

## **REQUEST FOR PUBLIC COMMENT**

### **PROPOSED REVISIONS TO NASAA STATEMENT OF POLICY REGARDING REAL ESTATE INVESTMENT TRUSTS**

**July 12, 2022**

**Deadline for Public Comment: August 11, 2022**

The Corporation Finance Section (“Section”) and the Direct Participation Programs Project Group (“Project Group”) of the North American Securities Administrators Association, Inc. (“NASAA”) seek public comment on proposed revisions to the NASAA *Statement of Policy Regarding Real Estate Investment Trusts* (the “REIT Guidelines”), attached hereto as Exhibit A.<sup>1</sup> The four primary revisions being proposed include:

- (1) an update to the conduct standards for brokers selling non-traded REITs, i.e., supplementing the suitability section with references to the new best interest conduct standard;
- (2) an update to the net income and net worth financial figures in the suitability section, i.e., adjusting upward to account for inflation occurring since last adjustment;
- (3) addition of a new standardized concentration limit to the suitability section; and
- (4) addition of a new prohibition against using gross offering proceeds as an investment objective or strategy to make distributions.

Comments on these proposed revisions to the REIT Guidelines should be submitted on or before the deadline above. We are only accepting comments by electronic mail. Comments should be emailed to [NASAAComments@nasaa.org](mailto:NASAAComments@nasaa.org), with a cc: to the Section Chair, Andrea Seidt ([Andrea.Seidt@com.ohio.gov](mailto:Andrea.Seidt@com.ohio.gov)), and the Project Group Chair, Mark Heuerman ([Mark.Heuerman@com.ohio.gov](mailto:Mark.Heuerman@com.ohio.gov)).

All comments received in response to this request will be posted to NASAA’s website ([www.nasaa.org](http://www.nasaa.org)) without edit or redaction, though inappropriate comments will not be posted. Accordingly, please do not include any information in your comment letter that you do not wish to become publicly available. After the close of the comment period, the Section and Project Group will review all comments and consider whether to present the proposed revisions to the REIT Guidelines, in their current or revised form, to the NASAA Board of Directors for potential adoption by vote of the NASAA membership.

#### **I. Summary of Proposed Revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts**

To keep NASAA Statements of Policy current and to enhance retail investor protections surrounding the offer and sale of non-traded REITs to retail investors, the Project Group

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<sup>1</sup> The current REIT Guidelines are available at: <https://www.nasaa.org/wp-content/uploads/2011/07/g-REITS.pdf>.

recommends four revisions to the REIT Guidelines. If adopted, these revisions have the potential to influence updates to other sets of Guidelines that are under development, including those for the Omnibus Guidelines, Asset-Backed Securities, Commodity Pools, Equipment Leasing, Mortgage Programs and Real Estate Programs (other than REITs). These updates will also permit the NASAA Business Organizations and Accounting Project Group to move forward with its proposal for inaugural guidelines applicable to business development companies.

The first area where the existing REIT Guidelines are outdated is in the conduct standard section. All offering circulars of registered direct participation programs, including those for non-traded REITs, have a “suitability” section that governs the standard of conduct that applies to persons selling or recommending the program’s shares. That section of the prospectus also specifies any minimum income and net worth standards that must be met by the investor. The United States Securities & Exchange Commission (“SEC”) elevated the conduct standard applicable to broker-dealers and their associated persons beyond the suitability standard by adopting a new conduct standard known as Regulation Best Interest (“Reg BI”) in 2019. Reg BI became effective June 30, 2020. The first revision recommended in this Notice is to update the REIT Guidelines by formally incorporating into the guidelines this new conduct standard as well as any other updated conduct standards that are adopted by the NASAA jurisdictions as applied to brokers recommending the securities.<sup>2</sup> NASAA welcomes feedback on this adjustment.

Consistent with this first proposed revision, NASAA recommends as the second revision an update to the net income and net worth figures in the suitability section of the prospectus, by adjusting these figures upward for inflation. The current figures have not been updated since the last update on May 7, 2007. NASAA has advocated inflationary adjustments in the accredited investor context for purposes of Regulation D, which figures have not been updated since 1982. It is consistent with NASAA public policy positions to make complementary adjustments to the financial thresholds applicable to these programs. In line with past practice, NASAA is using the U.S. Bureau of Labor Statistics Consumer Price Index for All Urban Consumers as the basis for the adjustment. Adjusting the figures with this index, purchasers of these securities must have either (a) the combination of a minimum annual gross income of \$95,000 and a minimum net worth of \$95,000 or (b) a minimum net worth of \$340,000. The current figures (adopted in 2007) specify the combination of a minimum net income of \$70,000 and minimum net worth of \$70,000 under (a) or the minimum net worth of \$250,000 under (b). Administrators retain their authority under the NASAA Guidelines to require higher or lower numbers as in the past.<sup>3</sup> NASAA welcomes suggestions on this adjustment.

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<sup>2</sup> Please note that NASAA is not taking a position that the securities of any particular issuer, or issuers with similar structures in practice today, can be sold in compliance with Regulation Best Interest or your state standard now or in the future. The proposed adjustments would simply place a disclosure obligation on the issuer and a compliance obligation on the broker similar to suitability. The updates do not examine all provisions within the Guidelines for compliance with current and prospective new conduct standards. For example, the revisions do not address whether NASAA Fee and Expense provisions at their maximum levels permit an issuer at those limits to sell their offering through recommendations by brokers/salespersons in compliance with Regulation Best Interest. However, NASAA welcomes any suggestions you have for further examination of other provisions.

<sup>3</sup> NASAA REIT Guideline III.B.1.

