most benefit to investors.

In your consideration of the questions and concerns posed in this letter, we would be happy to discuss our views or answer any questions. Please contact Richard J. Paley at your convenience at (212) 492-1175.

Very truly yours,

W. P. CAREY & CO. LLC

W. P. Carey & Co. LLC, 50 Rockefeller Plaza, New York, NY 10020 212-492-1100 1-800-WP CAREY Fax: 212-492-8922

Exhibit 2d

Regulatory Notice 12-14

March 2012

Customer Account Statements

FINRA Requests Comment on Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts

Comment Period Expires: April 11, 2012

Executive Summary

FINRA seeks comment on a revised proposal to amend NASD Rule 2340 (Customer Account Statements) to address the per share estimated values at which unlisted Direct Participation Programs (DPPs) and unlisted Real Estate Investment Trusts (REITs) are reported on customer account statements. The revised proposal reflects changes based on comments to the amendments FINRA proposed in *Regulatory Notice 11-44*.

Under the revised proposal, general securities members would no longer be required to provide a per share estimated value, unless and until the issuer provides an estimate based upon an appraisal of assets and liabilities in a periodic or current report filed under the Securities Exchange Act of 1934. During the initial offering period, member firms would have the option of using a modified net offering price or designating the securities as "not priced." Additionally, the revised proposal modifies the account statement disclosures that accompany the per share estimated value. The revised proposal also includes alternative requirements for DPPs or REITs that calculate a daily net asset value (NAV).

The text of the proposed amendments to NASD Rule 2340 (Customer Account Statements) is set forth in Attachment A.

Questions regarding this *Notice* may be directed to:

- Thomas M. Selman, Executive Vice President, Regulatory Policy, at (202) 728- 6977;
- Joseph E. Price, Senior Vice President, Corporate Financing/Advertising Regulation, at (240) 386-4623; or
- Gary L. Goldsholle, Vice President and Associate General Counsel, Office of the General Counsel, at (202) 728-8104.

FINRA
Financial Industry Regulatory Authority

Notice Type

- Request for Comment

Suggested Routing

- Compliance
- Legal
- Senior Management

Key Topics

- Customer Account Statements
- Unlisted Real Estate Investment Trusts (REITs)
- Unlisted Direct Participation Programs (DPPs)

Referenced Rules & Notices

- FINRA Rule 2310
- NASD Rule 2340
- Notice to Members 01-08
- Regulatory Notice 11-44
- Rule 415 under the Securities Act of 1933

Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by April 11, 2012.

Member firms and other interested parties can submit their comments using the following methods:

- Emailing comments to *pubcom@finra.org*; or
- Mailing comments in hard copy to:

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

To help FINRA process and review comments more efficiently, persons should use only one method to comment on the proposal.

Important Notes: The only comments that FINRA will consider are those submitted pursuant to the methods described above. All comments received in response to this *Notice* will be made available to the public on the FINRA website. Generally, FINRA will post comments as they are received.[1]

Before becoming effective, a proposed rule change must be authorized for filing with the Securities and Exchange Commission (SEC) by the FINRA Board of Governors, and then must be filed with the SEC pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).[2]

Background

As discussed in *Regulatory Notice 11-44*, NASD Rule 2340 generally requires each general securities member firm to send account statements to customers at least quarterly. The account statements must include a description of any securities positions, money balances and account activity since the firm issued the prior account statement. A firm that does not carry customer accounts and does not hold customer funds or securities is not a general securities member firm and is not subject to the provisions of NASD Rule 2340.

Paragraph (c) of the rule contains specific provisions addressing the estimated values of DPPs and REITs on customer account statements. The rule generally requires that a general securities member firm include a per share estimated value for a DPP or REIT security held in a customer's account whenever a value appears in the issuer's annual report. The rule states that the per share estimated value included on a customer account statement may be obtained from the annual report, an independent valuation service or any other source. The rule requires that firms develop a per share estimated value on a customer account statement from data that is not more than 18 months old. The rule also requires a firm to remove or amend a per share estimated value if the firm can demonstrate that the value was inaccurate as of the date of valuation or is no longer accurate as a result of a material change in operations. DPPs and REITs are the only securities identified in NASD Rule 2340 for which per share estimated account values are required on an account statement.

In *Regulatory Notice 11-44*, FINRA proposed several modifications to NASD Rule 2340 that were designed to improve the quality of the information provided to customers. The proposed amendments in *Regulatory Notice 11-44* (original proposal) would have limited the time period for which the per share estimated value may be based upon the gross offering price, to the initial three-year offering period provided under Rule 415(a)(5) of the Securities Act of 1933 (initial offering period). It also would have required firms to deduct organization and offering expenses from the gross offering price to reach a per share estimated value (net offering price). In addition, the original proposal would have prohibited a firm from using a per share estimated value from any source, if it "knows or has reason to know the value is unreliable," based upon publicly available information or nonpublic information that has come to the firm's attention. Finally, the original proposal would have allowed a firm to omit a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT does not contain a value that complies with the disclosure requirements of NASD Rule 2340.

Comments Received on Regulatory Notice 11-44

FINRA received 25 comments on the original proposal. While some commenters supported the proposal, many expressed concern about two elements: (1) the proposed requirement that the net offering price, rather than a gross offering price, be provided during the initial offering period, and (2) the proposed requirement that a general securities member firm refrain from providing a per share estimated value if it knows or *has reason to know* the value is unreliable.

The commenters provided numerous bases for objecting to the proposal's net offering price requirement. Some commenters addressed the practical limitations of calculating a net offering price, stating that a net offering price might vary over time as certain fixed expenses are allocated across a larger number of units sold, or might vary based upon the amount of selling concessions allocated to a particular broker-dealer. In addition, commenters noted that displaying a net offering price might create incentives to reduce expenditures on due diligence and might complicate implementation of issuer dividend reinvestment and redemption plans.

Of greater import from a policy perspective were the comments that implied that the gross offering price was not representative of value. One commenter stated that the gross offering price is an arbitrary figure and "does not reflect actual value."[3] Commenters also stated that since the gross offering price does not reflect an estimate of the true value of the shares, the gross price net of organization and offering expenses cannot reflect such an estimate. As one broker-dealer stated, "[b]ecause the $10 public offering price is not a reflection of the net asset value of the security – subtracting organizational and offering expenses from this arbitrary number to create a second arbitrary number fails to properly address the issue – *i.e., that the net asset value of the security is not calculable until the assets have been invested.*"[4]

Another commenter added that the net offering price "is not reflective of the investment's actual value," and "deducting organization and offering expenses from an arbitrary starting price that does not reflect intrinsic value will leave investors confused, as the net amount is a misrepresentation of what investors may believe is an intrinsic value."[5] Commenters also suggested that a net price would "confuse investors" and be "artificially low."[6]

Most commenters stated that they would support a requirement that member firms present a per share estimated value based upon an appraisal of the issuer's assets and liabilities after the initial offering period. As noted by one commenter, the "appraisals will be more relevant if they are done at a time when it is reasonably likely that a significant portion of the offering proceeds will have been invested."[7]

Revised Proposal[8]

FINRA proposes to eliminate the requirement from the existing rule that a member firm include a per share estimated value for a DPP or REIT security held in a customer's account whenever any value appears in the issuer's annual report. Instead, FINRA proposes to require that a firm provide a per share estimated value based upon an appraisal from the issuer's most recent periodic or current report. We agree with commenters that the appraised value that appears in the issuer's periodic or current reports should provide the most reliable per share estimated value. Requiring the gross offering price or net offering price to be included in customer account statements simply because it appears in the issuer's annual report does not address issues of value.

While the proposal would not require the presentation of net offering price, it would permit firms to present net offering price (modified as described below) 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. An appraised value during most of the initial offering period would not be as useful to investors because most of the assets in the program will typically consist of cash and short-term, liquid securities. By the time of this second quarterly filing, if the issuer has not included an appraised value in its periodic or current reports, then a member firm would be permitted only to indicate that the security is “not priced” in its customer account statements. This quarterly filing “grace period” is designed to ensure that issuers have had sufficient time to conduct an appraisal and include an appraised value after the initial offering period. Moreover, a quarterly public filing deadline might occur immediately after the initial offering period, and for this reason the proposal would allow firms to present the net offering price until the issuer has filed one more quarterly filing, unless the issuer includes an appraised value in its periodic or current reports before that time.

During the period in which the issuer has not provided an appraised value (but extending no longer than the second quarterly filing after the initial offering period) a member may present a modified version of net offering price or list the securities as “not priced.” To address some of the practical limitations of calculating a net price, FINRA proposes to redefine “net offering price” for purposes of the rule as the gross offering price less any front-end underwriting compensation expenses (as defined in Rule 2310(b)(4)(c)(ii)) reimbursed or paid for with offering proceeds. As such, firms would not be required to subtract either issuer expenses, due diligence expenses, or trail fees, unlike the original proposal. Simplifying the methodology to arrive at a net offering price should ease the burdens on firms electing to use that figure. Moreover, since the net offering price would reflect only the amount of front-end underwriting compensation expenses (used typically to pay the wholesaler and dealers), that value will be easily identified by firms participating in the offering and the estimated value would not have any undesired implications on the operation and pricing of an issuer’s dividend reinvestment or share repurchase plans.

In light of the comments and concerns expressed herein about the appropriateness of using gross offering price as a per share estimated value, and the requirements under the existing rule that firms provide an estimated value on a customer account statement where one is contained in the annual report, pending adoption of the proposed amendments to Rule 2340, FINRA will accept exemptive requests from firms that do not wish to use a gross offering price on a customer account statement. Paragraph (e) of the existing rule grants FINRA authority to exempt firms from the provisions of the rule for good cause shown. A firm that requests to remove a gross offering price from a customer account statement because that price is not indicative of the estimated value will generally be deemed to have met this standard.

Reliability of Estimated Values

Commenters expressed concern about the proposed requirement that a general securities member firm refrain from providing a per share estimated value if it knows or *has reason to know* the value is unreliable. The purpose of this proposal was to clarify the meaning of a current provision in the rule, which requires a firm to refrain from including a per share estimated value if the firm “can demonstrate” the value is inaccurate. However, in light of the other changes to the original proposal, FINRA has withdrawn that particular proposed requirement concerning the reliability of appraised values.

Under the revised proposal, we anticipate that per share estimated values will be almost exclusively derived from values based on appraisals obtained by issuers and included either in the issuer's periodic or current reports or a daily NAV calculation. As such, firms typically will have no reason to question their reliability, and the proposed requirement should not be necessary. If, however, a firm is aware of red flags as to the reliability of a per share estimated value, at a minimum, the firm must follow up with the issuer or its independent valuation service and ask the issuer or independent valuation service to reconsider the valuation in light of the information. The member firm must evaluate the response received to determine whether continuing to include the per share estimated NAV is appropriate in light of the red flags identified. The revised proposal does not require a member firm to include a per share estimated value on its customer account statements that it reasonably believes is unreliable.

Account Disclosures

NASD Rule 2340 requires that when a per share estimated value is provided on an account statement, firms must make certain disclosures pertaining to the illiquid nature of these securities and the source of the estimated net asset value. FINRA proposes to augment and refine these disclosures to assist investors in understanding them. First, FINRA proposes that the requirement to describe the value and the methodology by which a per share estimated value has been determined should apply only to the net offering price that may appear before the issuer provides an appraised value. Second, FINRA proposes to replace the terms "illiquid" and "liquidity" with terms more likely to be familiar to ordinary investors. Third, FINRA proposes disclosures directing customers to the issuer for information on redemption and the per share estimated value. Specifically, FINRA proposes that a general securities firm disclose:

- that the per share estimated value is being reproduced from the issuer's public filings with the SEC and is being presented without inquiry or investigation;
- the methodology by which any net price is calculated;
- that no public market currently exists for the securities, and even if the customer is able to sell these securities, the value the customer receives may be less than the per share estimated value reflected on the statement; and
- that additional information about redemption options and the per share estimated value reflected on the statement is available from the issuer.

As noted above, in recent years some unlisted DPPs and REITs have developed a daily NAV.[9] To accommodate this new development, FINRA proposes an alternative and parallel regime for unlisted DPPs and REITs calculating a daily NAV. For these securities, a general securities firm would have to publish the per share daily estimated NAV as of the end of the statement period. The proposed required account statement disclosures are virtually identical and would reflect only small changes based upon the daily NAV method. The proposal requires disclosure that:

- the per share estimated daily NAV is provided by the issuer and is being presented without inquiry or investigation;
- 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 these securities, the value the customer receives may be less than the per share estimated value reflected on the statement; and
- additional information about redemption options and the per share estimated daily NAV reflected on the statement is available from the issuer.

Endnotes

1. FINRA will not edit personal identifying information, such as names or email addresses, from submissions. Persons should submit only information that they wish to make publicly available. *See Notice to Members 03-73* (November 2003) (NASD Announces Online Availability of Comments) for more information.
2. *See* Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Certain limited types of proposed rule changes, however, take effect upon filing with the SEC. See SEA Section 19(b)(3) and SEA Rule 19b-4.
3. Letter from David T. Hirschmann, President and Chief Executive Officer, Center for Capital Markets Competitiveness of the United States Chamber of Commerce, dated November 11, 2011 (Chamber of Commerce).
4. Letter from Stephanie L. Brown, Managing Director and General Counsel, LPL Financial, dated November 12, 2011 (emphasis in original).
5. Chamber of Commerce.
6. Letters from Martel Day, Chairman, Investment Program Association, dated November 11, 2011, and Jeffrey W. Rubin, Chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, dated November 16, 2011.

7. Letter from W.P. Carey & Co. LLC, dated November 11, 2011.

8. As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. See SR-FINRA-2009-028. The amendments discussed herein would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of SEC approval.

9. One commenter described a new type of unlisted DPP and REIT with a daily, fluctuating NAV. Letter from Michael Weil, CEO, Realty Capital Securities, LLC, and Nicholas S. Schorsch, Chairman and CEO, American Realty Capital, dated November 11, 2011. Daily NAV REITs calculate the NAV in part based on appraisals of properties by an independent valuation firm in accordance with guidelines established by the board of directors. Changes in daily NAV typically reflect factors such as portfolio income, interest expense and unrealized capital gains or losses on assets and accrued fees and expenses. For DPPs and REITs that calculate a daily NAV, firms should use the daily NAV from the issuer for the end of the period of the customer account statement.

Attachment A

Below is the text of the proposed amendments to NASD Rule 2340.

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) on an account statement must publish a per share estimated NAV and accompanying disclosures as provided herein:

(A) Non-Daily NAV Securities

(i) Appraised Value

A member must publish on regularly scheduled account statements the per share estimated NAV based upon an 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 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 an appraisal of the assets and liabilities in the issuer's periodic or current report, or the issuer's filing of its second quarterly filing following 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 or net offering price that:

(a) the per share estimated 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) 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 or net offering price; and

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

(B) Daily NAV Securities

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

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

(ii) 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

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

(d) Definitions

No Change.

(e) Exemptions

No Change.

* * * * *

Exhibit 2e

REGULATORY NOTICE 12-14 Proposed Amendments to NASD Rule 2340 to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts			
	Date Letter Received	**Sender**	**Company Name**
1.	04/11/12	Ryan K. Bakhtiari	Public Investors Arbitration Bar Association
2.	04/11/12	Martel Day	Investment Program Association
3.	04/11/12	Michael C. Forman	Franklin Square Holdings, L.P.
4.	04/12/12	Mark Gatto and Michael A. Reisner	ICON Investment
5.	04/11/12	Daniel R. Gilbert	NorthStar Realty Finance Corp.
6.	03/22/12	Jon Hale	Partnership Consultants, Inc.
7.	04/11/12	Jack E. Herstein	North American Securities Administrators Association, Inc.
8.	04/11/12	David Hirschmann	U.S. Chamber of Commerce
9.	04/11/12	Daniel Oschin	Real Estate Investment Securities Association
10.	04/19/12	Prodigious, LLC	Prodigious, LLC
11.	04/09/12	Jeffrey W. Rubin	American Bar Association
12.	04/11/12	Nicholas S. Schorsch and Michael Weil	American Realty Capital
13.	04/11/12	Steven A. Wechsler	National Association of Real Estate Investment Trusts
14.	04/11/12	W.P. Carey & Co., LLP	W.P. Carey & Co., LLP
15.	01/31/13	IPA Task Force	Investment Program Association
16.	03/08/13	Steven A. Wechsler	National Association of Real Estate Investment Trusts
17.	01/14/14	Mark Goldberg	Investment Program Association

Public Investors Arbitration Bar Association

April 11, 2012

Via Email Only
pubcom@finra.org

Marcia E. Asquith
Office of Corporate Secretary
FINRA
1735 "K" Street, N.W.
Washington, DC 20006-1506

Re: Regulatory Notice 12-14 – Proposed Amendments to NASD Rule 2340

Dear Ms. Asquith:

On behalf of the Public Investors Arbitration Bar Association ("PIABA"), I thank FINRA for the opportunity to comment on the proposed amendments to NASD Rule 2340. PIABA is a national, not-for-profit bar association comprised of attorneys, including law professors and regulators, both former and current, who devote a significant portion of their practice to representation of public investors in securities arbitrations.