As the third proposed revision, NASAA recommends the addition of a specific concentration limit within the REIT Guidelines. NASAA advanced a similar proposal in 2017, but withdrew it in light of conduct standard proposals pending before the SEC and the U.S. Department of Labor (“DOL”).<sup>4</sup> NASAA was interested in the beneficial impact that the revised conduct standards might have on issuers, brokers, and/or retirement accounts.<sup>5</sup> While the DOL fiduciary rule has since been vacated (following a successful judicial challenge initiated by the industry in the interim), the SEC proceeded with the adoption of Reg BI as noted above. A recent NASAA report indicates that many broker-dealer firms have not materially changed their policies, procedures, or practices regarding the sale of non-traded REITs or other complex, costly, and risky products to retail investors since the passage of Reg BI notwithstanding the enhanced care, disclosure, and conflict of interest obligations mandated by the rule.<sup>6</sup> The NASAA Report also noted that firms recommending non-traded REITs, moreover, had the highest concentration of harmful compensation conflicts of any of the complex, costly, risky products that were recommended by firms examined in the state initiative post-Reg BI.

To limit retail investor risk, particularly the liquidity risk inherent in this product, a growing number of state securities regulators have independently imposed a concentration limit directing the maximum amount a retail investor may invest in non-traded REITs offered in their jurisdictions. At least 20 different jurisdictions have imposed a concentration limit of some form on this product, some selectively on a case-by-case basis and others across the board: Alabama, California, Idaho, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, Tennessee, Texas and Vermont.<sup>7</sup> To promote greater uniformity amongst the membership in this area, NASAA recommends a standardized limitation be formally adopted in the REIT guidelines. More specifically, NASAA recommends a limitation prohibiting an aggregate investment in the issuer, its affiliates, and other non-traded direct participation programs that exceeds 10% of the purchaser’s liquid net worth. Liquid net worth would be defined as that component of an investor’s net worth that consists of cash, cash equivalents, and marketable securities. Multiple states have this standard and many other states use the 10% threshold with very similar language. NASAA welcomes your feedback on this proposed revision.

The fourth and final proposed revision to the REIT guidelines concerns a controversial product feature used by some non-traded REIT sponsors, whereby sponsors reserve the right to use investor proceeds from an offering to fund regular cash distributions. As non-traded REITs are frequently sold and marketed to retail investors as “income-producing” or “yield-producing”

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<sup>4</sup> The primary trade association for sponsors and dealers of non-traded REITs – the Institute for Portfolio Alternatives (formerly known as the Investment Programs Association or “IPA”) responded to NASAA’s previous proposal on September 12, 2016, stating: “This new [DOL] rule, and the anticipated introduction by the SEC in the fall of 2016 of a coordinating fiduciary rule for all retail accounts, addresses many of the potential concerns giving rise to the perceived need for a concentration limit and provides significant additional safeguards for investors.”

<sup>5</sup> The IPA responded to the U.S. Department of Labor on July 21, 2015 that 43% of investments were from retirement accounts in Public Products.

<sup>6</sup> NASAA Reg BI Phase IIA Report (Nov. 2021), [https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021\\_FINAL.pdf](https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021_FINAL.pdf)

<sup>7</sup> See e.g., Brookfield Real Estate Income Trust Inc. Prospectus (Nov. 2, 2021) at i-ii, <https://www.sec.gov/Archives/edgar/data/1713407/000119312521318616/d181632d424b3.htm>

assets, investors might not understand that this feature means that some of their money is not being invested in income-producing real estate, but rather is being used to pay distributions to investors. In other words, some investors do not understand that the “income” or “yield” that they receive may be nothing more than a partial return of their own money.<sup>8</sup>

Although the distribution of gross offering proceeds feature is not new, it is an inefficient use of investor capital and has been consistently criticized by regulators as having the potential to confuse and mislead retail investors as described above. NASAA, therefore, recommends the addition of a prohibition to the investment restrictions in three subsections of the NASAA Guidelines.<sup>9</sup> NASAA welcomes your feedback on this proposed revision, including any suggestions that members might have on other methods short of a prohibition that could eliminate or mitigate the harm resulting from this practice.

It should be noted that all four of the foregoing proposals rely on other investor protection considerations as well. First, these products are heavily marketed to elderly investors,<sup>10</sup> which is not always a great match due to the liquidity restrictions inherent in these products.<sup>11</sup> Non-traded

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<sup>8</sup> Retail investors may also be confused by other performance claims by sponsors and selling dealers. Recent studies by the Securities Litigation & Consulting Group examined 140 non-traded REITs from June 1990 to December 2019 against the performance of traded REITs. The study found that investors in non-traded REITs underperformed investors in traded REITs by approximately \$75 billion. See Joshua Mallett and Craig McCann, *Further on the Returns to Non-Traded REITs*, *The Journal of Wealth Management* Winter 2021, 24 (3) 113-127; DOI: <https://doi.org/10.3905/jwm.2021.1.153>.

<sup>9</sup> NASAA Guideline V.E., V.K.1., and VI.H.

<sup>10</sup> Eleanor Laise, *Retirees, Don't Get Stranded Hunting Returns: Some Older Investors Are Turning to Unregistered Securities and Other Alternative Investment Risks*. Kiplinger (Dec. 13, 2019), <https://www.kiplinger.com/article/retirement/t037-c000-s004-retirees-don-t-get-stranded-hunting-returns.html> (warning elderly investors and retirees about the liquidity risk of non-traded REITs and other alternative investments, stating “[c]ompared with traditional investments, these holdings can have much higher fees and lower liquidity—meaning it may be difficult or impossible to get your money out when you want.”); Robert Stepelman, *The Rational Investor: Don't Let Current Volatility Scare You into Non-Traded REITs* (June 13, 2022), <https://www.heraldtribune.com/story/business/2022/06/13/robert-stepleman-dont-let-volatility-scare-you-into-non-traded-reits/7528898001/>.

<sup>11</sup> A good example case involving mis-matching of non-traded REITs with elderly investors can be found in the recent FINRA action, *In re Hicks*, FINRA Disc. Proc. No. 2017052867301 (May 19, 2021), <https://www.finra.org/sites/default/files/2021-07/oho-hicks-2017052867301-051921.pdf>. The investors in that case were all seniors aged 73-88 who were steered toward non-traded REITs and BDCs due to high broker compensation. Some investors needed to pull money out to pay for nursing care and other living expenses, but they were unable to do so because of the liquidity restrictions. Examples of state actions involving elderly victims include: *In re Bowser*, 2004 Md. Sec. LEXIS 31 (Aug. 20, 2004) (show cause order against firm for dual hatted agent misconduct involving unsuitable sale of non-traded REIT to 87 year old investor to earn \$16,800 commission and a reward trip that Wells Investment Securities, the sponsor, used to incentivize sales); *In re Brady*, 2020 Mo. Sec. LEXIS 34, \*9 (April 24, 2020) (sanctioning dual agent for unsuitable non-traded REIT sales with elderly client, earning more than \$135,000 in commissions in one-year period) (unsuitable non-traded REIT sales to elderly client, to earn more than \$135,000 in commissions in one-year period); *In re Daigneault*, 2016 Maine Sec. LEXIS 10 (Dec. 14, 2016)(order against dual hatted agent for unsuitable non-traded REIT sales to unsophisticated senior investors to yield high commissions, falsifying account documentation to circumvent firm policy); *In re Investment Professionals, Inc.*, 2017 Mass Sec. LEXIS 2 (Mar. 22, 2017)(ordering restitution and an independent consultant review of non-traded REIT sales to senior investors following unsuitable and excessive sales); *In re Kulch*, 2020 Mass. Sec. LEXIS 1 (July 16, 2020) (representative sanctioned for over-concentrating his customers, including elderly, in illiquid, risky, and high commission products such as non-traded REITs and variable annuities, earning over a million in commissions on those two products during five year period); *In re Shalabi*, 2011 S. Car. Sec. LEXIS 22 (Apr. 1,

REIT offerings are also lengthy, complex, and contain terms that may be difficult for the average investor to understand. For example, a non-traded REIT prospectus is typically close to 300 pages, not including organizational documents, supplements, financial statements and subscription agreements. Non-traded REITs are costly and include lucrative front and back-end expenses that entice brokers to sell these products to customers.<sup>12</sup> These offerings have significant risks, as disclosed in bullet points on the cover page of the prospectus, summary section, and in the risk factors section. Lastly, non-traded REITs are a significant source of customer complaints<sup>13</sup> and have resulted in various criminal enforcement actions over the years, including four federal fraud convictions this year involving the Texas REIT United Development Fund.<sup>14</sup>

## II. Discussion and Analysis

### A. Proposed Revision #1 - Conduct Standard Adjustments

New section I.A.3. sets forth in the Introduction section a statement of application that many may consider obvious in its scope. The provision is intending to make it clear that the registration of securities is not a defense to Reg BI or any conduct standard violations. Please consider whether this is necessary or better treated with disclosure.

New definitional section I.B.8. seeks to add and broadly define “Conduct Standard” to include current standards and those that may be adopted by other jurisdictions. The Project Group specifically identified standards under “federal or state law,” “Regulation Best Interest,” “ERISA,” or “Internal Revenue Code.” Please comment if you feel this list does not adequately address conduct standards.

The amendment to NASAA REIT Guideline Section II.G.2. would prohibit indemnification to associated persons, investment adviser, or investment adviser representatives for violations of federal or state laws. These programs have been offered through investment advisers although still somewhat less popularly than through brokers. NASAA is looking to add

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2011) (seeking revocation of dual hatted agent license, in part, for unsuitable recommendations and fraudulent statements regarding non-traded REIT sales to retiree).

<sup>12</sup> E.g., *In re Hicks*, FINRA Disc. Proc. No. 2017052867301 (May 19, 2021), <https://www.finra.org/sites/default/files/2021-07/oho-hicks-2017052867301-051921.pdf>

<sup>13</sup> REITs had the second most arbitrations filed in the product type of customer complaints according to FINRA for 2021 and led all types of investments for 2020. See: FINRA Top 15 Controversy Types, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#top15securitycustomers>. There are only around 50 or so companies that develop and manage REITs, BDCs, and other portfolio diversifying investment products, Institute for Portfolio Alternatives, List of Asset Managers (firms that develop and manage portfolio diversifying investment products like REITs and BDCs), <https://www.ipa.com/membership/> compared to approximately 3,500 companies offering publicly traded common stock. Matt Krantz, *Chasing Right Stocks To Buy Is Critical With Fewer Choices But Big Winners*, Investors.com, (Nov. 27, 2020) <https://www.investors.com/news/publicly-traded-companies-fewer-winners-huge-despite-stock-market-trend/>

<sup>14</sup> Department of Justice, U.S. Attorney’s Office, Northern District of Texas, *Former Chief Financial Officer of American Realty Capital Partners Sentenced For Accounting Fraud*, (Nov. 8, 2017) <https://www.justice.gov/usao-sdny/pr/former-chief-financial-officer-american-realty-capital-partners-sentenced-accounting>; Department of Justice, U.S. Attorney’s Office, Northern District of Texas, *United Development Fund Executives Convicted of Fraud*, (Jan. 21, 2022), <https://www.justice.gov/usao-ndtx/pr/united-development-funding-executives-convicted-fraud>.

Conduct Standards as a prohibited indemnified provision for clarification purposes. Is it necessary to add “Conduct Standards” as a prohibited indemnification item or is it enough to merely prohibit indemnification for federal or state securities laws?

The amendment to NASAA REIT Guideline II.G.2.a. requires a successful adjudication for the accused party in a conduct standard violation proceeding for indemnification.

NASAA REIT Guideline III., the title of the section, is amended to include conduct standard and concentration limit. NASAA has elected not to remove the suitability section even though Reg BI and other conduct standards are considered higher standards. Suitability may be imposed on issuers through subscription agreements in addition to Reg BI and when conduct standards applicable to third party brokers or investment advisers may not be available.