PIABA submitted a comment letter in response to Regulatory Notice 11-44, which described previously proposed amendments to NASD Rule 2340. PIABA stated that the amendments proposed in Regulatory Notice 11-44 were both beneficial and detrimental to investors. PIABA's comment on Regulatory Notice 11-44 set forth a detailed history of the previous amendments to Rule 2340 in late 2000 period and the simultaneous amendments to NASD Rules 2710 and 2810. PIABA will not here reiterate the history of the prior amendments. PIABA believes that it is critical to note that the purpose and intent of the amendments to Rules 2340, 2710, and 2810 were to ensure that investors who own direct participation program units or shares of non-traded REITs are provided with valuation information that is as accurate as possible, so that investors can determine how their investments were performing.

The proposed amendments to Rule 2340 set forth in Regulatory Notice 12-14 are ***contrary*** to the interests of investors and are ***contrary*** to the purpose and intent of the year 2000 amendments to Rules 2340, 2710, and 2810.

Direct Participation Programs ("DPPs") and non-traded REITs are illiquid, speculative investments. Non-traded REITs have been offered for sale to investors, including retirees, primarily based on two selling points: (1) that non-traded REITs provide higher dividend payments than other income producing investments, and (2) that investors can escape the volatility of the stock market by purchasing non-traded REIT shares. These so-called "advantages" of non-traded REIT shares are misleading.

Issuers of non-traded REIT shares have been able to list the offering price of non-traded REIT shares as the "value" of those shares, because FINRA placed its stamp of approval on that practice in Notice to Members 09-09. PIABA believes that this practice is contrary to the express language of NASD Rules 2710 and 2810.

PIABA recognizes that FINRA is not vested with the jurisdiction to regulate issuers of DPP units or non-traded REIT shares. However, FINRA has the ability to compel issuers of DPP units and non-traded REIT shares to provide meaningful and accurate share valuation information. FINRA can accomplish this goal by prohibiting member firms from selling DPP units or non-traded REIT shares of issuers that fail to timely and accurately provide valuations based on third-party appraisals. If broker/dealers were prohibited from selling DPP units or non-traded REIT shares of issuers who refuse to provide share valuations based upon independent appraisals of the assets, liabilities, and operations of the program or REIT, then issuers would be compelled to comply with that requirement to ensure that their shares could be sold to the investing public by broker/dealers.

Proposed subsection (c)(1) of Rule 2340 is a step backward for investors. Under (c)(1), FINRA provides an option to general securities members to provide share values based upon appraised value supplied by issuers or net offering price or to indicate on monthly or quarterly statements that the DPP or non-traded REIT securities are "not priced". The current Rule 2340 requires general securities members to provide a per share estimated value from an independent valuation source if the general securities member can demonstrate that the value provided by the issuer is inaccurate. *See* SEC Release No. 34-43601 at p. 71171 (Nov. 29, 2000). Allowing general securities members to list on customers' account statements that their DPP or non-traded REIT securities are "not priced" defeats the purpose of the amendments to Rule 2340, 2710, and 2810 in 2000 and provides a disclosure loophole to issuers.

In Regulatory Notice 12-14, FINRA states that pending the adoption of amendments to Rule 2340, it will accept exemptive requests from broker/dealers that do not wish to use gross offering price per share on customer account statements as estimated value. FINRA cites to paragraph (e) of the existing rule which grants FINRA authority to exempt firms from the provisions of the rule for good cause shown. FINRA concludes that any firm requesting to remove gross offering per share price from a customer's account statement because that price is not indicative of estimated value will generally be deemed to have shown good cause. This language in Regulatory Notice 12-14 is troubling and is contrary to the interests of investors.

As stated above, the NASD took the position during the approval process for the amendments to Rules 2340, 2710, and 2810 that broker/dealers would not be excused from providing an estimated value from an independent valuation source if

Public Investors Arbitration Bar Association
2415 A Wilcox Drive Norman, OK 73069 Phone: (405) 360-8776 Fax: (405) 360-2063
Toll Free: (888) 621-7484 Website: *www.PIABA.org* Email: *piaba@piaba.org*

the member could demonstrate that the estimated value provided by the issuer was inaccurate. Thus, according to FINRA's predecessor, if a member can demonstrate that the offering price is not an accurate estimate of value, the member is required to obtain a more accurate estimated value from an independent valuation source. Pending the adoption of amendments to Rule 2340, FINRA should simply enforce its own interpretation of the requirements of the rule. FINRA's allowing member firms to indicate on investors' account statements that their DPP units or non-traded REIT shares are "not priced", pending adoption of amendments to Rule 2340, is an abdication of FINRA's investor protection responsibilities and is a rejection of the NASD's interpretation of the requirements of Rule 2340.

Allowing issuers to avoid providing an accurate estimated value of DPP and non-traded REIT securities until the second quarterly filing following the effective period of the first registration statement is contrary to the interests of investors. In the body of Regulatory Notice 12-14, FINRA blithely dismisses the utility of appraised values during the offering period with the following statement:

> An appraised value during most of the initial offering period would not be as useful to investors because most of the assets in the program will typically consist of cash and short-term, liquid securities.

To the contrary, an appraisal of the assets, liabilities, and operations of an issuer during the offering period, which would provide investors with the most accurate estimated value of shares, is precisely what is best for investors. Such appraisals would demonstrate that what investors were sold at $10 per share is almost immediately valued at $9 to $8.50 per share. Any amendments to Rule 2340 should focus on providing investors with accurate share valuations and not allowing issuers to provide artificially high or misleading valuations during the offering period to boost sales of DPP units and non-traded REIT shares.

The importance of FINRA doing all that it can to prevent investors from being duped into buying DPP units and non-traded REIT shares is evidenced by FINRA's enforcement proceeding against David Lerner & Associates filed in May, 2011, and recent share valuation write-downs by a number of non-traded REITs. Over the last two weeks, Investment News has reported on numerous non-traded REITs writing down estimated share valuations significantly. Those non-traded REITs include the following:

1. Berringer Harvard Opportunity REIT I had a per share offering price of $10 per share and currently estimates the value of each share at $4.12;

2. Berringer Harvard REIT I had a per share offering price of $10 and has a current estimated per share value of $4.64;

3. Berringer Harvard Short-Term Opportunity Fund had a per share offering price of $10 per share and has a current estimated per share value of $.40;

Public Investors Arbitration Bar Association
2415 A Wilcox Drive Norman, OK 73069 Phone: (405) 360-8776 Fax: (405) 360-2063
Toll Free: (888) 621-7484 Website: *www.PIABA.org* Email: *piaba@piaba.org*

4. Cornerstone Core Properties REIT had a per share offering price of \$8 and has a current estimated per share value of \$2.25;

5. Inland Western Retail Real Estate Trust, Inc., had a per share offering price of \$10 per share and has a current estimated per share value of \$6.95; and

6. KBS Real Estate Investment Trust, Inc., had a per share offering price of \$10 and has a current estimated per share value of \$5.16.[1]

Unless FINRA amends Rules 2310 and 5110 (former NASD Rules 2810 and 2710) and strengthens the requirements of Rule 2340, issuers will continue to be able to have member firms sell unsuitable DPP units and non-traded REIT shares to investors, many of whom are seeking safety of principal and income. Rules 2310 and 5110 should be amended to prohibit general securities members from selling DPP units or non-traded REIT shares unless the issuers of such units or shares will provide in each annual report a valuation of the units or shares based upon an independent appraisal of the assets, liabilities, and operations of the program or REIT. Annual independent appraisals and the reporting of appraised values should be required throughout the offering period and after the conclusion of the offering period. In addition, Rule 2340 should require the reporting of those appraised values unless member reasonably believes that the per share estimated value is unreliable. In that event, consistent with the requirements of the current Rule 2340, members should be required to report estimated value based upon an analysis of the audited financial statements of the program or REIT prepared by an independent valuation service.

Very truly yours,

Ryan K. Bakhtiari
Aidikoff, Uhl & Bakhtiari
9454 Wilshire Blvd., Suite 303
Beverly Hills, CA 90212
Telephone (310) 274-0666
Fax (310) 859-0513
rbakhtiari@aol.com

---

[1] *See* Investment News, "Six notable non-traded REITs on the slide" (March 30, 2012).

Advocacy
Collaboration
Education

Advocating Direct Investments Through Education

IPA
Investment Program Association

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

Advocating Direct Investments Through Education

IPA
Investment Program Association

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

Advocating Direct Investments Through Education

IPA
Investment Program Association

- 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

Advocating Direct Investments
Through Education

IPA
Investment Program Association

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

FRANKLIN SQUARE
CAPITAL PARTNERS

Franklin Square Holdings, L.P.
2929 Arch Street, Suite 675
Philadelphia, PA 19104

April 11, 2012

VIA E-mail <pubcom@finra.org> and Overnight Delivery

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street NW
Washington, DC 20006

Re: FINRA Regulatory Notice to Members 12-14

Dear Ms. Asquith:

The Financial Industry Regulatory Authority, Inc. ("FINRA") has published Regulatory Notice 12-14 seeking comments on its proposal to amend NASD Rule 2340 regarding the reporting of per share estimated values on customer account statements (the "Proposed Amendment"). This comment letter is submitted on behalf of FS Investment Corporation and FS Energy and Power Fund (together, the "FS Entities") by Franklin Square Holdings, L.P., the sponsor of the FS Entities. The FS Entities are non-traded business development companies ("BDCs") that are offering shares pursuant to effective registration statements on Form N-2 filed with the Securities and Exchange Commission (the "SEC"). As direct participation programs ("DPPs"), and like non-traded real estate investment trusts ("REITs"), the FS Entities' organization and offering expenses, including selling commissions and dealer manager fees, are regulated by FINRA Rule 2310.

Comment to the Proposed Amendment

In this letter, we request that FINRA address the following issues relating to the Proposed Amendment:

1) **Grandfathering/Implementation Period.** The FS Entities support and applaud FINRA's efforts under the Proposed Amendment. We eagerly anticipate its beneficial effects and feel that its implementation is a positive step for our industry, which is comprised of the different types of investment funds regulated under NASD Rule 2340 (such funds, collectively, "2340 Funds") and the member firms that offer them to their clients. We ask, however, that FINRA carefully consider the method in which the Proposed Amendment is implemented and the applicability of the Proposed Amendment for existing 2340 Funds. As can often happen, the unintended consequences of this well-intended regulation could be quite problematic.

First, please note that all existing 2340 Funds were developed, structured, marketed and sold in a manner compliant with current NASD Rule 2340. An immediate implementation of the Proposed Amendment would very likely result in widespread confusion among investors (whose account statements will show vastly different values overnight) and significant operational difficulties for both sponsors and member firms. To elaborate briefly, back office operations between sponsors and member firms are currently systemized, integrated and fine-tuned, at significant expense, to comply with NASD Rule 2340 in its current form. This allows for the orderly transaction of business, facilitates the flow of funds and information and helps to provide adequate customer service for member firms, registered representatives and their clients. A 2340 Fund may undergo this integration process hundreds of separate times as it adds member firms to its selling group, each of which may employ different forms of technology in carrying out its business. Without properly designed and well-integrated technology and procedures in place well ahead of time that take into account the final implementation of the Proposed Amendment, the potential exists for serious disruptions in the flow of information and, potentially, a total seizure in the conduct of business. In our view, an immediate blanket implementation of the Proposed Amendment imposes an unreasonable (and likely insupportable) burden on sponsors and member firms and should be avoided.

As important as the potential operational challenges posed by the Proposed Amendment in our view is the issue of fairness. Today, member firms house over $84 billion in assets of 2340 Funds, each of which was developed, structured and marketed in strict adherence to applicable law and regulation. Furthermore, sponsor firms are currently conducting offerings in good faith and, as it is often their primary business, many will be doing so as the Proposed Amendment goes into effect. While it is impossible to prove, we submit that many of the 2340 Funds in existence would be structured differently today *had sponsors and member firms known* that Rule 2340 would incorporate the Proposed Amendment. We view the retrospective implementation of the Proposed Amendment as a form of *ex post facto* regulation, with the unintended consequence of immediately rendering existing products and modes of business obsolete or significantly less competitive. We feel that this unduly burdens the sponsors and member firms that have worked diligently in good faith to comply with FINRA regulations in their current form. The length of time and difficulty involved in modifying existing funds to succeed if the Proposed Amendment were to go into effect – which means developing, testing and implementing appropriate technology while obtaining approval of any modifications from more than 55 regulatory bodies that oversee the offering of 2340 Funds – makes this course of action infeasible without a grandfathering provision in place.

As a result, we respectfully request that FINRA exempt from compliance with the Proposed Amendment existing 2340 Funds whose registration statements under the Securities and Exchange Act of 1933 have been submitted to the Securities and Exchange Commission on or before the date the Proposed Amendment was issued. As such, the Proposed Amendment would apply prospectively to new 2340 Funds only, allowing sponsors and member firms adequate time to address the structure of 2340 Funds, the method of offering securities and the development of appropriate operational and technological regimes in light of the final form of the Proposed Amendment without disruption to the existing businesses upon which they and their employees rely. In the interim, we believe that requiring all 2340 Funds to publish a quarterly net asset value per share ("NAV"), as discussed below, would help to address the issue of transparency that is so important to the marketplace.

2) **Elimination of "Not Priced" Option During the Offering Period.** We disagree in a fundamental way with the notion that any form of investment should be granted an option by regulators to obfuscate price discovery while in the midst of a public offering. NAV is one of the most basic and vital forms of information in the investment world. It permits an investor to judge the fairness of any offering price, the liquidation value of his or her investment and the historical and current performance of the manager before deciding to invest. It also facilitates performance monitoring during the investment period. Most of the investment world (including mutual funds, hedge funds, real estate private equity funds, private equity funds and a host other forms of investment) publish NAVs for their investors understanding the necessity for transparency of this sort to be self-evident. In the world of 2340 Funds, published NAVs remain the exception rather than the rule. To help investors properly evaluate 2340 Funds, we believe that NAVs should be published at least quarterly. We question the suitability of any product that is unable to produce some form of timely and reliable price discovery, whether in the form of a public trading price or NAV.

We also disagree with a number of the arguments mentioned in Regulatory Notice 12-14 fashioned to avoid publishing a modified net offering price on client statements. While we refrain from delving too deeply into the details, we focus on two points. First, the very existence of "daily NAV" REITs and unlisted BDCs, which are required to publish net asset values quarterly under the Investment Company Act of 1940, belies the notion that reliable values are impossible to determine or unreasonably difficult to estimate while conducting an offering. Second, while the initial price may be an arbitrary figure, there is nothing arbitrary about the net asset value of a share immediately after a sale is made. The amount of funds per share remaining in the program after deducting underwriting compensation is the exact net asset value, before deducting organizational and offering expenses, pending investment of proceeds (in most cases $9.00 per share). Initially, the market value of any purchases will also aggregate to something *less than* $9.00 per share to reflect the deduction of organizational and offering expenses borne by investors as well as any acquisition fees that various programs might charge in connection with making investments. As such, a modified net offering price provides a (somewhat generous) barometer of initial per share value during the conduct of an offering.

Of greatest import in our view, however, is that a "no price option" provides a needless opportunity for a variety of actors to avoid discussing potentially significant up-front commissions and fees until well after a sale is made. In addition to permitting certain charges to remain hidden from the customer's view for years, the "no price" option allows sponsors to continue selling shares to unwitting investors at the initial offering price even if the value of the 2340 Fund is significantly lower. We enthusiastically support FINRA's efforts to demystify customer account statements for 2340 Funds; the "no price" option in our view is an unnecessary and potentially damaging step in the wrong direction.

In the name of greater transparency, we respectfully request that all 2340 funds be required to make a bona fide *publication of net asset value on a quarterly basis (as many 2340 Funds already do without difficulty) and use this net asset value to price shares on customer account statements during the offering period and thereafter. Absent a* bona fide *net asset value calculation, we request that all member firms be required to use a modified net offering price on customer account statements during the offering period.*

*****

We appreciate the opportunity to provide input on the Proposed Amendment, which we feel will strengthen and improve our industry considerably.