NASAA REIT Guideline III.C.1. has added the higher conduct standard to the provision of the NASAA Guidelines that had previously been dedicated solely to suitability. Reg BI is referenced to the federal citation and the general standard is restated broadly in the provision. The provision also states that suitability is applicable when recommendations are made to non-retail customers. Finally, new NASAA REIT Guideline III.C.1. states that the provisions do not relieve each person from the responsibility to comply with other applicable fiduciary duties under federal or state law.

NASAA REIT Guideline III.C.3. has been enhanced for both suitability and Reg BI. The provision has a design to require the financial professional to perform suitability and based upon information it has obtained from a prospective purchaser. This is typically the new account forms and subscription agreements. We have added “tax status,” “investment time horizon,” financial situation and “needs,” “liquidity needs,” and “risk tolerance.” These provisions may appear obvious; however, suitability arbitration and regulatory enforcement cases have been a substantial part of these products. Moreover, these characteristics are components of a “retail customer’s investment profile” that must be considered by broker-dealers in complying with their obligations under Reg BI. Are these provisions necessary or helpful?

Revised NASAA REIT Guideline III.C.5. requires the disclosure of conduct standards generally in the offering circular. The provision is not designed to require disclosure of multiple different conduct standards.

## **B. Proposed Revision #2 - Income and Net Worth Adjustment**

As noted above, NASAA recommends adjusting the REIT investor income and net worth guidelines for inflation, which revisions appear under amended III.B.1. Unless the administrators require a lower or a higher standard, an investor would need the combination of a \$95,000 net income and a \$95,000 net worth or simply the higher net worth of \$340,000 in order to purchase a non-traded REIT under the revised standard. NASAA is using the U.S. Bureau of Labor Statistics Consumer Price Index for All Urban Consumers to render a full inflationary adjustment, resulting in the 95/95/340.<sup>15</sup> Do you support adjusting these thresholds upwards for inflation at the

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<sup>15</sup> U.S. Bureau of Labor Statistics Consumer Price Index, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm)

recommended thresholds? If not, why not? Are there any supplemental methods that NASAA should use to make sure the REIT guidelines are automatically adjusted for inflation moving forward?

### C. Proposed Revision #3 - Concentration Standard

Variations in state specific concentration limits now appear in the offering circulars of publicly registered non-traded REITs. It is not uncommon to see 20 different standards listed. As noted above, NASAA previously requested public comment on a proposed uniform concentration limit applicable to non-traded REIT offerings in 2017.<sup>16</sup> At that time, there were fewer states imposing concentration standards. Industry stakeholders urged NASAA to withdraw or delay the proposal in deference to the recently adopted DOL rule and in anticipation of SEC rulemaking that led to subsequent adoption of Reg BI. Since that time, the DOL rule has been vacated and Reg BI has been adopted and implemented, but there has been no attendant decrease in REIT mismatches or REIT customer complaints. During the pandemic, the liquidity risks inherent in these products materialized to the detriment of many investors.<sup>17</sup> The redemption programs for at least 18 direct participation programs (including three NAV REITs) were either suspended during the pandemic or amended in that timeframe to restrict investor withdrawals. There were also two other non-traded REIT issuers (including one NAV REIT) that did not formally suspend their redemption programs but nonetheless refused significant numbers of repurchase requests, meaning many investors were blocked from getting their money back.<sup>18</sup> In light of these findings and a proliferation of non-uniform concentration limit standards within the membership, NASAA is renewing advancement of a uniform concentration limit to the NASAA REIT Guidelines.

NASAA recommends that a 10 percent concentration limit be structured to apply to the issuer, its affiliates, and other non-traded direct participation programs. This structure was chosen based on the observation that liquidity is restricted in all programs; high fees and expenses,

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<sup>16</sup> Notice of Request for Public Comment Regarding a Proposed Amendment to the NASAA Statement of Policy regarding Real Estate Investment Trusts (Jul. 27, 2016), <https://www.nasaa.org/wp-content/uploads/2016/07/Notice-for-Public-Comment-REIT-Concentration-Limit-07272016.pdf>.

<sup>17</sup> *Non-traded REITs Limit Withdrawals Amid Investor Rush To Retrieve Cash: Smaller Investors Feeling The Financial Pressures From The Pandemic Are Finding It Increasingly Difficult To Redeem Shares*, The Real Deal (Apr. 15, 2020), <https://therealdeal.com/2020/04/15/non-traded-reits-limit-withdrawals-amid-investor-rush-to-retrieve-cash/>; see also Kirsten Grind and Jean Eaglesham, *A \$2.5 Billion Business-Development-Corporation Fund Hits Redemption Limit: Volatile markets have prompted rush of investors to exit nontraded business development companies*, Wall Street Journal (Apr. 10, 2020), <https://www.wsj.com/articles/a-2-5-billion-bdc-halts-redemptions-after-limit-reached-1460280602>.

<sup>18</sup> The issuers with redemption suspensions during the pandemic include: Pacific Oak Strategic Opportunity REIT, Inc.; MacKenzie Realty Capital, Inc.; KBS Real Estate Investment Trust III, Inc.; Watermark Lodging Trust, Inc.; SmartStop Self Storage REIT, Inc.; Strategic Storage Trust IV, Inc.; FS Energy and Power Fund; Fundrise Growth eREIT 2019, LLC; InPoint Commercial Real Estate Income, Inc.; Resource Real Estate Opportunity REIT, Inc.; Resource Real Estate Opportunity REIT II, Inc.; Phillips Edison & Company; Griffin Capital Essential Asset REIT, Inc.; InvenTrust Properties Corp.; Moody National REIT II, Inc.; and Procaccianti Hotel REIT, Inc. The issuers who amended their programs to restrict investor redemptions include: Steadfast Apartment REIT, Inc. and CIM Income NAV, Inc. The issuers that did not formally suspend but refused significant numbers of repurchase requests include: FS Credit Real Estate Income Trust, Inc. (refusing at least 179,318 repurchase requests) and RW Holdings NNN REIT, Inc. (refusing monthly requests ranging from \$696,559 to \$11,218,557 in a single month). Lastly, there were several programs that were merged out of existence during the pandemic.