Thank you for your consideration.

Sincerely,

Franklin Square Holdings, L.P.

By:________________
Name: Michael C. Forman
Title: Chief Executive Officer

cc:

Mr. Gerald F. Stahlecker, Franklin Square Holdings, L.P.
Mr. Ryan D. Conley, Franklin Square Holdings, L.P.
Mr. Stephen Sypherd, Franklin Square Holdings, L.P.
Ms. Adrienne Hart, FS^2 Capital Partners, LLC

ICON
INVESTMENTS

April 12, 2012

Submitted via *pubcom@finra.org*

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: *FINRA Regulatory Notice 12-14: Customer Account Statements*

Dear Ms. Asquith:

On behalf of ICON Securities Corp., a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"), and its affiliates, ICON Capital Corp. and ICON Investment Group, LLC, which collectively do business as ICON Investments ("ICON"), we appreciate the opportunity to comment on FINRA's proposed modifications to NASD Rule 2340.[1] With more than 25 years of experience in the alternative asset management industry, ICON has managed equipment finance investments for approximately 56,000 investors, raised approximately $1.7 billion in equity and made more than $4.2 billion in total investments. ICON also provides distribution services and advisory and formation services to non-traded real estate investment trusts ("REITs") sponsored and managed by The Lightstone Group. In addition to these active business lines, ICON has also filed registration statements for a publicly registered, non-traded oil and gas fund that will seek to raise capital to primarily invest in oil and natural gas development wells located in the Mid-Continent region of the U.S. and a publicly registered, non-traded business development company (a "BDC").

ICON strongly believes in the importance of protecting the investing public by providing transparency in its public programs while at the same time balancing the need for sponsors of quality direct participation programs ("DPPs") and the FINRA members that sell these products to be able to efficiently raise capital without an overly burdensome regulatory scheme. To that end, ICON commends FINRA's efforts to bring further transparency regarding the valuation of the securities of publicly registered, non-traded DPPs and REITs and the understanding that investors have of such investments.

---

[1] As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. See SR-FINRA-2009-028. The amendments discussed in Regulatory Notice 12-14 would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of final approval of this Regulatory Notice.

In Regulatory Notice 11-44, FINRA proposed amendments to NASD Rule 2340 (*Customer Account Statements*) (the "Original Proposed Amendments") to address how FINRA member firms report per share estimated values of publicly registered, non-traded DPPs and REITs on customer account statements. The Original Proposed Amendments, among other things:

(a) Limited the time period for which the per share estimated value may be based upon the gross offering price to an initial three-year offering period; [2]
(b) Required firms to deduct organization and offering expenses from the gross offering price to reach a per share estimated value or net offering price;
(c) Prohibited a FINRA member firm from using a per share estimated value from any source if it "knows or has reason to know the value is unreliable"; and
(d) Omitted a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT did not contain a value that complied with the rule.

As most of these proposed changes did not raise significant concerns regarding the types of DPPs that ICON sponsors, we did not comment on the proposed changes; however, the changes proposed in Regulatory Notice 12-14, taken together with those in Regulatory Notice 11-44, precipitated our need to address some of the potential unintended consequences of the proposed changes to Rule 2340.

In Regulatory Notice 12-14, FINRA has revised its original proposal to amend Rule 2340 in response to various comments submitted on Regulatory Notice 11-44 (the "Revised Proposed Amendments"). The Revised Proposed Amendments would, among other things:

(a) Require every DPP to adopt "net asset value" or "NAV" as the measure for estimating the value of its securities;
(b) Require general securities members to provide a per share estimated value once an issuer provides an estimate based upon an appraisal of assets and liabilities in a periodic or current report filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act");
(c) Allow, during the effective period of the first registration statement for the DPP or REIT securities,[3] members to use either a modified net offering price with an explanation of methodology by which such price was determined or designate the securities as "not priced"; and
(d) Require certain disclosures to accompany the per share estimated value as set forth in the Revised Proposed Amendments.

---

[2] The initial offering period was defined in Regulatory Notice 11-44 and by Rule 415 under the Securities Act of 1933, as amended, as lasting up to three years plus an additional 180-day extension period if a follow-on public offering has been registered.

[3] The effective period of the first registration statement for the DPP or REIT securities is not defined in Regulatory Notice 12-14. Based upon the definition of "initial offering period" in Regulatory Notice 11-44. ICON would expect that the time period during which a net offering price could be used would be three years plus an additional 180-day extension period if a follow-on public offering had been registered.

ICON believes that the market benefits when the focus highlights investor protection and transparency relating to non-traded REITs and other types of DPPs. However, ICON believes that while the Revised Proposed Amendments may work for the design and structure of non-traded REITs, they do not work in the same way for other types of investment products that are regulated as DPPs pursuant to FINRA's rules. ICON's programs are structured differently, have different economic terms for investors and some of ICON's programs have shorter offering periods than the non-traded REITs and therefore require different considerations when determining the appropriate timing and calculation of an estimated per share value than the non-traded REITs. Set forth below are ICON's general comments on the Revised Proposed Amendments that ICON believes require clarification or additional information, as well as specific comments as to the three classes of DPPs with which ICON is involved as a sponsor.

General Comments

In addition to the specific issues raised below regarding the applicability of the Revised Proposed Amendments to certain DPPs, ICON requests the following:

- that, as discussed below in further detail in the sections concerning Equipment Funds and Oil and Gas Funds, Rule 2340 retain the use of the term "per share estimated value" in lieu of "net asset value" or "NAV";
- that FINRA confirm ICON's understanding based on discussions with FINRA staff that the phrase "from the issuer's most recent periodic or current report filed with the SEC" contained in proposed Rule 2340(c)(A)(i) modifies the words "the per share NAV" and not "based upon an appraisal of assets and liabilities";
- that the amended rule provide clarification on whether an appraisal of a DPP's "assets and liabilities" requires an appraisal of each and every *financial statement* asset and liability of the DPP, which for many DPPs (e.g., equipment funds and BDCs) could include items such as prepaid expenses, deferred revenue and other accruals that would be costly to have appraised with little benefit to a valuation process, or just the DPPs investments with associated liabilities deducted from the appraised value of such investments;
- that the amended rule provide clarification on whether an appraisal of a DPP's "assets and liabilities" requires an appraisal of each and every *investment* asset and liability of the DPP, which for many DPPs (e.g., equipment funds and BDCs) is contrary to accounting and/or valuation policies as such DPPs may have a large number of investments that would, if required to be appraised each year, incur significant costs, which costs would be borne by the investors of the DPP; and

- that the amended rule provide guidance on the transition and/or grandfathering of the proposed rules, which, in particular, takes into account distinctions in the type and age of the non-traded REIT or DPP (e.g., the cost of compliance with the rule change for equipment funds about to enter into or that are currently in liquidation would seem to outweigh the benefits), such guidance to include the effective date of the rule and the impact on non-traded REITs and DPPs currently in their offering periods, as well as late stages of operation and/or liquidation.

Non-Traded REITs vs. DPPs

While publicly registered, non-traded REITs represent a significant portion of the non-traded REIT/DPP industry, there are a variety of DPPs that are or have been in the marketplace in recent years. These investment products are similar inasmuch as the products are publicly registered and non-traded and are typically sold through the same retail distribution channel. Yet, there are significant differences among these investment products, many of which highlight the need for proceeding deliberately and cautiously when adopting (and amending) rules of general application. The following chart highlights some of the differences that are relevant to the Revised Proposed Amendments:

	REITs	Equipment Funds	Oil & Gas Funds[4]	BDCs
Offering Period	3 years	2 years	2 years	3 years
- 6 month extension?	Yes	No	No	Yes
- Follow-on offering?	Yes	Typically no	Typically no	Yes
Operations:				
- Immediate investment during offering period?	Typically yes	Typically yes	Typically no – investment commences following offering period	Typically yes
- Commencement of Distributions	Often immediately after escrow break	Often immediately after escrow break	After wells produce revenue	After first quarter of operations
- Reinvestment of cash from operations?	Yes – no restrictions	Yes, but subject to restrictions	Typically no	Yes, but subject to restrictions
- Limited investment/operating period?	No	Typically limited to offering period, plus 5-year investment period	No, but net proceeds typically are fully invested within 1-2 years after offering period ends	No
Asset attributes	Typically appreciate	Typically depreciate	Typically deplete/depreciate	Typically depreciate
Exit Strategy:				
- Listing?	Yes	No	No	Yes
- Merger?	Yes	No	No	Yes

[4] The chart and the discussion regarding oil and gas funds focuses on oil and gas funds that engage in drilling activities, particularly developmental drilling activities, as opposed to exploratory drilling activities. The attributes of oil and gas funds that engage in production purchase activities, royalties, and/or exploratory drilling activities may differ and have different concerns regarding the Revised Proposed Amendments.

- **Liquidation?**	Yes	Yes – formal liquidation period commences after end of operating period	Only after wells are uneconomical to maintain in light of reduced production	Yes

<u>Equipment Funds</u>

ICON's equipment funds primarily provide secured financing to businesses in industries such as marine, manufacturing, transportation, automotive, energy and power, telecommunications, and industrial and mining. The funds generally have a two-year offering period, followed by an estimated five-year operating period and then an estimated two to three year liquidation period. Unlike the non-traded REITs, ICON's equipment funds have never had a follow-on offering that extends the offering period beyond the two-year period and in only one, very limited circumstance, was a fund permitted to extend its offering period beyond two years. ICON has historically provided a per share/interest estimated value by disclosing an equipment fund's ERISA value[5] in such fund's first Annual Report on Form 10-K ("Form 10-K") following the end of the fund's offering period. The first Form 10-K reporting an ERISA value has typically been filed within three years after the initial effective date of the registration statement for the fund. Thus, historically, ICON and its equipment funds begin providing such an estimated per share/interest value sooner than required under FINRA's current rules.

The total return received by investors in an ICON equipment fund is based not only on the cash flow received from investments made from the net offering proceeds, but also on the cash flow received from reinvesting a portion of the proceeds from the fund's investments multiple times throughout the life of the fund. This dependency on reinvestment and the resulting compounding of returns from earlier investments is principally necessitated by two factors: the need to overcome the front-end underwriting compensation incurred to raise capital in the retail distribution channel and the fact that equipment funds largely invest in depreciating assets. This unique operating model also explains why ICON (often to its detriment and to the confusion of investors and registered reps alike) has used a very conservative proxy of a per share/interest estimated value – ERISA value – for Rule 2340 purposes for many years.

---

[5] This reflects that the estimated value per interest has been calculated based using the instructions for IRS Form 5500, which provides that the value provided by custodians/trustees on Form 5500 shall be "current value," which is defined to mean "fair market value where available . . . [or] the fair value as determined in good faith . . . assuming an orderly liquidation at the time of determination". In this case, the estimated value per interest is the amount that a holder of an interest in the fund would receive if all of the fund's assets were sold in an orderly liquidation as of the close of the fiscal year and all proceeds from such sales, without reduction for transaction costs and expenses, together with any cash held by the fund, were distributed to the partners upon liquidation. To estimate the amount that limited partners would receive upon such liquidation, the fund calculates the sum of: (i) the unpaid finance lease and note receivable payments on its existing finance leases and notes receivable, discounted at the implicit yield for each such transaction; (ii) the fair market value of its operating leases, equipment held for sale or lease, and other assets, as determined by the most recent third-party appraisals obtained by the fund for certain assets or ICON's estimated values of certain other assets, as applicable; and (iii) the fund's cash on hand. From this amount, the fund then subtracts its total debt outstanding and then divides that difference by the total number of interests outstanding.

The Original Proposed Amendments included the requirement to calculate a per share estimated value based upon "an appraisal of the assets, liabilities and operations" of the DPP or REIT. In the Revised Proposed Amendments, FINRA deleted the language "and operations." For an equipment fund, calculating a per share estimated value based solely on an appraisal of the assets and liabilities of the fund at any given moment in time would typically result in a significant understatement of the estimated value of the fund, the magnitude of which would depend in part upon when the valuation was performed. ICON did not comment on the Original Proposed Amendments because it believed that the flexibility of having an appraisal that included an assessment of the fund's operations would give it the ability to more closely approximate an "estimated value" given the structure of its equipment funds. However, with the limitations on appraising just assets and liabilities in the Revised Proposed Amendments, ICON believes that a significant aspect of the value of its equipment funds to an investor would be omitted. Further, the resulting estimated value would not reflect an accurate estimate of the value of the fund and would cause confusion amongst investors, who would not have an accurate snapshot of the estimated value of their investment in the fund. Allowing a calculation of estimated per share value for an equipment fund that takes into account more than just a sum of its assets and liabilities as if the fund suddenly liquidated, in contravention to its investment structure, on an arbitrary date would more closely approximate the economic deal that an investor has made by more closely approximating an "enterprise value" for the fund. Therefore, we believe that there is sufficient justification and need for the amended rule to provide flexibility for equipment funds to base estimated per share value on an appraisal of the fund's assets, liabilities and operations. For similar reasons to those stated above, we also note that the terminology "net asset value" and "NAV" would not be appropriate for determining an estimated value of an interest in an equipment fund. Finally, because equipment funds are unique in having a predefined exit strategy that requires the fund to enter liquidation immediately after the end of the operating period, we believe that the amended rule should provide an accommodation for equipment funds (and other similarly situated DPPs) to avoid the cost and expense of appraisals outside the ordinary course of a fund's accounting and impairment policies during the liquidation period.

Oil and Gas Funds

ICON's oil and gas fund intends to invest in oil and natural gas development wells located in the Mid-Continent region of the U.S. ICON's oil and gas fund is comprised of three separate limited partnerships that intend to raise a maximum of $200,000,000 in the aggregate for all three partnerships. Each limited partnership within the fund is intended to have an offering period of up to a maximum of one year, but in no event to cross over taxable years, so one limited partnership could raise capital for six months and then the second limited partnership could raise capital for up to 12 months and if there were any securities remaining, the third limited partnership could raise capital for up to another 12 months, but in no event would the aggregate offering period exceed two years. Once the offering for a limited partnership is closed, the net offering proceeds will be used by such limited partnership to locate potential sites and begin drilling. There will be no income generated by the fund and no distributions made to limited partners until such time as oil or natural gas has been produced, gathered and sold into the market. Therefore, it is not expected that there will be any distributions paid to investors for at least nine to 12 months from the date that a program's offering period has been closed and operations have begun.

Compliance with the Proposed Revised Amendments for ICON's oil and gas fund and other similar funds presents a number of issues. First, deriving an estimated per share/interest value for an ICON oil and gas fund from an appraisal of the fund's "assets and liabilities" risks significantly overstating or understating the fund's value. This is because the principal asset of an oil and gas fund that engages in drilling is comprised of the fund's cost to purchase its interest in one or more wells, less estimated depletion, with the principal liability being the estimated cost of retiring the fund's wells if and when the wells are retired. For example, basing the appraisal at cost could result in overstating (if the wells ultimately would not produce enough oil and gas to recoup the cost to purchase the interest in the wells) or understating (if the wells, as one might expect from making an investment in the wells in the first place, produce more than enough oil and gas to recoup the cost to purchase the interest in the wells) the value of the fund's assets. Instead, the appraisal should be able to take into account more reliable factors, such as the estimated value of the fund's oil and gas reserves and the estimated costs of producing, gathering and selling those assets.

As noted above, the Original Proposed Amendments included the requirement to calculate a per share estimated value based upon "an appraisal of the assets, liabilities and operations" of the DPP or REIT. In the Revised Proposed Amendments, FINRA deleted the language "and operations." ICON did not comment on the Original Proposed Amendments because it believed that the flexibility of having an appraisal that included an assessment of the fund's operations would give it the ability to more closely approximate an "estimated value" of an oil and gas fund by permitting it to take into account more reliable factors than the fund's balance sheet assets and liabilities. However, with the limitations on appraising just assets and liabilities in the Revised Proposed Amendments, ICON believes that the most significant aspects of the value of its oil and gas fund to an investor would be omitted and the resulting estimated value would not reflect an accurate estimate of the value of the fund. Allowing a calculation of an estimated per share value for an oil and gas fund that takes into account more than just a sum of its assets and liabilities on an arbitrary date, such as the fund's oil and gas (i.e., the potential value of the natural gas or oil to be gathered and sold by the fund) and the costs associated with producing, gathering and selling such assets, would more closely approximate the economic deal that an investor has made by more closely approximating an "intrinsic value" of the fund. Therefore, we believe that there is sufficient justification and need for the amended rule to provide flexibility for oil and gas funds to base estimated per share value on an appraisal of the fund's assets, liabilities and operations. For similar reasons to those stated above, we also note that, the terminology "net asset value" and "NAV" would not be appropriate for determining an estimated value of an interest in an oil and gas fund.