conflicts, and lack of historical operations also predominate these offerings. As sponsors of non-traded REITs also sponsor business development companies, the proposed limit would cover those sales based on the restriction respecting affiliates and other non-traded direct participation programs. NASAA does not recommend a carve-out for “Accredited Investors.” NASAA has repeatedly urged the SEC to make inflationary adjustments to that definition, without success so far at this date.<sup>19</sup> Moreover, many elderly citizens qualify as accredited investors based on their accumulated retirement savings, a critical class of investors that NASAA has advocated should be protected.

New proposed NASAA Guideline III.D. is the concentration standard subsection and has language similar to III.A., which relate to the net income and net worth policies. Proposed NASAA Guideline III.D.1. and 2. sets forth basic reasons for concentration limits which are the same reasons for net income and net worth.

NASAA has added additional provisions at III.D.2.k.-m. which include: “complexity of the offering,” “past disciplinary or legal actions by state or federal securities regulators, self regulatory organizations or investors,” and “administrative rules or statutory provisions of the Administrator’s jurisdiction.” Are additional factors necessary for inclusion in this proposal? Should NASAA make the same adjustments to the other similarly worded section of III.A.2.?

The main substance of the proposal is contained in proposed NASAA REIT Guideline III.D.3. and is restated as follows:

3. Unless the ADMINISTRATOR determines that the risks or other factors in III.D. associated with the REIT would require lower or higher standards, a PERSON’s aggregate investment in the REIT, its AFFILIATES, and other non-traded direct participation programs shall not exceed 10% of the PERSON’s liquid NET WORTH.

The provision accomplishes the goal of diversification to reduce the risk of loss from a single investment or single investment type. The provision, like the net income and net worth standards provides the Administrator discretion to require a lower or higher standard. Is 10% the correct threshold? Should this be higher if the concentration limit adds other non-traded direct participation programs rather than just non-traded REIT’s? Should it be lower? NASAA defines the measurement as “liquid NET WORTH” as cash, cash equivalents and marketable securities. This helps ensure that some liquid funds are available for emergency purposes without penalty to the investor. Is this sufficient? Are additional safeguards necessary? NASAA greatly values all feedback on this important revision.

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<sup>19</sup> NASAA letter to SEC on Private Placement Finders November 13, 2020 at page 3. <https://www.nasaa.org/wp-content/uploads/2020/11/State-Securities-Administrators-Letter-to-SEC-Commissioners-on-Finders-Proposal-111320.pdf> NASAA Letter to SEC on Amending the Accredited Investor Definition, March 16, 2020 <https://www.nasaa.org/wp-content/uploads/2020/03/NASAA-Accredited-Investor-Comment-Letter.pdf>



#### **D. Proposed Revision #4 - Gross Offering Proceeds Prohibited as Distribution Source**

NASAA is concerned about the confusing and deceptive practice of non-traded REITs using gross offering proceeds to pay distribution sources. These are not liquidating distributions, but rather are distributions performed while simultaneously raising capital in the non-traded REITs offering to create the phantom “yield” that was promised. This return of proceeds is not clearly disclosed to investors in a price adjustment.<sup>20</sup> NASAA proposes to revise the REIT Guidelines to prohibit this practice and do so in multiple areas.

The first revision would amend NASAA Guideline V.E. to prohibit an investment objective or strategy to source regular distributions with gross offering proceeds. This would permit an issuer to source a one-time “liquidating distribution” of proceeds that would not be invested in income producing assets.

NASAA also proposes to prohibit this practice at NASAA Guideline V.K.1, which would state in the other limitations section that the REIT may not reserve the right that gross offering proceeds from the sale of the securities will be reserved or used to source regular or declared distributions.

Lastly, NASAA proposes an amendment to NASAA REIT Guideline VI.H. to state in the distributions subsection that the REIT may not source regular or declared distributions from gross offering proceeds.

NASAA seeks comment on these proposed revisions and comment on whether there are other approaches that NASAA should consider as an alternative to a flat prohibition against the use of gross offering proceeds as a distribution source? For example, should the NASAA REIT guidelines be revised to prohibit non-traded REIT programs and selling dealers from marketing the products as “income-producing” assets or otherwise prohibited from marketing “yield” as part of their advertising where the program reserves the right to use gross offering proceeds to fund distributions? Should the REIT guidelines be revised to require direct individual investor notification each and every time the feature is invoked by a sponsor? NASAA welcomes your feedback on the proposed revisions and suggestions for other revisions that would ameliorate investor confusion and deception arising from this practice.

#### **E. Conforming Amendments**

Conforming amendments were made to renumber, reletter, correct past typographical errors, or add consistency across NASAA Guideline provisions in the definitional section of I.B., the suitability, conduct standard and concentration standard section of III., the other limitations

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<sup>20</sup> FINRA Rule 2310(b)(5); FINRA NTM 15-02 only explicitly requires customer accounts to reflect a per share price under the net investment methodology for commissions, dealer manager fees, and organizational and offering expenses but does not include return of offering proceeds. An appraised value methodology for reporting per share prices on customer accounts may be used at any time and appraised values are subject to substantial discretion.

section within the conflicts of interest section of V.K. Conforming amendments were also made to the cross reference sheet.

A redline of the NASAA REIT Guidelines with the proposed amendment is attached as Exhibit A.