Finally, since ICON's oil and gas fund and similar funds are unique because such funds (i) have a shorter offering period, (ii) do not pay any distributions until investments are made and revenue is received from producing assets (and hence cannot and are not providing any fund performance measures regarding distribution coverage or sustainability), (iii) invest in depreciating/depleting assets and (iv) do not have any type of exit strategy, we believe that the amended rule should provide several accommodations for such funds (and other similarly situated DPPs). First, requiring an estimated per share value to be reported no later than the second quarterly report following the closing of the fund's offering period is not likely to enable the fund (or a partnership in a fund, in a fund structured like ICON's) to assess its estimated value because the fund is not likely to be able to take into account the results from its drilling operations, which may not even have commenced by such time. To address this concern, we believe that the amended rule should provide that an estimated per share value should be required no later than the second quarterly filing following the three year anniversary of the date that the DPP's or REIT's first registration statement was declared effective by the Securities and Exchange Commission. This change would permit DPPs with shorter offering periods, but longer operational lead times (like ICON's oil and gas fund) to provide better estimates of per share value out of the gate while leaving the proposed regulatory regime applicable to investment products with the longer, three year offering periods (REITs and BDCs) unchanged. In addition, the cost of requiring an appraisal of an oil and gas fund in its later years at some point outweighs the benefits to investors because oil and gas funds invest in depleting/depreciating assets and do not have any type of exit strategy, which means the funds typically just self liquidate over time. To address this concern, we believe that the amended rule should provide that an estimated per share value derived from a third party appraisal should not be required for oil and gas funds similar to ICON's (and any other similarly situated funds) at such time that the fund's remaining assets represent less than a specified percentage – such as 20% – of the fund's net offering proceeds.

BDCs

ICON's BDC intends to invest primarily in senior secured loans, including unitranche loans, and to a lesser extent, second lien loans and long-term subordinated loans of private and thinly traded U.S. companies. ICON's BDC intends to raise up to $1,000,000,000 over a three-year offering period. While BDCs are relatively new to the DPP industry, listed BDCs have existed for more than two decades, with most of the prominent names in the listed BDC industry – Ares, Apollo and MCG Capital, among others – dating back to the early 2000s. While early BDCs were typically internally managed, BDCs are almost all now externally managed – including those in the non-traded industry. The result is that these entities, in addition to having independent board of director requirements like REITs, are subject to additional layers of regulation under the Investment Company Act of 1940, as amended (the "1940 Act") and the Investment Advisers Act of 1940, as amended (the "Advisers Act"). These additional regulations should be welcomed as such regulations provide significant, additional protections for those that invest in these products.

One of the requirements under the 1940 Act is that BDCs calculate and publish a net asset value, or NAV, per share. This requirement serves two fundamental purposes: to provide transparency to investors (and the market in general) as to the *current* value of the BDC's investment portfolio and to ensure that the BDC does not dilute its existing stockholders by issuing equity at a price below that current value. As neither Section 2(a)(41) of the 1940 Act nor Rule 2a-4 promulgated thereunder require a BDC to have every asset and liability of the

BDC appraised, yet alone appraised annually, we reiterate our previous request that the amended rule provide greater clarity and/or flexibility on what it is that must be appraised. In addition, while we leave the argument that BDC's may be unfairly prejudiced by having to report NAV as an estimated per share price during the offering period as opposed to the net offering price to others, we do believe that FINRA should retain flexibility in the amended rule for BDCs to calculate a per share estimated value independent of NAV in the future, once FINRA has had the opportunity to become more familiar with the structure and other nuances of non-traded BDCs. As noted in comments submitted by other participants in the industry, NAV is not the equivalent of the intrinsic value of a BDC – historical market data shows that it may be just as likely to overstate as understate the value of a BDC – as, among other things, it only factors in the value of the BDC's investment portfolio as of the date of valuation; the BDC's future value is entirely ignored. If the ultimate goal is, as it should be, to provide a transparent, meaningful and accurate picture of the value of an investor's investment in a BDC, then arbitrarily cutting off all of the future value of the investment seems to be inconsistent with that goal.

Conclusion

ICON believes that transparency and meaningful disclosure to investors is important, but believes that the one-size fits all approach of the Revised Proposed Amendments does not address the significant differences between non-traded REITs and certain DPPs, such as equipment funds, oil and gas programs and BDCs. Rather, as we have discussed in further detail above, there should be flexibility in the amended rule that allows for different types of DPPs to provide valuations in ways that make the most sense for that particular investment product. ICON appreciates the opportunity to comment on Regulatory Notice 12-14 and looks forward to a continued dialogue with FINRA on these and other important issues for the protection of investors and the capital markets.

Sincerely,

Mark Gatto
Co-Chairman, Co-President and
Co-Chief Executive Officer
ICON Investments

Michael A. Reisner
Co-Chairman, Co-President and
Co-Chief Executive Officer
ICON Investments

cc: Mr. Joel S. Kress, ICON Investments
Ms. Deborah S. Froling, Arent Fox LLP

NorthStar
REALTY FINANCE

399 Park Avenue, 18th Floor | New York, NY 10022
p 212.547.2600 | f 212.547.2700 | www.nrfc.com | NYSE: NRF

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:

NorthStar Realty Finance Corp. ("NRF"), NorthStar Real Estate Income Trust, Inc. ("NorthStar Income"), NorthStar Healthcare Income Trust, Inc. ("NorthStar Healthcare") and NorthStar Realty Securities, LLC ("NorthStar Realty Securities") appreciate the opportunity to comment on Regulatory Notice 12-14 (the "Notice") published by the Financial Industry Regulatory Authority, Inc. ("FINRA"). The Notice seeks comments to FINRA's revised proposal to modify NASD Rule 2340, which governs reporting of per share estimated values on customer account statements (the "Proposed Amendment"). NRF is the sponsor of both NorthStar Income and NorthStar Healthcare and is a NYSE-listed finance real estate investment trust ("REIT") that primarily originates, acquires and manages portfolios of commercial real estate debt, real estate securities and net lease properties. In addition, NRF engages in asset management and other activities related to real estate and real estate finance. NRF has approximately $7.0 billion of commercial real estate assets under management. NorthStar Income is a public, non-listed REIT that was formed to originate, invest in, and manage a diversified portfolio of commercial real estate debt, commercial real estate debt-related securities and select commercial real estate equity investments. NorthStar Income has raised in excess of $200 million of capital to date. NorthStar Healthcare (f/k/a NorthStar Senior Care Trust, Inc.), is a non-listed REIT presently in registration with the U.S. Securities and Exchange Commission ("SEC") and the various States, formed to primarily originate, acquire and asset manage a diversified portfolio of debt and equity investments in healthcare real estate, with a focus on the senior housing sector. Lastly, NorthStar Realty Securities is a FINRA registered broker-dealer, NorthStar Income's dealer manager and an affiliate of NRF.

Together, we offer a unique perspective on the Notice given that (i) to our knowledge, NorthStar Income was the first public non-listed REIT with a core focus on commercial real estate debt related investments, (ii) NorthStar Income is one of only a few public, non-listed REITs sponsored by a publicly traded company and (iii) we have the benefit of perspectives held by four important constituencies, namely the sponsor of non-listed REITs, a public non-listed REIT issuer currently executing its initial public offering, a non-listed REIT presently in registration and a captive broker-dealer focused on the industry.

We again share FINRA's commitment to providing transparency and clear disclosure to investors. The primary focus of this letter is to highlight potential concerns that would arise in connection with implementation of the Proposed Amendment and, if and when implemented, to recommend an appropriate timeframe for such implementation. We believe it is abundantly fair to say that neither regulators nor industry participants can, with certainty, predict all of the practical implications associated with implementing the Proposed Amendment. Given the breadth of the industry as well as its importance to investors, capital markets and the economy as a whole, we recommend that any changes be implemented cautiously and on a timeline that would minimize market disruption. In this letter, we urge FINRA to consider: (1) adopting an incremental implementation for effectiveness of the Proposed Amendment, referred to in the industry as "grandfathering;" (2) the potential confusion of investors associated with placing a "net offering price" on customer account statements; and (3) to consider the unintended impact caused by the "not priced" option on certain qualified plans, among other logistical considerations.

Incremental Implementation of the Proposed Amendment

First and foremost, we think it is critical that existing market participants currently raising capital be grandfathered from any changes during their remaining initial public offering period. The capital raised during an initial public offering period is the foundation of any issuer's ability to implement its business plan and create value for its stockholders. The Proposed Amendment has the potential to negatively impact the non-listed REIT industry and investors unless the existing market participants have ample time to adjust market practices. To the extent that any market disruptions result from implementation of the Proposed Amendment, whether as a result of modified broker-dealer incentives or technical logistics, such disruptions could impose significant hardship not only on existing issuers currently raising capital, but also on investors who have already placed their money with these non-listed REITs. These investors made their investment decision under the existing regulatory regime and likely had reasonable expectations that regulatory changes would not stifle capital raising efforts and negatively impact the companies in which they invested. Furthermore, we think that FINRA should include issuers in registration in any grandfathering provisions incorporated into any final rule based on the Proposed Amendment given the considerable resources those issuers have expended in preparing to raise capital under the current regulatory regime. Without grandfathering existing issuers currently raising capital, FINRA's Proposed Amendment may have the unintended consequence of disrupting capital flows and, consequently, harming the value of existing investments. We respectfully urge FINRA to permit existing issuers and investors to operate under the terms of the existing regulatory framework to provide consistency in the capital markets and market participants' expectations.

Net Offering Price as a Source of Investor Confusion

We also want to express our concern that FINRA's proposed reporting of "net offering price," namely the gross offering price during the initial offering period as reduced by front-end underwriting compensation expense (the "Net Offering Price Option") may create additional confusion for investors. Investors may mistake this figure as a reflection of value or cost basis, and it is neither. While value and cost basis are relatively common metrics that the investing public is familiar with when reviewing customer account statements, there is no such familiarity with this new concept of net offering price and we believe it is bound to create confusion. Again, we fully support accurate and comprehensive disclosure to investors to ensure that investors are provided with a clear understanding of all underwriting and other expenses in the applicable prospectus, however, we view the Net Offering Price Option as a calculation that is better presented in a prospectus than on a customer account statement. Given the issues being evaluated by FINRA and the surrounding circumstances, we submit that all applicable constituents, including investors, may be better served if additional disclosure is made within an applicable prospectus rather than on a customer account statement.

Existing Systems and "Not Priced" Option

We also note that implementation of the Proposed Amendment will likely require a significant devotion of time and effort by market participants to adapt to the change, educate constituents and navigate the numerous logistical challenges that may arise. We anticipate the Proposed Amendment would necessitate the revamping of various programs and systems associated with the record keeping and customer account statement production. The option that member firms have to report securities as "not priced," provided that the issuer has not provided an appraised value in its periodic or current reports by the second quarterly filing deadline (the "Not Priced Option"), also presents significant implementation issues for issuers and investors. As FINRA is aware, non-listed REITs and DPPs are often marketed to investors through their individual retirement accounts, defined contributions, or profit-sharing plans since these investments have income-generation as an investment objective. Once a beneficiary reaches a certain age, that beneficiary must begin taking distributions from the account based on the beneficiary's life expectancy. The formula used requires an estimated value per share in order to calculate this required distribution. A substantial problem presented by the Not Priced Option is that it may be difficult, if not impossible, for these investors to calculate the proper distribution given that there will be no dollar amount associated with their non-listed REIT securities, which may prevent these investors from participating in the non-listed REIT market and negatively impact the capital raising efforts of issuers who depend on these accounts as a significant source of funds.

To avoid investor confusion, unintended negative impacts on the non-listed REIT industry, a reduction in capital formation in the United States and, most importantly, an adverse effect for existing investors, we encourage FINRA to incorporate either an extended transition period or grandfathering provisions into any final rule. In addition, we urge FINRA to conduct further research and studies to determine the potential impact of the Proposed Amendment on the non-listed REIT market and investors.

We fully support the prudent regulation of the U.S. capital markets by FINRA, the SEC and the state securities commissions. We appreciate the opportunity to comment on the Proposed Amendment so we can work in a collaborative manner to protect investors and support a well-functioning capital markets system in the United States.

Very truly yours,

NorthStar Realty Finance Corp.
Daniel R. Gilbert
Co-President and Chief Investment Officer

NorthStar Real Estate Income Trust, Inc.
Daniel R. Gilbert
President and Chief Investment Officer

NorthStar Healthcare Income Trust, Inc.
Daniel R. Gilbert
Chief Executive Officer

NorthStar Realty Securities, LLC
W. Timothy Toole
President

Partnership Consultants, Inc.

A LEADER IN PARTNERSHIP RESEARCH

2477 Stickney Point Road
Suite 301-B
Sarasota, Florida 34231-4071
941-923-5836 Fax 941-923-8769

March 22, 2012

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

RE: FINRA Regulatory Notice 12-14
Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts

Dear Ms. Asquith:

Investors want a reasonable estimate of what they can get for their DPP units and non-exchange REIT units. If you are addressing transparency for such investors, the current estimated sale price is the key issue. What can investors get for their units?

The top priority consideration for estimating a current sale price for units of a DPP or shares of a non-exchange REIT should be the redemption price. The redemption price is usually the highest and best price available to a potential seller. (This means the redemption price follows IRC 2031.) A redemption price solves the transparency issue. The redemption price tells the investors what they can get for their units. My firm reports DPP and non-exchange REIT redemption prices similar to the redemption price of an open-end mutual fund.

If the redemption hasn't started, or if it is suspended, or if the redemption program has a waiting list beyond the current quarter, or if the redemption price is lower other alternatives, such as Inland Land Appreciation I & II offering redemption at approximately zero; then another approach would be appropriate. Some of the alternatives, that were available before FINRA 11-44 or FINRA 12-14, are IRS Rev. Ruling 59-60 and ASC 820 Levels 2 and 3.

Sincerely,

Jon Hale, President

NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

April 11, 2012

Via electronic submission to pubcom@finra.org

Ms. Marcia E. Asquith
Senior Vice President and Corporate Secretary
FINRA
1735 K Street, NW
Washington DC 20006-1506

RE: Comments in Response to Regulatory Notice 12-14

Dear Ms. Asquith:

NASAA Jurisdictions review unlisted DPP and REIT offerings to assess whether disclosure is adequate and the terms are fair to investors. NASAA is concerned about inconsistent and inaccurate valuation methods presently utilized by issuers and member firms to present investment values on customer account statements. We support the efforts of FINRA in Regulatory Notice 12-14 and the proposed amendments to NASD Rule 2340, which we believe will improve customer comprehension of the value of investments held in their accounts. We are confident that a more uniform and accurate valuation method proposed by FINRA will inure to the benefit of issuers, FINRA member firms, and investors. NASAA respectfully offers the following comments and suggestions to further enhance the transparency and accuracy of customer account statement reporting.

NASAA understands that Regulatory Notice 12-14 is an extension of Regulatory Notice 11-44, for which we previously wrote a letter of support. We also understand that Notice 12-14 makes a number of modifications to Notice 11-44, which we would like to address in turn:

1. NASAA continues to support Regulatory Notice 11-44's proposed limit on the period during which a per share estimated value based on the net offering price may be included on a customer account statement to the Initial Offering Period. We also continue to support the proposal in Notice 11-44 that following the Initial Offering Period, a per share estimated value included on a customer account statement must be based on an appraisal of a DPP's or REIT's assets, liabilities and operations. NASAA suggests that FINRA add a requirement that such appraisals must be conducted by qualified independent appraisers, using Rule 2-01 of Regulation S-X, or a similar rule, as guidance. NASAA also suggests that the selection criteria for those portfolio assets to be appraised

be set by rule in order to help alleviate any conflicts of interest the appraiser and the issuer may have in manipulating its net offering price or NAV in future periods.

2. Regulatory Notice 11-44 defined "net offering price" as the gross offering price less "all organization and offering expenses," which include "(1) issuer expenses that are reimbursed or paid for with offering proceeds, (2) underwriting compensation, and (3) due diligence expenses." Regulatory Notice 12-14 redefines "net offering price" as "gross offering price less any front-end underwriting compensation expenses."

   NASAA understands, as some commenters argued in response to Notice 11-44, that subtracting fees and expenses from an already arbitrary price simply yields a different arbitrary price. While this may be true, what these commenters did not acknowledge is that since front-end fees and expenses are not made available for investment by DPP and REIT programs, deducting them from the gross offering price results in a more accurate, albeit arbitrary, estimated per share value. If accuracy of the per share estimated price is the goal, then NASAA suggests that other standard costs incurred during the Initial Offering Period should also be deducted, such as acquisition fees and expenses, incurred advisory fees, and other incurred fees and expenses, as such costs continue to erode the value of a customer's initial investment. NASAA does not agree that accounting for fees and expenses as incurred, and reflecting this activity on customer account statements on a per share basis, places an unreasonable burden on issuers, as they are already required to report such information to the SEC.

3. Regulatory Notice 12-14 proposes that "[d]uring the period in which the issuer has not provided an appraised value (but extending no longer than the second quarterly filing after the initial offering period) a member may present a modified version of net offering price or list the securities as 'not priced.'" NASAA supports this proposal. As discussed in comment 2 above, "net offering price," while an improvement over gross offering price, is still an arbitrary number that may not accurately reflect the intrinsic or market value of the customer's shares. Because no ready market exists for shares of non-traded DPP and REIT offerings, the price a customer would receive if it were able to find buyers for its shares would likely represent a significant discount to even the "net offering price." Therefore, "net offering price" may still be misleading to investors. Presenting such shares as "not priced" on customer account statements, while not providing much information to customers about the current value of their investments, is less likely to confuse them as to the liquidation value of their accounts.

4. NASAA does not support FINRA's withdrawal of its proposed requirement concerning the reliability of appraised values. Regulatory Notice 11-44 proposed a requirement that

would prohibit a member firm from using a per share estimated value "if it knows or has reason to know that the value is unreliable." Regulatory Notice 12-14 withdraws this proposal, stating that "[u]nder the revised proposal, we anticipate that per share estimated values will be almost exclusively derived from values based on appraisals obtained by issuers and included either in the issuer's periodic or current reports or a daily NAV calculation. As such, firms typically will have no reason to question their reliability, and the proposed requirement should not be necessary." While it may be true that appraisal or daily NAV based valuations may be more reliable, the policy behind prohibiting a firm from presenting a per share estimated value that it knows or has reason to know is unreliable is no less compelling. Member firms have a role to play as gatekeepers. Prohibiting member firms from reporting valuations that they have reason to know are unreliable is central to maintaining customer and market confidence in the integrity of reported valuations of securities. Removing the proposed requirement tacitly permits member firms to report unreliable information that could undermine such customer and market confidence. NASAA strongly urges reinstatement of the withdrawn proposed requirement.

If the proposed rule is reinstated, NASAA also encourages FINRA to provide additional guidance to help member firms comply with this provision. This would include a review of the financial statements and a U.S. GAAP or IFRS (as allowed by law) analysis in assessing the appropriate valuation. If adopted, the FASB proposal, *Proposed Accounting Standards Update 2011-210 Real Estate-Investment Property Entities* (Topic 973), would require a fair market value for certain real estate holdings in financial reporting. This would further support the obligation of member firms to exercise appropriate due diligence in reviewing the financial statements under the originally proposed Rule 2340(c)(2).

5. For unlisted DPPs and REITs using daily NAV pricing, Regulatory Notice 12-14 would require such firms to publish their per share daily estimated NAV as of the end of the statement period. NASAA suggests that daily NAV be calculated using fair value pricing under acceptable methods detailed under the FASB Accounting Standards Codification Topic 820. Additionally, it is important for NAV to not be presented as an on-the-market price unless liquidity and risk adjustments are made to NAV since, if the issuer were to sell its real estate assets, it would incur exit and carrying costs and face potential liquidity issues. Using gross on-the-market pricing for NAV, especially if used in determining compensation elements and various other expenses, will likely cause such elements and expenses to be unnecessarily higher than if determined on a fair value GAAP pricing, liquidation pricing, or Investment Company pricing model.

NASAA continues to support FINRA's efforts to enhance the accuracy and integrity of investment valuations reported on customer account statements, and believes that the proposals offered in Regulatory Notices 11-44 and 12-14 represent meaningful improvements over current practices. NASAA thanks FINRA for the opportunity to comment on this process.

Sincerely,

Jack E Herstein

Jack E. Herstein
NASAA President and
Assistant Director, Nebraska Department of Banking and Finance, Bureau of Securities

CENTER FOR CAPITAL MARKETS COMPETITIVENESS

OF THE

UNITED STATES CHAMBER OF COMMERCE

DAVID T. HIRSCHMANN
PRESIDENT AND CHIEF EXECUTIVE OFFICER

1615 H STREET NW
WASHINGTON, DC 20062-2000
202/463-5609 • 202/955-1152 FAX
david.hirschmann@uschamber.com

April 11, 2012

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

Re: FINRA 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 (hereinafter, together referred to as DPPs)

Dear Ms. Asquith:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation representing the interests of over three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective it is an important priority of the CCMC to advance an effective and transparent system for capital formation, including capital formation for alternative investments like direct participation programs (DPPs). The CCMC welcomes the opportunity to comment on Regulatory Notice 12-14 (Notice 12-14) published by the Financial Industry Regulatory Authority, Inc. (FINRA) on March 7, 2012 regarding amendments to NASD Rule 2340 to address how firms report the per share estimated value of unlisted DPPs and unlisted Real Estate Investment Trusts (REITs) on customer account statements.

The CCMC supports the efforts of FINRA to provide protections and transparency to investors through amendments to NASD Rule 2340 and gratefully acknowledges FINRA's openness to feedback expressed in Notice 12-14 as a continuation of the comment process begun last year by FINRA Regulatory Notice 11-44 regarding customer account statements.

Ms. Marcia E. Asquith
April 11, 2012
Page 2

We believe there are many positive benefits to requiring on a customer account statement, within two quarterly filings of the conclusion of a DPP's initial offering period, the use of a per share estimated value based on current financial information.

However, we are concerned about the absence of a clear discussion of the timeframe for implementation of the proposal and all of its aspects, particularly changes impacting the DPP initial offering period. Adoption of the proposed amendment without proper consideration of its impact across a variety of constituencies could result in serious repercussions to the commercial real estate market and the broader U.S. economy, without any commensurate benefits.

We believe that FINRA should not act to implement a rule capable of having such widespread impact without first providing separately for public comment its proposal regarding rule implementation. To this end, we strongly recommend that FINRA delay acting unilaterally to implement its proposal until additional meetings and dialogue with the DPP industry to fully explore and identify the best timeframe and means through which improved customer account statements may come about.

For well over a decade, most DPPs have used an arbitrary $10.00 per share price during the offering period because it allows for ease and simplicity in determining the number of shares to be issued. This offering price, however, does not represent the book or net asset value of a share in the DPP, the amount of proceeds an investor would receive in the event of liquidation, or the price at which the shares would be traded if they were listed on an exchange—all factors clearly disclosed in the DPP's prospectus. While we support full and obvious disclosure of the commissions associated with such purchases, we continue to note that because the $10.00 offering price does not reflect actual value, deducting front-end underwriting compensation expenses to create a net offering price will do nothing to change the arbitrary nature of the starting point from which the net offering price calculation begins. To this end, we urge FINRA to draft the final rule carefully such that investors will not be led to believe that a net offering price (which we note is a reflection of gross proceeds to the issuer) is a closer approximation of intrinsic value.

An investment in a DPP is a long-term investment, and the ultimate success of the investment is based on a variety of factors, including the DPP's ability to select and manage assets, and its ability to implement a business plan effectively and efficiently over a substantive asset holding period. During the initial offering period, the fundamental nature of the assets to be acquired, as well as the costs associated with their appraisal, prevent them from being readily quantified and translated into an estimated per share value bearing any significant connection to the type of return or per share value the investor could expect when the offering finally liquidates. To the extent the choice to use a net offering price on a customer statement is a departure from long standing statement practice, we believe that FINRA should confer with DPP industry leaders and devise a rule implementation plan that provides greater transparency on initial fees charged to the investor without allowing the investor to mistakenly conclude that the value of their initial investment has experienced an immediate loss as soon as the investment is made. Such an investor misunderstanding could bring immediate significant harm to the DPP industry's ability to raise capital.

We further note that FINRA's decisions on timing of the effectiveness of any final new rule should take into account the following:

1. The impact of implementation on existing programs in their initial offerings, including historical versus future calculations of return of capital, distributions, and total return;

2. The issuer legal, printing and other costs associated with creating and distributing offering materials converting to new share pricing and disclosure systems;

3. The costs associated with transfer agent technology updates associated with statement production for net offering price statements, as well as the possible need to modify historical statements for offerings active when the proposal is implemented;

4. The impact of a net offering price on existing issuer advisory agreements and related compensation, promote and/or hurdle calculations;

5. The impact of a net offering price on existing participating broker selling agreements and managing dealer agreements and related compensation matters;

6. The impact of any transition to ERISA valuations based upon net offering price for existing offerors;

7. The ability of trail commissions to be treated as capitalized versus operating expenses by issuers;

8. The impact of a net offering price statement on DPP assets held in brokerage accounts under AIP;

9. The preferential distribution implications of using a net offering price for distribution reinvestment plans; and

10. The possible taxability of the price difference in net offering price purchases versus fully loaded purchases.

As the U.S. economy and this industry recover from the recent economic downturn and commercial real estate activity picks up again, financial regulators should heed caution when considering rules that could hamper capital formation. While the list of issues above is not FINRA's sole responsibility, it is a relevant consideration set for the implementation of the final customer account statement rule. FINRA's final plan to implement a revised NASD Rule 2340 should also consider the significant improvements and upgrades to the DPP investment process incumbent upon such securities' recent ability to be DTCC eligible and thus capable of placement within traditional investor brokerage accounts.

A lack of capital flowing into the nonlisted DPP and REIT markets will have repercussions for the broader economy. These products have played a key role in the recovery of distressed markets since the economic collapse, providing tens of thousands of Americans with employment directly and indirectly through the capital formation process, and through the development, management and maintenance of assets they hold. Without this robust sector of the financial community operating at capacity, the emergence of the economy will continue at a laggard pace. Only by FINRA and other regulators proceeding judiciously in a manner that promotes transparency without unduly inhibiting growth and capital formation will the U.S. economy return to its former vibrancy.

Conclusion

In summary, the CCMC believes that the implementation of FINRA's proposed customer account statement rule offers many positives for capital formation and for investors. However, if not carefully implemented in consultation with DPP industry leaders, the process of making the rule effective could place significant difficulties on nonlisted DPPs and REITs. Therefore, we recommend that FINRA delay this proposed amendment's effectiveness until it can establish such lines of communication, arrive at agreed upon best practices, and once more seek comment from affected stakeholders and interested parties before implementation of a final rule.

We appreciate the opportunity to submit these comments and would be happy to discuss these issues with you or your staff.

Sincerely,

David Hirschmann

REISA
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

April 11, 2012

Submitted via pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 12-14: Customer Account Statements

Dear Ms. Asquith:

On behalf of the Real Estate Investment Securities Association ("**REISA**"), this letter is submitted in response to the Financial Industry Regulatory Authority, Inc.'s ("**FINRA**") request for comments on *Regulatory Notice 12-14: Customer Account Statements* ("**Regulatory Notice 12 -14**"). Regulatory Notice 12-14 is a revision to prior Regulatory Notice 11-44 ("**Regulatory Notice 11-44**"), upon which REISA previously commented by letter dated November 12, 2011 ("**REISA's Prior Comments**"). REISA is a trade association serving the real estate securities industry, including all professionals active in offering, managing and distributing non-traded REITs, real estate partnerships, tenant-in-common interests (TICs), Delaware statutory trust interests (DSTs), real estate income and development funds, oil and gas interests, natural resources and alternative energy investments.

REISA works to maintain the integrity and reputation of the industry by promoting the highest ethical standards to its members and provide education, networking opportunities and resources. REISA connects members directly to key industry experts through intimate forums providing timely trends and education and helping create a diversified portfolio for their clients. The association was founded in 2003 and has over 800 members who are key decision makers that represent over 30,000 professionals throughout the nation including:

- Sponsors and managers of real estate and related offerings
- Broker-dealers
- Securities licensed registered representatives
- Registered investment advisers (RIAs)
- Investment adviser representatives (IARs)
- Accountants
- Attorneys
- Mortgage brokers
- Institutional lenders
- Qualified intermediaries
- Real estate agents
- Real estate brokers

REISA
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

REISA believes in the importance of protecting the investing public while balancing the need for businesses and sponsors of quality real estate and direct participation investment products, along with the FINRA members who sell these products, to be able to efficiently raise capital without an overly burdensome regulatory scheme. REISA also represents a broad range of interests within its membership and a variety of programs, including public and private programs, including REITs, BDCs, and Reg D funds; and sectors, including real estate, energy, equipment, oil and gas and corporate debt and equity. REISA has attempted to convey the opinions and concerns of its membership as a whole as it relates to its comments below.

In Regulatory Notice 12-14, FINRA has revised its original proposal to amend Rule 2340[1] in response to various comments submitted on Regulatory Notice 11-44 (the "Revised Proposed Amendments"). The Revised Proposed Amendments would, among other things:

(a) Require general securities members to provide a per share estimated value once an issuer provides an estimate based upon an appraisal of assets and liabilities in a periodic or current report filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act");
(b) Allow, during the effective period of the first registration statement for the DPP or REIT securities,[2] members to use either a modified net offering price with an explanation of methodology by which such price was determined or designate the securities as "not priced"; and
(c) Require certain disclosures to accompany the per share estimated value as set forth in the Revised Proposed Amendments.

REISA appreciates that FINRA addressed some of the comments received on Regulatory Notice 11-44, including REISA's Prior Comments, but believes that additional clarifications and considerations are required. REISA notes the following with respect to the Revised Proposed Amendments.

1. REISA believes that while Regulatory Notice 12-14 discusses the option to list the securities as "not priced," the actual text of revised Rule 2340(c)(1) should be revised to clarify that a FINRA member has an option to either provide the per share estimated value or show the security as "not priced."

[1] As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. See SR-FINRA-2009-028. The amendments discussed in Regulatory Notice 12-14 would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of final approval of this Regulatory Notice.

[2] The effective period of the first registration statement for the DPP or REIT securities is not defined in Regulatory Notice 12-14. REISA expects that the time period during which a net offering price could be used would be three years plus an additional 180-day extension period if a follow-on public offering had been registered as it was in Regulatory Notice 11-44.

REISA
REAL ESTATE INVESTMENT SECURITIES ASSOCIATION

2. REISA believes that the obligations of FINRA firms must be clarified if issuers do not provide an appraised value within the time period required by Rule 2340.
3. REISA believes that FINRA needs to clarify what consideration members should take into account when formulating a "reasonable belief" that the value is unreliable as well as the practical application of members' obligations to follow up with the issuer or the independent valuation service if they believe there are "red flags."
4. REISA believes that in order to take into account the various technological as well as practical issues involving the changes to the way these offerings are valued, implementation of the Proposed Revised Amendments should be delayed until July 1, 2014.
5. REISA believes that FINRA and the SEC should work together to make certain that issuers and FINRA members do not face conflicting regulatory obligations in providing the per share estimated values as proposed.

Conclusion

REISA remains committed to collectively working to improve the industry from the standpoint of transparency and valuation. REISA believes that providing valuation information to investors is important and believes that the considerations above should be included in any final rules proposed by FINRA.

REISA appreciates the opportunity to comment on Regulatory Notice 12-14 and looks forward to a continued dialogue with FINRA on these and other important issues for the protection of investors and the capital markets.

Sincerely,

Daniel Oschin
President, Real Estate Investment Securities Association

Prodigious LLC

April 12, 2012

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

Via email: pubcom@finra.org

RE: Regulatory Notice 12-14

Ms. Asquith:

We submit this letter of comment to voice our concerns with respect to the proposed changes noted in the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 12-14 ("12-14") which were provided in response to Regulatory Notice 11-44 ("11-44") which outlines various changes to FINRA Rule 2340. Thank you for allowing us to voice our response on the matter.

In response to 11-44, numerous responders provided valid reasons as to why the proposals by FINRA to address the values of unlisted Direct Participation Programs ("DPPs") and REITs were not feasible. We are of the opinion that the proposals in 12-14 are not adequate in addressing a number of concerns that the member firms will face when attempting to comply with the changes. Furthermore, the changes proposed in 12-14 will cause additional issues for the investors.