# **Exhibit A**

## STATEMENT OF POLICY REGARDING REAL ESTATE INVESTMENT TRUSTS

As revised and adopted by the NASAA membership on ~~May 7, 2007~~ [Date]

### I. INTRODUCTION

#### A. Application

1. This Statement of Policy applies to qualifications and registrations of Real Estate Investment Trusts (REITS)
2. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain guidelines may be modified or waived by the Administrator.
3. Compliance with standards contained herein, or registration or qualifications by any securities regulatory authority, shall not imply that the sale of the offering is made in compliance with any CONDUCT STANDARD owed by the PERSON selling, recommending or providing investment advice relating to the SHARES of the REIT.

#### B. Definitions

1. ADMINISTRATOR: The official or agency administering the Securities laws of a jurisdiction.
2. ACQUISITION EXPENSES: Expenses including but not limited to legal fees and expenses, travel and communications expenses, cost of appraisals, nonrefundable option payments on property not acquired, accounting fees and expenses, title insurance, and miscellaneous expenses related to selection and acquisition of properties, whether or not acquired.
3. ACQUISITION FEE: The total of all fees and commissions paid by any party to any party in connection with making or investing in mortgage loans or the purchase, development or construction of property by a REIT. Included in the computation of such fees or commissions shall be any real estate commission, selection fee, DEVELOPMENT FEE, CONSTRUCTION FEE, nonrecurring management fee, loan fees or points or any fee of a similar nature, however designated. Excluded shall be DEVELOPMENT FEES and CONSTRUCTION FEES paid to PERSONS not affiliated with the SPONSOR in connection with the actual development and construction of a project.
4. ADVISOR: The PERSON responsible for directing or performing the day-to-day business affairs of a REIT, including a PERSON to which an Advisor subcontracts substantially all such functions. To the extent the provisions of this Statement of Policy are germane they shall apply to self-administered REITS.
5. AFFILIATE: An AFFILIATE of another PERSON includes any of the

following:

- a. any PERSON directly or indirectly owning, controlling, or holding, with power to vote ten percent or more of the outstanding voting securities of such other PERSON.
  - b. any PERSON ten percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held, with power to vote, by such other PERSON.
  - c. any PERSON directly or indirectly controlling, controlled by, or under common control with such other PERSON.
  - d. any executive officer, director, trustee or general partner of such other PERSON.
  - e. any legal entity for which such PERSON acts as an executive officer, director, trustee or general partner.
6. AVERAGE INVESTED ASSETS: For any period the average of the aggregate book value of the assets of the Trust invested, directly or indirectly, in equity interests in and loans secured by real estate, before reserves for depreciation or bad debts or other similar non-cash reserves computed by taking the average of such values at the end of each month during such period.
7. COMPETITIVE REAL ESTATE COMMISSION: Real estate or brokerage commission paid for the purchase or sale of a property which is reasonable, customary and competitive in light of the size, type and location of such property.
8. CONDUCT STANDARDS: One or more standards of conduct required of or owed by the PERSON selling, recommending, or providing investment advice relating to the SHARES of the REIT to the SHAREHOLDER or prospective SHAREHOLDER under federal or state law or standards set by self-regulatory organizations. Standards of conduct owed by such PERSONS include, but are not limited to, suitability obligations, compliance with Regulation Best Interest, requirements under Employee Retirement Income Security Act of 1974 or Internal Revenue Code of 1986 and/or federal or state fiduciary duties.
98. CONTRACT PRICE FOR THE PROPERTY: The amount actually paid or allocated to the purchase, development, construction or improvement of a property exclusive of ACQUISITION FEES and ACQUISITION EXPENSES.
109. CONSTRUCTION FEE: A fee or other remuneration for acting as general contractor and/or construction manager to construct improvements, supervise and coordinate projects or to provide MAJOR REPAIRS OR REHABILITATION on a REITS property.

110. CROSS REFERENCE SHEET: A compilation of the STATEMENT OF POLICY sections, referenced to the page of the PROSPECTUS and DECLARATION OF TRUST, or other exhibits, and justification for any deviation from the STATEMENT OF POLICY. Such compilation shall comply with the provisions set forth on the CROSS REFERENCE SHEET.
121. DECLARATION OF TRUST: The declaration of trust, by-laws, certificate, articles of incorporation or other governing instrument pursuant to which a REIT is organized.
132. DEVELOPMENT FEE: A fee for the packaging of a REIT'S property, including negotiating and approving plans, and undertaking to assist in obtaining zoning and necessary variances and necessary financing for the specific property, either initially or at a later date.
143. INDEPENDENT EXPERT: A PERSON with no material current or prior business or personal relationship with the ADVISOR or TRUSTEES who is engaged to a substantial extent in the business of rendering opinions regarding the value of assets of the type held by the REIT.
154. INDEPENDENT TRUSTEE(S): The TRUSTEE(S) of a REIT who are not associated and have not been associated within the last two years, directly or indirectly, with the SPONSOR or ADVISOR of the REIT.
- a. A TRUSTEE shall be deemed to be associated with the SPONSOR or ADVISOR if he or she:
    - i. owns an interest in the SPONSOR, ADVISOR, or any of their AFFILIATES; or
    - ii. is employed by the SPONSOR, ADVISOR or any of their AFFILIATES; or
    - iii. is an officer or director of the SPONSOR, ADVISOR, or any of their AFFILIATES; or
    - iv. performs services, other than as a TRUSTEE, for the REIT; or
    - v. is a TRUSTEE for more than three REITS organized by the SPONSOR or advised the ADVISOR; or
    - vi. has any material business or professional relationship with the .SPONSOR, ADVISOR, or any of their AFFILIATES.
  - b. For purposes of determining whether or not the business or professional relationship is material, the gross revenue derived by the prospective INDEPENDENT TRUSTEE from the SPONSOR and ADVISOR and AFFILIATES shall be deemed material per se if it exceeds 5% of the prospective INDEPENDENT TRUSTEE'S:

- i. annual gross revenue, derived from all sources, during either of the last two years; or
  - ii. net worth, on a fair market value basis.
- c. An indirect relationship shall include circumstances in which a TRUSTEE'S spouse, parents, children, siblings, mothers- or fathers-in-law, sons-or daughters-in-law, or brothers- or sisters-in-law is or has been associated with the SPONSOR, ADVISOR, any of their AFFILIATES, or the REIT

165. INITIAL INVESTMENT: That portion of the initial capitalization of the REIT contributed by the SPONSOR or: its AFFILIATES pursuant to Section II.A of this Statement of Policy.
176. LEVERAGE: The aggregate amount of indebtedness of a REIT for money borrowed (including purchase money mortgage loans) outstanding at any time, both secured and unsecured.
187. NET ASSETS: The total assets (other than intangibles) at cost before deducting depreciation or other non-cash reserves less total liabilities, calculated at least quarterly on a basis consistently applied.
198. NET INCOME: For any period total revenues applicable to such period, less the expenses applicable to such period other than additions to reserves for depreciation or bad debts or other similar non-cash reserves. If the ADVISOR receives an incentive fee, NET INCOME, for purposes of calculating TOTAL OPERATING EXPENSES in Section IV.D shall exclude the gain from the sale of the REIT'S assets.
2019. ORGANIZATION AND OFFERING EXPENSES: All expenses incurred by and to be paid from the assets of the REIT in connection with and in preparing a REIT for registration and subsequently offering and distributing it to the public, including, but not limited to, total underwriting and brokerage discounts and commissions (including fees of the underwriters' attorneys), expenses for printing, engraving, mailing, salaries of employees while engaged in sales activity, charges of transfer agents, registrars, trustees, escrow holders, depositaries, experts, expenses of qualification of the sale of the securities under Federal and State laws, including taxes and fees, accountants' and attorneys' fees.
210. PERSON: Any natural persons, partnership, corporation, association, trust, limited liability company or other legal entity.
224. PROSPECTUS: Shall have the meaning given to that term by Section 2(10) of the Securities Act of 1933, including a preliminary Prospectus; provided, however, that such term as used herein shall also include an offering circular as described in Rule 256 of the General Rules and Regulations under the Securities Act of 1933 or, in the case of an intrastate offering, any document by whatever name known, utilized for the purpose of offering and selling securities to the public.

- 232.** REAL ESTATE INVESTMENT TRUST ("REIT"): A corporation, trust, association or other legal entity (other than a real estate syndication) which is engaged primarily in investing in equity interests in real estate (including fee ownership and leasehold interests) or in loans secured by real estate or both.
- 243.** ROLL-UP: A transaction involving the acquisition, merger, conversion, or consolidation either directly or indirectly of the REIT and the issuance of securities of a ROLL-UP ENTITY. Such term does not include:
- a. a transaction involving securities of the REIT that have been for at least 12 months listed on a national securities exchange or traded through the National Association of Securities Dealers Automated Quotation National Market System; or
  - b. a transaction involving the conversion to corporate, trust, or association form of only the REIT if, as a consequence of the transaction there will be no significant adverse change in any of the following:
    - i. SHAREHOLDERS' voting rights;
    - ii. The term of existence of the REIT;
    - iii. SPONSOR or ADVISOR compensation;
    - iv. The REIT'S investment objectives.
- 254.** ROLL-UP ENTITY: A partnership, real estate investment trust, corporation, trust, or other entity that would be created or would survive after the successful completion of a proposed ROLL-UP transaction.
- 265.** SHARES: Shares of beneficial interest or of common stock of a REIT of the class that has the right to elect the Trustees of such REIT.
- 276.** SHAREHOLDERS: The registered holders of a REIT'S SHARES.
- 287.** SPECIFIED ASSET REIT: A PROGRAM where, at the time a securities registration is ordered effective, at least 75% of the net proceeds from the sale of SHARES are allocable to the purchase, construction, renovation, or improvement of individually identified assets. Reserves shall not be included in the 75%.
- 298.** SPONSOR: Any PERSON directly or indirectly instrumental in organizing, wholly or in part, a REIT or any PERSON who will control, manage or participate in the management of a REIT, and any AFFILIATE of such PERSON. Not included is any PERSON whose only relationship with the REIT is as that of an independent property manager of REIT assets, and whose only compensation is as such. SPONSOR does not include wholly independent third parties such as attorneys, accountants and underwriters whose only compensation is for professional services. A PERSON may also be deemed a SPONSOR of the REIT by:



- a. taking the initiative, directly or indirectly, in founding or organizing the business or enterprise of the REIT; either alone or in conjunction with one or more other PERSONS;
- b. receiving a material participation in the REIT in connection with the founding or organizing of the business of the REIT, in consideration of services or property, or both services and property;
- c. having a substantial number of relationships and contacts with the REIT;
- d. possessing significant rights to control REIT properties;
- e. receiving fees for providing services to the REIT which are paid on a basis that is not customary in the industry; or
- f. providing goods or services to the REIT on a basis which was not negotiated at arms-length with the REIT.

**3029.** TOTAL OPERATING EXPENSES: Aggregate expenses of every character paid or incurred by the REIT as determined under Generally Accepted Accounting Principles, including ADVISORS' fees, but excluding:

- a. the expenses of raising capital such as ORGANIZATION AND OFFERING EXPENSES, legal, audit, accounting, underwriting, brokerage, listing, registration and other fees, printing and other such expenses, and tax incurred in connection with the issuance, distribution, transfer, registration, and stock exchange listing of the REIT'S SHARES;
- b. interest payments;
- c. taxes;
- d. non-cash expenditures such as depreciation, amortization and bad debt reserves;
- e. incentive fees paid in compliance with Section IV.F., notwithstanding Section I.B.29.(f);
- f. ACQUISITION FEES, ACQUISITION EXPENSES, real estate commissions on resale on property and other expenses connected with the acquisition, disposition, and ownership of real estate interests, mortgage loans, or other property, (such as the costs of foreclosure, insurance premiums, legal services, maintenance, repair, and improvement of property).