On Page 4 of 12-14 FINRA writes, "*Instead, FINRA proposes to require that a firm provide a per share estimated value based upon an appraisal from the issuer's most recent periodic or current report. We agree with commenters that the appraised value that appears in the issuer's periodic or current reports should provide the most reliable per share estimated value.*" It has been our experience in providing valuations that this is not plausible because the "'issuer's most recent periodic or current report' is partially a subjective number predicated on analysis and evaluation not held to any standardized accounting practice.

Sometimes the value provided in a cyclical report is carried over from the previous reporting period. At other times the issuers provide a quarterly report which does not include a valuation. The proposal language should be amended to indicate "the most recently provided value, regardless of the date of the most recent report" and additionally there should be more explanation with respect to the context of the word "appraised" as it is used. For instance, if the security is not real estate based – the "appraised" values may not apply. Of course most of the comments to 11-44 appeared to be coming from the perspective of REITS – of which out of tens of thousands of securities in this sector are representative of less than 100 of the securities known to many firms in the industry.

We believe that the interpretation based on the proposed language will allow too much latitude for issuers that essentially can prop up their books when reporting values in an effort to establish a false sense of standards. When determining a valuation of an issuer's product, the financials of the issuer as well as the cash, securities and other instruments within the product are adequately evaluated. Relying solely on an issuer to provide valuation data could bring about similar problems that faced this sector of the industry in the early 1990s. By not requiring the values, at a minimum, to be audited by an outside party, the valuations being provided are a farce.

Prodigious LLC

We are willing to become a part of the solution by not only voicing our thoughts on issues with the proposed rule, but also offering some degree of possible solution. In our opinion, the number that would be the most accurate and the most representative figure for the investing public is, "What would their security be worth given a best exit strategy" Whether it be exit strategy; a secondary sale; redemptions or issuer buybacks are all different given the circumstances. Since all secondary transactions are required by rule to be reported to FINRA, it seems that should be a viable resource the broker/dealer community could rely upon. It is our preference that secondary prices and/or redemption plans be utilized because they are not as likely to be biased. In the case of a secondary price, the value is determined by two main factors, the competing market and unaffiliated valuation. In the case of a redemption price, it is backed by cash which is a powerful incentive to get closer to a real value, and fiduciary responsibility regulation is quite clear and robust.

More specifically the Securities and Exchange Commission ("SEC") has preferred accounting methods which were adopted in concert with Financial Accounting Standards Boards ("FASB"), Accounting Standards Codification ("ASC") or Generally Accepted Accounting Principles ("GAAP"). In nearly all of our experience, an issuer has never reported a valuation that an investor could utilize as a basis for exiting their security. Keep in mind, redemption plans sometimes have parameters such as investors have to own the position for a specific period of time, or it's based on a sliding scale. When issues such as these are present, we feel as though FINRA should define the methodology to be used – such as the use of the earliest holding time possible to determine the redemption price so that all investors possible would be included regardless of the individual position's holding period. Of course this would cause the need for additional disclaimers, which also should be defined or deemed too great a burden. It would seem appropriate that a member firm handle the burden of redemption plans if one exists, as long as parameters are clearly defined with respect to aforementioned variables. It would be important to recognize that this solution may be a burden and if so we suggest a possible second solution.

For tax reporting purposes, using the IRS required value that is established and hasn't changed for years would be preferable as was referenced in our response to 11-44. The broker/dealer community is currently required to calculate these numbers and it appears to be a viable option since it is already in use. This is especially true in the quarter it is reported by the firm. It seems as though if member firms or the governing bodies do not want the burden created by our first option, allowing the industry to use an accepted value, calculated using a universally accepted methodology, seems logical and to be completely appropriate. With all the many caveats outlined above and the myriad of disclosures the proposed rule change would require, it will likely leave the investors more confused and thus muddying the true picture. This second option would also eliminate the confusion often created by one value on the issuer's statement, a second value on member firm customer statement and a third value sent once a year to meet IRS requirements. If the goal is to obtain and allow for the value to be changed more often than annually, for example, within the parameters of the cycle of the specific security, the proposed rule language should permit for the allowance of utilizing the varying cycles that occur within this market sector"

Until ASC 825 (formerly FAS 159), ASC 820 (formerly FAS 157 "Fair Value Measurements and Disclosures") and Internal Revenue Service's ("IRS") Revenue Ruling 59-60 are given appropriate consideration, investors will continue to not be in receipt of a true valuation on their statements; they will have problems with tax reporting and the necessary transparency to the general public and investors for DPPs and non-trading REITs will never be achieved.

Prodigious LLC

Our third option would be allowing member firms to use a book value if provided. As stated in the initial paragraphs of this section, there are issues with book value that must be addressed. We believe allowing the values but requiring that member firms identify whether those values are reported by issuers utilizing audited versus unaudited financial statements and whether the issuer is affiliated or unaffiliated with the entity calculating the value is imperative. We propose that regardless of whether the value is calculated by an affiliated or unaffiliated party, it should be disclosed as such and we further propose that whether or not the value has been audited, and if so, whether by an affiliated or unaffiliated party should also be disclosed. You may not be able to give the investor information that could be deemed reliable or address the myriad of methodologies used in calculation, but in the very least the member firms can disclose up front as to whether the information could be more or less reliable by virtue of its preparation.

On Page 5 of 12-14 it is stated, "*This quarterly filing "grace period" is designed to ensure that issuers have had sufficient time to conduct an appraisal and include an appraised value after the initial offering period. Moreover, a quarterly public filing deadline might occur immediately after the initial offering period, and for this reason the proposal would allow firms to present the net offering price until the issuer has filed one more quarterly filing, unless the issuer includes an appraised value in its periodic or current reports before that time.*"

First and most importantly, not all securities supported by this rule provide quarterly reporting. Secondly, if this rule is to apply specifically to publicly registered, non-trading REITS – the proposed rule changes should address that security type specifically followed by requirements for all other security types falling into this sector. The SEC defines Non-Standard Asset as "any security not listed on a recognized exchange". If this regulation is to incorporate all Non-Standard Assets, can it be specifically stated and if not, can it specifically state what security types are to be incorporated and what is exempt? By combining REITS and other DPPs without specifying as to whether they are publicly registered, or any other parameters, and the fact that the "concerns" addressed were almost all specifically addressed to REITS doesn't solve the problem as the rules cannot be adequately applied to the other security types.

We believe the issue of language stipulating an "appraised" value must be reconsidered. It is understood that to address this point, there must be some language put into place that deals with offering periods and providing time for an issuer to invest those funds raised; however, we believe that building rule language from the point of view of only a single security type within the covered sector is short sighted.

Our third topic comes from Page 7 of 12-14 it states, "As noted above, in recent years some unlisted DPPs and REITs have developed a daily NAV." It has been our experience that relying upon and/or creating a certain standard to one DPP will not apply to all DPPs. As such, a daily NAV would only apply to an extremely small number of DPPs and REITs and would again create confusion.

A fourth and final thought process from our perspective, which we believe should be considered is as follows. We believe there will always be inherent problems with respect to the methodology and valuation of these types of securities because no two are alike. Furthermore, I point to another concern with respect to DPPs specifically in the way they offered to prospective investors. In every Private Placement Memorandum ("PPM") there is disclosure language which generally states, ***Limited Liquidity.*** *Investment in the Partnership is highly restricted with significant restrictions. Investors do not have a right to withdraw from the Partnership. Investors should be prepared to hold their investment for an indefinite period of time. There is generally no publicly recognizable market for the Units and none is expected to develop.*

Prodigious LLC

Marcia E. Asquith, FINRA
April 12, 2012
Page Four

Because no true liquid market exists for DPPs and other Non-Standard Assets, what an investor can expect to receive in the sale of said securities will be misleading and they will most likely never realize the value identified on their customer statement. We believe a standardized method of valuation is necessary but various principals must be followed such as standardized accounting; accurate disclosures with respect to the different types of DPPs and REITs; member firm reporting requirements and issuer standards to name a few. While we wanted to include this statement for disclosure purposes, we realize that this is a very large issue that would require much stronger requirements than are intended to be addressed with in this rule.

One primary concern that will always be prevalent with respect to the issuers of DPPs and non-trading REITs is that they are not held to similar and more stringent standards as those of public companies. Inasmuch, an issuer's accounting and reporting processes are not streamline nor are they required to follow standards established by FASB, ASC or GAAP. Having access to the methodology utilized by each issuer and then reviewing that methodology so that investors can be correctly and completely informed is a burden much too large for a broker-dealer to undertake. Again, leaving the investors to garner these facts on their own, and then interpret and understand said facts, when simply standardizing the valuation process could be an opportunity for clarity and transparency that the industry should not overlook.

Again, thank you for allowing Prodigious, LLC to provide comments on the aforementioned matters and we trust that our opinions will assist the Financial Industry Regulatory Authority in achieving its goals. Prodigious has been providing specialized services with respect to non-standard assets, DPPs and non-publicly traded REITs to FINRA and NYSE broker/dealers for nearly 20 years.

Respectfully,

Prodigious, LLC

Enclosure: Prodigious, LLC Public Comment to 11-44

Prodigious LLC

November 11, 2011

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

Via email: pubcom@finra.org

Ms. Asquith:

We are submitting this letter of comment to voice our concerns of the proposed changes as noted in the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 11-44 ("11-44"). The changes to FINRA Rule 2340 attempts to address the values of unlisted Direct Participation Programs ("DPPs") and Real Estate Investment Trusts ("REITs") as they are to be reported on customer account statements.

As stated in 11-44, *"FINRA proposes to permit valuations based on the offering price during the Initial Offering Period when the program is acquiring assets and firms are selling shares at a stable value on a best-efforts basis. However, FINRA proposes to amend the rule to require that all per share estimated values, including those that are based on the offering price, reflect a deduction of all organization and offering expenses (net value)."* It appears 11-44 and the changes proposed in Rule 2340 do not take into consideration key elements such as the Financial Accounting Standards Boards ("FASB") and Accounting Standards Codification ("ASC") 820.

It is our understanding that the FASB partnered with the Securities and Exchange Commission ("SEC") in their construction of the "Fair Value" rules as it pertains to ASC 820. However, this should not be confused with "Fair Market Value" in the Internal Revenue Service's ("IRS") Revenue Ruling 59-60 as described below.

Pursuant to Generally Accepted Accounting Principles (GAAP) and FASB, once a method of valuing assets has been selected, firms are required to continue to utilize that same method for the life of the asset. ASC 825 (formerly FAS 159) specifies that the choice of valuation method is up to the reporting entity. In order to determine "fair value" ASC 820 (formerly FAS 157 "Fair Value Measurements and Disclosures") specifies three levels in which a determination may be made. They are as follows:

Level 1: prices for the same asset from an active market. (If a stock trades on an exchange, then the trade price is the fair value.)

Level 2: observable inputs, such as the active market price for similar assets, or a redemption price for the subject asset. (If the client holds a note, then it would seem that the principal redemption price is an observable input and the interest is to compensate the note holder for the time value of money.)

Level 3: unobservable inputs, such as an income approach or a market data approach or a cost approach.

4745 Independence Street, Suite B, Wheat Ridge, CO 80033 Phone: 303-716-7234 Fax: 303-716-7239

Marcia E. Asquith
FINRA
November 11, 2011
Page Two

Therefore, once a method for valuing the assets has been chosen, it must continue to provide a value within those standards identified above until the asset is sold, paid off or becomes impaired. Furthermore, FASB ASC 820 requires firms to independently evaluate the fair value measurement process utilized by the fund managers to accurately calculate the NAV.

As referenced above, another key factor that appears to not be taken into consideration is the IRS Revenue Ruling 59-60. In Section 1 of 59-60 it states, "The purpose of this Revenue Ruling is to outline and review in general the approach, methods and factors to be considered in valuing shares of the capital stock of closely held corporations for estate tax and gift tax purposes. The methods discussed herein will apply likewise to the valuation of corporate stocks on which market quotations are either unavailable or are of such scarcity that they do not reflect the fair market value."

According to 59-60 there are eight components which must be taken into consideration when arriving at a fair market value.

1. The nature of the business and the history of the enterprise from its inception.
2. The economic outlook in general and the condition and outlook of the specific industry in particular.
3. The book value of the stock and the financial condition of the business.
4. The earning capacity of the company.
5. The dividend-paying capacity.
6. Whether or not the enterprise has goodwill or other intangible value.
7. Sales of the stock and the size of the block of stock to be valued.
8. The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

When taking ASC 820 and IRS Rev Ruling 59-60 into consideration, it appears the proposed changes to FINRA Rule 2340 may inherently cause potentially serious tax problems to owners of alternative investments. The proposed changes identified in 11-44 also do not address redemption prices and secondary market trades. Rule 2340 does not address the concerns of giving considerations to changes in asset values with respect to valuations. So our primary concern is whether there is empirical evidence to support FINRA 11-44 (Rule 2340) over ASC 820 or Rev Ruling 59-60. As such, the question as to whether the IRS would accept the changes with respect to Rule 2340 approach over 59-60 for estate valuations remains to be answered.

With that said we have used a similar method if the valuation date is during the offering period and if the offering period is relatively short and other indicators are not available. However, once the redemption price kicks in, the method prescribed by Rule 2340 will essentially become meaningless, so the proposed changes will cause confusion for multiple-year offerings.

We would be open to discuss this matter and our thoughts as to what we believe would be the most appropriate and prudent methods and solutions to address the concerns described above.

Marcia E. Asquith
FINRA
November 11, 2011
Page Three

About Prodigious

Prodigious has been providing pricing and valuation services as well as transfer services for alternative investment securities on behalf of the financial services industry since the 1990s. It has a strong knowledge and intimate understanding of these securities and it is our desire to ensure the integrity of the marketplace is maintained while providing complete transparency for both the industry participant firms and the general public.

Respectfully,

Prodigious, LLC
Wheat Ridge, Colorado

Business Law Section
AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654
~~(312) 988-5588~~
Fax: (312)988-5578
www.ababusinesslaw.org
businesslaw@americanbar.org

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

FINRA
April 9, 2012
Page 4

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] <u>Per Share Estimated</u> Value

A member must [publish] <u>provide</u> 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;
([ii] 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
([iii] 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

AMERICAN REALTY CAPITAL
405 PARK AVENUE, 12TH FLOOR
NEW YORK, NY 10022

April 11, 2012

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

RE: *Regulatory Notice 12-14 regarding Customer Account Statements*

Dear Ms. Asquith,

Please accept this letter in response to Regulatory Notice 12-14 on the Proposed Amendments to NASD Rule 2340[1] to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts on Customer Account Statements (the "Notice").

In the Notice, Financial Industry Regulatory Authority, Inc. ("FINRA") has proposed amendments to NASD Rule 2340 to address how firms report the per share estimated values of unlisted Direct Participation Programs ("DPPs") and unlisted Real Estate Investment Trusts ("REITs") (collectively, "Issuers") on customer account statements. The proposed amendments would require a member firm to provide per share estimated values based on per share estimates disclosed in the Issuer's most recent periodic or current report filed with the SEC. Further, the amendments would require that these per share estimates be "based on an appraisal of assets and liabilities."

American Realty Capital and its FINRA member subsidiary, Realty Capital Securities, LLC, applaud FINRA's Division of Corporate Financing in taking such action which will serve to ensure enhanced transparency and Issuer accountability. These measures will allow the investor better visibility on those costs to investors which today are somewhat difficult to ascertain. We illustrate below how these proposed changes can be especially helpful to investors in reviewing their customer account statements.

Accordingly, we respectfully present FINRA the following comments for consideration:

- *First,* in light of comments made to Regulatory Notice 11-44, FINRA drafted a revised proposal requiring an Issuer to disclose a per share estimated value once it has conducted an appraisal of its assets and liabilities, as presented in the second periodic or current report as filed with the SEC.

[1] As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. See SR-FINRA-2009-028. The amendments discussed in FINRA Regulatory Notice 12-14 would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of SEC approval. The timeline for this amendment was extended until April 27, 2012.

We support the proposed requirement that a firm provide a per share estimated value based upon an acceptable valuation of the Issuer's assets and liabilities from its most recent periodic or current report. This proposal addresses the need to provide investors with important information on the value of their investment, while allowing Issuers sufficient time to invest net offering proceeds in line with its investment objectives.

- *Second,* during an Issuer's initial offering period, for the purposes of reporting a per share value on customer account statements, a firm would only be required to list a modified net offering price [2] or list the security as "not priced."

  We support the presentation of a "Net Offering Price" which excludes any upfront "underwriting compensation expenses [as defined in Rule 2310(b)(4)(c)(ii)] reimbursed or paid for with offering proceeds" until the per share estimated value is provided in the Issuer's periodic or current report. We believe that amount best reflects what is received by the Issuer for investment and it provides for a more consistent treatment when compared to other financial products.

Furthermore, American Realty Capital and Realty Capital Securities respectfully suggest the following additional proposals:

- **"Uniform Implementation"** – We oppose the concept of "grandfathering." As we previously noted with respect to FINRA Regulatory Notice 11-44, we believe that the effective date of this proposal should uniformly be July 1, 2014. This allows sufficient time for Issuers, transfer agents, broker dealers, and statement providers to prepare for the changed approach. Each Issuer should comply simultaneously and two years affords ample time for Issuers to put policies in place to comply with the Notice.

- **"Initial Offering Period"** – We believe that the Notice should clarify the definition of "initial offering period." This will allow Issuers to define with greater precision when they must begin their process to determine per share estimated value. We believe that it would be helpful to clarify that the "initial offering period" is three years *plus* the potential 180 day extension as provided for in Rule 415 of the Securities Act of 1933.

- **"Applicability to all NAV products"** – We believe that the Notice should apply to all NAV products, not just daily NAV products in order to provide clarity with respect to the disclosures required in customer account statements.

American Realty Capital and Realty Capital Securities remain committed to conducting ourselves and our sponsor's companies in accordance with industry "best practices." We embrace this principle for our entire suite of investment programs and have taken significant steps to present the current value of certain of our securities offerings to our investors.

In fact, American Realty Capital Trust IV, Inc., our latest non-traded REIT offering currently in registration with the SEC, adheres to the requirements of the proposed amendments and goes a step further by requiring quarterly NAV calculations beginning the first quarter following its acquisition of at least $1.2 billion in total portfolio assets (or approximately halfway through its intended equity raise,

---

[2] This proposal also will amend FINRA Rule 2310(b)(4)(c)(ii) to redefine "net offering price" as "gross offering price less any front-end underwriting compensation expenses reimbursed or paid for with offering proceeds."

instead of ***after*** the initial offering period). At that time, it intends to set a purchase price equal to NAV plus applicable commissions while the purchase price in its distribution reinvestment plan will be equal to NAV. We believe this new offering more closely aligns a best practice, i.e., current third-party valuation, with the interests of stockholders. We expect this practice will establish a new standard for the public, non-listed REIT and DPP industries.

Thank you in advance for your repeated courtesies and consideration.

Respectfully,

Michael Weil

CEO, Realty Capital Securities, LLC, Dealer Manager for:

American Realty Capital New York Recovery REIT, Inc.
American Realty Capital Trust III, Inc.
American Realty Capital Healthcare Trust, Inc.
American Realty Capital – Retail Centers Of America, Inc.
Phillips Edison – ARC Shopping Center REIT, Inc.
American Realty Capital Daily Net Asset Value Trust, Inc.
American Realty Capital Global Daily Net Asset Value Trust, Inc.
American Realty Capital Trust IV, Inc.
United Development Funding IV, Inc.

Nicholas S. Schorsch

Chairman & CEO, American Realty Capital, parent company to Realty Capital Securities and sponsor of American Realty Capital public non-traded real estate offerings

NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS®

◆ ◆ ◆

REITS: BUILDING DIVIDENDS AND DIVERSIFICATION®

April 11, 2012

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

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.

1875 I Street, NW, Suite 600, Washington, DC 20006-5413
Phone 202-739-9400 Fax 202-739-9401 REIT.com

Ms. Marcia E. Asquith
April 11, 2012
Page 2

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,

Steven A. Wechsler
President & CEO

April 11, 2012

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

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 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 PNLR 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 PNLR 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 PNLR 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 PNLR 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 PNLR 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 PNLR's board of directors, the majority of which must be independent directors. The PNLR Council notes that, for example, while most PNLRs provide valuation disclosures in their SEC reports based on net asset value, some PNLRs have chosen to use enterprise value. In addition, PNLRs 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 PNLR 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 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 PNLR 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 PNLR Council generally agrees with and supports the proposed modifications to the definition of net offering price. The PNLR Council agrees with FINRA's definition of net offering price as gross offering price less point of sale or front-end underwriting commissions. The PNLR 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 PNLR 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 PNLR 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 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 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~~ (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~~.

Ms. Marcia E. Asquith
April 11, 2012
Page 7

(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 ~~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 value ~~NAV~~ or net offering price; and

(e~~d~~) 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.

(e) Exemptions

No Change.

* * * * *

W. P. CAREY

April 11, 2012

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,

W.P. Carey & Co., LLC ("W.P. Carey") is writing to express its support of FINRA's efforts to improve transparency and enhance investor confidence in the Direct Participation Program and unlisted REIT sectors, as exemplified in FINRA Regulatory Notice 12-14. We believe that FINRA has taken a very important step by requiring issuers to publish valuation information sooner, and by requiring that such information take the form of a per share estimated net asset value ("NAV") that is based upon an appraisal of an issuer's assets and liabilities. We believe that requiring issuers to prepare and disclose a per share NAV based upon the fair value of an issuer's assets and liabilities, as determined by appraisal, is 1) consistent with the basis of valuation reporting required by institutional investors in direct, private, joint venture, open and closed end fund and other forms of real estate investment[1]; 2) a recognized metric used by securities analysts and institutional investors in comparing listed REIT equity securities; and 3) consistent with the GAAP accounting methodology used by investment companies (which are the forbears of the REIT industry) and the growing movement towards fair value accounting under U.S. and international accounting standards generally. We believe that the primarily retail investors who invest in DPPs and unlisted REITs should benefit from the wisdom of sophisticated institutional investors and analysts and have access to the same quality of information for their investments in DPPs and unlisted REITs.

We note that the unlisted REIT industry has grown significantly in the past decade and investors now enjoy many options in terms of product and sponsorship. We think that in light of the proliferation of new issuers, sponsors and products, it is particularly critical that investors have a useful basis of comparison. We believe that a per share NAV based on fair values will provide a useful basis of comparison, and is a metric that has been validated by the institutional investment community, as well as analysts of listed REIT equity securities.

---

[1] See, for example, the Real Estate Information Standards, developed by the National Council of Real Estate Investment Fiduciaries and the Pension Real Estate Association at reisus.org.

W. P. CAREY

We also believe that DPPs and unlisted REITs should retain an independent third party to appraise an issuer's assets at least once each year. We believe that the involvement of a third party will enhance the credibility of per share estimated NAVs. We also think it would ameliorate the perceived and actual conflicts of interest that may exist between the sponsor and the issuer in determining valuations and provide an independent check for perpetual life products that will not ultimately list or liquidate. We recognize that a third party's involvement will add costs to the process, but we believe that the timeline for providing valuation information gives issuers sufficient time to prepare for the costs and that the benefits to be gained for investors more than justify the expense. Issuers could consider having a third party appraise a percentage of their assets each quarter as a means of spreading the cost over more than one period.

In conclusion, we believe that FINRA's proposed requirement for DPPs and unlisted REITS to disclose estimated per share NAVs based on appraisals of an issuer's assets and liabilities is a great step forward in improving transparency and enhancing investor confidence in our industry. We urge FINRA to retain this aspect of its proposed amendments to NASD Rule 2340 as set forth in Regulatory Notice 12-14.

Sincerely,

W.P. Carey & Co., LLC

W. P. Carey & Co. LLC, 50 Rockefeller Plaza, New York, NY 10020 212-492-1100 1-800-WP CAREY Fax: 212-492-8922
WPC NYSE

Advocacy
Collaboration
Education

Advocating Direct Investments Through Education

IPA
Investment Program Association

January 31, 2013

Mr. Robert L.D. Colby
Chief Legal Officer
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Suggestions for Disclosure of Share Prices on Customer Account Statements As Proposed In Regulatory Notice 12-14

Dear Mr. Colby,

The IPA Task Force on Account Statement Reporting ("IPA TF") appreciated the opportunity to meet with you, Joe Price and Tom Selman and obtain a better understanding of FINRA's concerns and objectives relating to prices for illiquid publicly registered direct participation programs and non-listed REITs which appear on customer account statements during the offering period. Following that meeting, the IPA TF has given considerable thought to possible solutions which achieve your regulatory objectives and enhance transparency, accuracy and understandability of account statement reporting for investors.

We are writing to offer a potential solution to the challenges we have mutually discussed with respect to account statement reporting for illiquid investments. We have crafted this solution to address what we understand to be the key objectives of FINRA and the SEC, namely that the pricing on account statements:

- Insure the accuracy of account statement reporting;
- Enhance the transparency of underwriting compensation expenses paid by investors;
- reflect the impact of distribution costs in a manner more consistent with account statement reporting for other retail investment products;
- not remain static during the initial offering period (typically two to three years) of these securities;
- be replaced by estimates of share value based on determinations of net asset value significantly sooner than under the current NASD Rule 2340, thereby addressing in a more timely fashion the potential for value changes during an extended offering period; and

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

- reflect any material impact of distributions during the offering period which constitute a return of capital, thereby making such distributions more transparent to investors.

Challenges Relating To "Not Priced" and "Below the Line" Alternatives

The IPA TF has carefully considered two of the alternatives FINRA discussed at our meeting: (i) the removal of the existing requirement for the account statement to show any pricing information for the security (an option proposed in RN 12-14); or (ii) the reporting of the investment on account statements at original cost carried "below the line" – i.e. not included in the net worth total for the account holder.

We respectfully submit that neither of these alternatives achieves the objectives cited above. Allowing the security to be shown as "not priced" on account statements or placing the security "below the line" would not make distribution costs more visible to investors, would not assist investors to recognize the impact of material returns of capital in the form of distributions during the offering period, and would not provide a more dynamic pricing protocol during the offering period (i.e. the security would remain un-priced or priced at cost during the offering period).

We have identified a number of other significant issues relating to the implementation of the "not-priced" or "below the line" options, including the following:

- Both options would result in an immediate "write-down" (or more accurately, elimination) from customer net worth of the amount invested in all currently offered and closed investment programs which have not yet commenced asset valuations. The estimated aggregate magnitude of this customer net worth write-down on account statements is approximately $29 billion, potentially triggering a precipitous number of customer questions and complaints to FINRA and FINRA-member broker-dealers.

- From the perspective of individual investors, purchasing a DPP or non-listed REIT security would result in an immediate reduction in account statement net worth by the entire amount invested, raising confusion and concern and creating a reluctance to make future investments. (Correspondingly, upon valuation of the security, account statement net worth would spike, potentially creating a misleading impression of the performance of the investment account.)

- The resulting potentially biased perception of these investments would result in a significant decrease in capital formation unrelated to the merit and efficacy of the individual investment programs. Given the Congressional desire to facilitate capital formation for American businesses, as evidenced in the provisions of the JOBS Act of 2012 and the SEC's mandate to implement such capital formation provisions, the IPA TF prefers a solution which would not negatively impact capital formation. In this regard it is noteworthy that IPA member firms have been responsible for over $44 billion of DPP and public non-listed REIT capital formation during the past five years. The programs provide capital for a variety of industries, including real estate (construction and finance), oil and gas, equipment leasing and businesses in numerous other industries which execute sale-leasebacks to provide capital for corporate expansion and job growth.

- Approximately 40% of the capital invested in DPPs and Non-Listed REITs comes from ERISA accounts. The "not priced" and "below the line" options would complicate broker-dealer compliance with the requirement to provide pricing for such accounts and could compromise accurate RMD calculations and Form 5498 reporting.

- These options would also result in increased difficultly for transfer agents and custodians in satisfying requirements under Rule 15c3-3 and would add obstructions to 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.

Advocating Direct Investments
Through Education

IPA
Investment Program Association

Perhaps most importantly, the IPA TF also respectfully submits that both of these approaches, while intended to improve reporting, could be interpreted by other regulatory authorities, legislators, the media and the investing public as a retreat from the very transparency that FINRA clearly seeks to enhance.

Proposed Solution

The IPA TF believes there is a solution to these challenges and respectfully submits that a rule can be fashioned and implemented which achieves the aforementioned regulatory goals using objective and quantifiable information – a rule that would avert numerous unintended consequences and facilitate dynamic and accurate account statement reporting.

Specifically, the IPA TF suggests and would vigorously endorse the official support of the entire IPA for the following approach to the revision of Rule 2340 if proposed by FINRA:

- The account statement would reflect "Net Offering Price" until the earlier of (i) an appraisal-based valuation of the securities is published in the issuer's periodic or current report, or (ii) the filing of the issuer's first periodic report following the first anniversary of the date when initial escrow is released to commence investments. As proposed in RN 12-14, "Net Offering Price" would be defined as gross offering price less sales commissions and dealer manager fees (i.e. front-end underwriting compensation expenses as defined in Rule 2310(b)(4)(c)(ii)) reimbursed or paid for with offering proceeds. Please note that in our comment letter of April 11, 2012 the IPA recommended that Net Offering Price only deduct initial point of sale commission – a method the IPA believes is more consistent with that used by the mutual fund industry, thereby creating a level playing field among publicly registered investments.

- Following the filing of the issuer's first periodic report after the first anniversary of the breaking of escrow, "Net Offering Price" on account statements would be reduced to reflect that portion, if any, of cumulative distributions to investors through the anniversary of the breaking of escrow which was provided from borrowings, net offering proceeds, returns of capital in distributions from asset sales proceeds, or stock dividends. Such an adjustment would capture any dilution of per share value resulting from unearned distributions in the initial year following

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

breaking of escrow. We note that the SEC currently requires disclosure of the sources of distributions and that such disclosures delineate distributions provided by the aforementioned sources. Therefore, this adjustment to Net Offering Price would be consistent with, and verifiable by reference to, the disclosures in forms 10-Q and 10-K.

- Given this methodology, the IPA recommends that the term used be "Net Investment" in lieu of "Net Offering Price." We believe this term would more accurately describe the amount shown on the account statement following the adjustment for any return of capital component of distributions.

- After the filing of the second period report following the second anniversary of the effective date of the first registration of the offering, the account statement would reflect the estimated per share valuation. We note, as in our April 11, 2012 comment letter, that FINRA Rule 2310(b)(5) would need to be amended 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 periodic report (e.g., the Form 10-Q or 10-K) following the second anniversary of the effective date of the first registration of the offering. (The general partner, sponsor or issuer could always choose to provide the estimated value earlier than this requirement.)

Advocating Direct Investments Through Education

IPA
Investment Program Association

The following chart summarizes this approach:

SUMMARY OF ACCOUNT STATEMENT REPORTING	
Period	**Basis of Amount Shown on Statement**
First 12 months following the Breaking of Escrow of the initial offering (through 1st periodic report thereafter)	Net Offering Price (gross offering price reduced by underwriting compensation expenses reimbursed or paid with offering proceeds)
First anniversary of the Breaking Of Escrow until second year of initial offering (through 2nd periodic report thereafter)	Net Offering Price reduced by that portion of cumulative distributions, if any, through the first anniversary of the breaking of escrow provided from borrowings, net offering proceeds, returns of capital in distributions from asset sales proceeds, or stock dividends.
Thereafter	Estimated appraisal-based per share value as reported by the general partner, sponsor or issuer.

If this approach were adopted by FINRA, then Rule 2340(c)(1)(A)(ii) could be amended to read as follows:

(ii) A member may publish on account statements a net offering price, which may be referred to as a "net investment", 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 based estimated valuation of the securities in the issuer's periodic or current report, or the issuer's filing of its second periodic filing following the effective period of the first registration statement for the DPP or REIT securities. Such "net investment" will be adjusted upon the issuer's filing of its first periodic filing following the first anniversary of the breaking of escrow to reflect the portion of cumulative distributions, if any, paid to investors through the first anniversary of the breaking of escrow which have been provided from borrowings, net offering proceeds, returns of capital from distributions of asset sales proceeds, or stock dividends.

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

Advocating Direct Investments
Through Education

IPA
Investment Program Association

Conclusion

The IPA TF believes that the above approach to account statement reporting represents a significantly superior alternative to the "not priced" or "below the line" approaches in that it provides useful and accurate information to investors and achieves what we understand to be the primary objectives of FINRA in amending Rule 2340. Please note that this letter addresses solely the issue of the price shown on customer account statements. We refer FINRA to the comments previously provided in the IPA's April 11, 2012 letter relating to other provisions of the proposed amendments to Rule 2340.

The IPA TF welcomes the opportunity to answer any questions relating to this proposed solution or to other provisions of RN 12-14 and to provide constructive comments on any technical aspects of the proposed text of the amendments. If FINRA decides to embrace a solution along the lines outlined above, the IPA TF would act swiftly to seek the IPA's formal endorsement of FINRA's solution.

We look forward to the opportunity to continue to work constructively with FINRA.

Respectfully Submitted

IPA Task Force on Account Statement Reporting

cc: Mr. Joseph Price
Mr. Thomas Selman

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

NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS®

REITS: BUILDING DIVIDENDS AND DIVERSIFICATION®

March 8, 2013

Robert L. D. Colby, Esq.
General Counsel
FINRA
1735 K Street
Washington DC, 20006

Re: FINRA Regulatory Notice 12-14

Dear Mr. Colby,

On behalf of the Executive Committee of NAREIT's Public Non-Listed REIT (PNLR) Council, I want to thank you for meeting with us last month to discuss our views and your current thinking on FINRA's Regulatory Notice 12-14 issued in connection with possible amendment of NASD Rule 2340 (Customer Account Statements).

We found the conversation both informative and constructive, and we hope that the information and perspective we sought to provide to you and your colleagues was helpful.

As stated to you at the meeting, the Executive Committee of our PNLR Council supports the approach to FINRA Notice 12-14 delineated in the Investment Program Association's January 31, 2013 letter to you.

Given the passage of time since Regulatory Notices 11-44 and 12-14 were published, the PNLR Executive Committee also believes it is important for FINRA to appropriately adjust forward the effective date for amendments to be made to NASD Rule 2340 so that sponsors of real estate investment trusts and FINRA-regulated entities are able to plan a workable transition in the full interest of existing and potential investors.

As the process affecting NASD Rule 2340 unfolds, NAREIT's PNLR Council looks forward to continued dialogue with you and you colleagues

Sincerely,

Steven A. Wechsler
President and CEO

1875 I Street, NW, Suite 600, Washington, DC 20006-5413
Phone 202-739-9400 Fax 202-739-9401 REIT.com

Advocacy
Collaboration
Education

IPA
Investment Program Association

January 14, 2014

Mr. Robert L.D. Colby
Chief Legal Officer
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Dear Mr. Colby,

The Board of Trustees of the Investment Program Association ("IPA") wishes to acknowledge its appreciation for the opportunities you and your staff have given the IPA to provide information and views regarding potential amendments to NASD Rule 2340 – Customer Account Statements (the "Proposed Amendments"). Through this constructive dialogue we have obtained a better understanding of FINRA's objectives relating to prices for illiquid publicly registered direct participation programs ("DPPs") and non-listed REITs ("NL REITs") which appear on customer account statements during the offering period.

The IPA shares and supports FINRA's commitment to changes which will benefit our industry's investors in the following ways:

- Enhance the accuracy of account statement reporting;
- Foster transparency of underwriting compensation expenses paid by investors;
- Reflect the impact of securities distribution costs in a manner more consistent with account statement reporting for other retail investment products;
- Provide investors with estimates of share value based on determinations of net asset value significantly sooner than under the current NASD Rule 2340, thereby addressing in a more timely fashion the potential for value changes during an extended offering period; and
- Improve the information provided to investors concerning the sources of cash distributions received during the offering period as the issuer raises capital and aggregates assets.

As you know, the IPA has given considerable thought to possible approaches to the Proposed Amendments which achieve these objectives. In the past several weeks we have devoted several Board of Director meetings to defining IPA recommendations with respect to the Proposed Amendments, with a particular focus on issues which provide significant challenges of implementation by FINRA and the industry, standardization across the many asset classes which DPPs and NL REITs encompass, and consistency with existing recognized valuation and reporting standards.

IPA
Investment Program Association

As a result of these Board meetings, we are writing to provide FINRA with a brief summary of provisions which, if filed with the Securities and Exchange Commission ("SEC") and exposed for comment, the IPA intends to support. For brevity we have not provided all the details and justifications of the IPA positions herein. We are prepared to provide more fulsome information, if necessary, during the SEC comment period. However, we believe that any Proposed Amendments which are filed with the SEC need to be sufficiently defined prior to exposure for comment to obtain thoughtful and definitive industry input. To that end, we respectfully suggest that FINRA staff and the IPA continue to engage in a constructive dialogue in the coming days to clarify the positions described below and any potential alternatives.

Reporting of Share Values Based on "Net Investment"

The IPA recommends and will support the reporting of share values on customer account statements based on "Net Investment" where Net Investment is defined as Gross Offering Proceeds reduced by (i) commissions, and (ii) dealer manager fees.

Since issuer offering and organizational costs are indeterminate at the time of commencement of an offering, the IPA questions the advisability of deducting estimates of these costs from reported account statement values prior to the incorporation of the actual costs incurred in a formal NAV valuation after the second year. If FINRA nevertheless proposes to include such costs in account statement values during the offering period, the IPA would recommend that such costs be amortized as actually incurred over the offering period. We are prepared to discuss with you over the next few days our observations concerning the treatment of an issuer offering and organization costs method the IPA deems appropriate and further information on an amortization approach.

Addressing Potential "Over-Distributions" Prior To Publishing of NAV

The IPA has carefully considered the approach which FINRA has proposed whereby account statement values would be adjusted by an amount deemed to constitute "over-distributions" prior to the issuance of an estimated NAV per share. The IPA believes an approach which addresses this issue through adjustments to account statement values is not recommended. Information which the industry is prepared to present now or during a comment period in support of this position includes:

- the nature of DPPs and NL REITs as start-up businesses, operational anomalies associated therewith, and precedents for treatment of distributions from typical start-up businesses;

- o the unprecedented nature of such a regulatory approach compared with all other public securities offerings;
- o the severe implementation challenges for FINRA to incorporate in a single rule accounting standards and practices unique to a variety of asset classes and industries funded by DPPs and NL REITs and to define appropriate "earnings" metrics, potentially leading to years of interpretive releases;
- o potential confusion created among investors by valuation changes dictated by a single attribute of value;
- o the fact that this issue has already been substantially addressed by the industry via:
    - ▪ enhanced member firm due diligence relating to distribution sources, coverage and sustainability;
    - ▪ improved disclosure required by the SEC in periodic filings relating to sources of distributions;
    - ▪ the contemplated acceleration of initial valuations (which will capture the impact of over-distribution on share values)
    - ▪ the promulgation in 2013 of the IPA Valuation Guideline and expanding use of broker-dealer selling agreements which call for valuations approximately two years after breaking of escrow.

Given these considerations, the IPA recommends an approach which avoids the numerous difficulties associated with attempting to adjust account statement valuations for over-distributions – a recommended approach which is entirely consonant with existing regulations of the SEC and, importantly, provides a "level regulatory playing field."

The IPA recommends and will support a significantly enhanced disclosure regimen that parallels the principals which exist in current regulations regarding "over-distributions" by companies subject to the Investment Company Act of 1940 ("1940 Act Companies"). Section 270.19a-1 of the Investment Company Act requires (simplifying the concept) that the payment of any dividend from a source other than current (or prior) fiscal year net income or accumulated undistributed net income is prohibited unless such payment is accompanied by a **written statement** (a "Section 19(a) Notice") that discloses the source(s) of the distribution. The SEC has stated that *"the purpose of this Secion....is to afford security holders adequate disclosure of the sources from which dividend payments are made."* The parallel between this requirement for 1940 Act Companies and the stated objectives of FINRA with respect to NL REITs and DPPs is striking and suggests that this alternative is the appropriate and proven path for addressing the issue of "over-distribution" and is a path which provides a level regulatory playing field for DPPs, NL REITs and 1940 Act companies.

Therefore, the IPA recommends and will support a requirement that during the offering period prior to the initial NAV determination, DPP and NL REIT issuers will be required to provide a notice to investors which quantifies the source(s) of distributions when such distributions come from a source other than earnings. The IPA further recommends that such quantification of sources be based upon appropriate performance metrics allowed by the SEC in periodic filings, including GAAP Cash Flow, NAREIT FFO, or any other such metric allowed by the SEC. The IPA is prepared to meet with you in the next few days to provide additional details and benefits of such a Disclosure Notice requirement.

"Not Priced Option"

The IPA recommends and will support the preservation of the existing rules which require reporting on customer account statements of valuations where the issuer includes an estimated value in annual reports (unless the value can be demonstrated to be inaccurate or based on "stale" data). The IPA respectfully submits that the Not Priced Option, while intended to improve reporting, could be interpreted by other regulatory authorities, legislators, the media and the investing public as a retreat from the very transparency that FINRA seeks to enhance. Further, we refer you to our letter dated January 31, 2013, for additional concerns relating to a "Not Priced Option", including concerns relating to ongoing broker-dealer due diligence and required IRS reporting for ERISA accounts.

Timing of Initiation of Valuations

The IPA recommends and will support a requirement that member firms may only participate in an offering if the issuer discloses an estimated per share value in the second periodic report filed with the SEC after the second anniversary of the breaking of escrow and in each annual report thereafter. (Note: This timing is generally consistent with current IPA Non-Listed REIT Valuation Guideline which calls for disclosure no more than 150 days after the second anniversary of escrow break – a period designed to address the calendar non-uniformity of SEC periodic filing deadlines.)

Implementation / Effective Date of the Amendments

The IPA recommends and will support an 18-month period between issuance of the final Amendments and their effective date. It is the IPAs conclusion that the DPP and NL REIT current offering structure would not be viable and that all new offerings would be structured differently. As such we anticipate that post adoption of the rule the industry will immediately respond with new registrations of new offerings that contemplate the proscribed rules. These offerings will be subjected to various regulatory regimens

Investment Program Association

including SEC, FINRA and State Securities Administrators over the next 12 months before they are declared effective and approximately another 6 months before a best efforts offering can commence in earnest. Our members are deeply concerned about a disruption of capital formation during this 18 month period. A thoughtful approach to transition is imperative -- one that also discourages filings during the transition period in an attempt to skirt the regulatory intention of transition, but insures that capital formation is not abruptly halted.

Conclusion

The IPA believes that the above mentioned approaches to the issues associated with Proposed Amendments to NASD Rule 2340 will provide useful and accurate information to investors and achieve the primary objectives of FINRA. We have not provided all the details and justifications of these IPA recommendations, and we respectfully suggest that FINRA staff and the IPA continue discussions over the next few days to clarify these recommendations, explore any potential alternatives or modifications of these specific approaches, and address any details necessary for prompt submission of Proposed Amendments to the SEC.

We look forward to continuing to work constructively with FINRA over the coming days.

Respectfully Submitted

Mark Goldberg

Mark Goldberg
Chairman
Investment Program Association

cc: Mr. Joseph Price
Mr. Thomas Selman
Mr. Paul Matthews

EXHIBIT 5

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

* * * * *

NASD Rule

* * * * *

2300. TRANSACTIONS WITH CUSTOMERS

* * * * *

2340. Customer Account Statements

(a) through (b) No Change.

(c) <u>Unlisted</u> DPP/REIT Securities

[(1)(A) Voluntary Estimated Value]

[A general securities member may provide a per share estimated value for a direct participation program ("DPP") or real estate investment trust ("REIT") security on an account statement, provided the member meets the conditions of paragraphs (b)(2) and (3) below.]

[(B) Mandatory Estimated Value]

[If the annual report of a DPP or REIT includes a per share estimated value for a DPP or REIT security that is held in the customer's account or included on the customer's account statement, a general securities member must include an estimated value from the annual report, an independent valuation service, or any other source, in the first account statement issued by the member thereafter, provided that the member meets the conditions of paragraphs (b)(2) and (3) below.]

[(2) A member may only provide a per share estimated value for a DPP or REIT security on an account statement if the estimated value has been developed from data that is as of a date no more than 18 months prior to the date that the statement is issued.]

[(3) If an account statement provides an estimated value for a DPP or REIT security, it must include:]

[(A) a brief description of the estimated value, its source, and the method by which it was developed; and]

[(B) disclosure that DPP or REIT securities are generally illiquid, and that the estimated value may not be realized when the investor seeks to liquidate the security.]

[(4) Notwithstanding the requirement in paragraph (b)(1)(B), a member must refrain from including a per share estimated value for a DPP or REIT security on an account statement if the member can demonstrate the value was inaccurate as of the date of the valuation or is no longer accurate as a result of a material change in the operations or assets of the program or trust.]

<u>No member is required to include a per share estimated value of a direct participation program (DPP) or real estate investment trust (REIT) security in a customer account statement, but any member may do so, provided that the per share estimated value has been developed in a manner reasonably designed to ensure that it is reliable, the member has no reason to believe that the per share estimated value is unreliable, and the account statement provides the disclosures in subparagraph (2)(A).</u>

(1) For purposes of this paragraph (c), the following per share estimated value methodologies for a DPP or REIT security will be presumed to have been developed in a manner reasonably designed to ensure that it is reliable.

(A) Net Investment

At any time before the second anniversary of breaking escrow, the member may include a per share estimated value reflecting:

(i) the "net investment" disclosed in the issuer's most recent periodic or current report ("Issuer Report"). "Net investment" must be based on the "amount available for investment" percentage in the "Estimated Use of Proceeds" section of the offering prospectus or, where "amount available for investment" is not provided, another equivalent disclosure; and that deducts

(ii) the portion, if any, of cumulative distributions per share that exceeded GAAP net income per share for the corresponding period, after adding back depreciation and amortization or depletion expenses, and provided that the deduction for each distribution shall not exceed the full amount of the distribution.

(B) Independent Valuation

At any time, the member may include a per share estimated value reflecting a valuation disclosed in the Issuer Report. A third-party valuation expert or experts must determine, or provide material assistance in the process of determining, the valuation.

(2) Disclosures

(A) If an account statement provides a per share estimated value for a DPP or REIT security, it must:

(i) briefly describe the per share estimated value, its source, and an explanation of the method by which such per share estimated value was developed; and

(ii) disclose that the DPP or REIT securities are not listed on a national securities exchange, are generally illiquid and that, even if a customer is able to sell the securities, the price received may be less than the per share estimated value provided in the statement.

[(5)] (B) If an account statement does not provide an estimated value for a DPP or REIT security, it must include disclosure that:

[(A)] (i) unlisted DPP or REIT securities are generally illiquid;

[(B)] (ii) the current value of the security will be different than its purchase price and may be less than the purchase price; and

[(C)] (iii) if applicable, that [accurate valuation information] an estimated per share value of the security currently is not available.

(d) Definitions

For purposes of this Rule, the following terms will have the stated meanings:

(1) through (2) No Change.

(3) "direct participation program" or "direct participation program security" refers to the publicly issued equity securities of a direct participation program as defined in FINRA Rule 2310[2810] (including limited liability companies), but does not include [securities on deposit in a registered securities depository and settled

regular way,] securities listed on a national securities exchange[,] or any program registered as a commodity pool with the [Commodities] Commodity Futures Trading Commission.

(4) "real estate investment trust" or "real estate investment trust security" refers to the publicly issued equity securities of a real estate investment trust as defined in Section 856 of the Internal Revenue Code, but does not include [securities on deposit in a registered securities depository and settled regular way or] securities listed on a national securities exchange.

(5) through (6) No Change.

(e) No Change.

* * * * *

FINRA Rules

* * * * *

2300. SPECIAL PRODUCTS

2310. Direct Participation Programs

(a) No Change.

(b) Requirements

(1) through (4) 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) a per share estimated value is calculated on a periodic basis in accordance with a methodology disclosed in the prospectus; or

(B) the general partner or sponsor of the program or REIT has agreed to: [will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Exchange 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.]

(i) disclose in the first periodic report filed pursuant to Section 13(a) or 15(d) of the Exchange Act after the second anniversary of breaking escrow and in each annual report thereafter, a per share estimated value calculated by, or with the material assistance of, a third-party valuation expert; an explanation of the method by which the per share estimated value was developed; the date of the valuation; and the identity of the service used to obtain the valuation; and

(ii) ensure that the valuation is:

a. conducted at least once every two years;

b. derived from a methodology that conforms to standard industry practice; and

c. accompanied by a written opinion to the general partner or sponsor of the program or REIT that explains the scope of the review, the methodology used to develop the valuation, and the basis for the per share estimated value.

(6) No Change.

(c) through (d) No Change.

* * * * *

5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

5110. Corporate Financing Rule — Underwriting Terms and Arrangements

(a) through (e) No Change

(f) Unreasonable Terms and Arrangements

(1) No Change.

(2) Prohibited Arrangements

Without limiting the foregoing, the following terms and arrangements, when proposed in connection with a public offering of securities, shall be unfair and unreasonable.

(A) through (L) No Change.

[(M) For a member or person associated with a member to participate in a public offering of real estate investment trust securities, as defined in NASD Rule 2340(c)(4), unless the trustee will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Exchange Act a per share estimated value of the trust securities, the method by which it was developed, and the date of the data used to develop the estimated value.]

(g) through (i) No Change

* * * * *