COMMENT: The Exclusion from TOTAL OPERATING EXPENSES for costs related directly to asset acquisition, operation and dispositions intended to allow exclusion of expenses incurred on the individual property level but not to allow to exclusion of expenses incurred on the REIT level.

~~310.~~ TRUSTEE(S): The members of the board of trustees or directors or other body which manages the REIT.

~~321.~~ UNIMPROVED REAL PROPERTY: The real property of a REIT which has the

following three characteristics:

- a. an equity interest in real property which has not acquired for the purpose of producing rental or other operating income;
- b. has no development or construction in process on such land; and
- c. no development or construction on such land is planned in good faith to commence on such land within one year.

## II. REQUIREMENTS OF SPONSOR, ADVISOR, TRUSTEES AND ANY AFFILIATE

### A. Minimum Capital

1. Prior to the initial public offering, the SPONSOR, or any AFFILIATE, shall contribute to the REIT an amount not less than the lesser of:
  - a. 10% of the total net assets upon completion of the offering, or
  - b. \$200,000 as an INITIAL INVESTMENT.
2. The SPONSOR or any AFFILIATE may not sell this INITIAL INVESTMENT while the SPONSOR remains a SPONSOR but may transfer the shares to other AFFILIATES.

### B. Number and Election of TRUSTEES

1. The REIT shall have a minimum of three TRUSTEES, each of whom (other than a TRUSTEE elected to fill the unexpired term of another TRUSTEE) is elected by the SHAREHOLDERS of the REIT and who shall serve for a term of one year.
2. Nothing in this section shall prohibit a TRUSTEE from being reelected by the SHAREHOLDERS.
3. A majority of the TRUSTEES shall be INDEPENDENT TRUSTEES.
4. INDEPENDENT TRUSTEES shall nominate replacements for vacancies amongst the INDEPENDENT TRUSTEES' positions.
5. the TRUSTEES may establish such committees they deem appropriate (provided the majority of the members of each committee are INDEPENDENT TRUSTEES).

### C. Duties of TRUSTEES

1. At, or before, the first meeting of the TRUSTEES, the DECLARATION OF TRUST shall be reviewed and ratified by a majority vote of the TRUSTEES and of the INDEPENDENT TRUSTEES. The PROSPECTUS shall disclose that such ratification is required.

2. The TRUSTEES shall establish written policies on investments and borrowing and shall monitor the administrative procedures, investment operations and performance of the REIT and the ADVISOR to assure that such policies are carried out.
3. A majority of the INDEPENDENT TRUSTEES must approve matters to which this Section and Sections II.A., II.F., II.G., IV.A., IV.B., IV.C., IV.D., IV.E., IV.F., IV.G., V.E., V.H., V.J., VI.A., VI.B.4, and VI.G., of this Statement of Policy.

COMMENT: The special obligations of the INDEPENDENT TRUSTEES should not be interpreted to lessen in any way to obligations of the affiliated TRUSTEES.

#### D. Experience of TRUSTEES

A TRUSTEE shall have had at least three years of relevant experience demonstrating the knowledge and experience required to successfully acquire and manage the type of assets being acquired by the REIT. At least one of the INDEPENDENT TRUSTEES shall have three years of relevant real estate experience.

COMMENT: “Relevant real estate experience” shall mean actual direct experience by the TRUSTEE in acquiring or managing the type of real estate to be acquired by the REIT for his or her own account or as an agent. For example, in the REIT will acquire commercial real estate. i.e. office buildings or shopping centers, “relevant real estate experience” would not include experience in buying and selling houses because it is apparent that a different level of sophistication and knowledge is required.

#### E. Fiduciary Duty

The TRUSTEES and ADVISOR of the REIT shall be deemed to be in a fiduciary relationship to the REIT and the SHAREHOLDERS. The TRUSTEES of the REIT shall also have a fiduciary duty to the SHAREHOLDERS to supervise the relationship of the REIT with the ADVISOR.

#### F. Advisory Contract

1. It shall be the duty of the TRUSTEES to evaluate the performance of the ADVISOR before entering into or renewing an advisory contract. The criteria used in such evaluation shall be reflected in the minutes of such meeting.
2. Each contract for the services of an ADVISOR entered into by the TRUSTEES shall have a term of no more than one year.
3. Each advisory contract shall be terminable by a majority of the INDEPENDENT TRUSTEES, or the ADVISOR on sixty (60) days written notice without cause or penalty. In the event of the termination of such contract, the ADVISOR will cooperate with the REIT and take all reasonable steps requested to assist the TRUSTEES in making an orderly transition of the advisory function.
4. The qualifications of the ADVISOR shall be set forth in the PROSPECTUS relating to the initial public offering of the SHARES of

the REIT and the TRUSTEES shall determine that any successor ADVISOR possesses sufficient qualifications to:

- a. perform the advisory function for the REIT; and
- b. justify the compensation provided for in its contract with the REIT.

G. Liability and Indemnification

1. The REIT shall not provide for indemnification of the TRUSTEES, ADVISORS or AFFILIATES for any liability or loss suffered by the TRUSTEES, ADVISORS or AFFILIATES, nor shall it provide that the TRUSTEES, ADVISORS or AFFILIATES be held harmless for any loss or liability suffered by the REIT, unless all of the following conditions are met:
  - a. The TRUSTEES, ADVISORS or AFFILIATES have determined, in good faith, that the course of conduct which caused the loss or liability was in the best interests of the REIT.
  - b. The TRUSTEES, ADVISORS or AFFILIATES were acting on services for the REIT.
  - c. Such liability or loss was not the result of:
    - i. negligence or misconduct by the TRUSTEES, excluding the INDEPENDENT TRUSTEES, ADVISORS or AFFILIATES; or
    - ii. gross negligence or willful misconduct by the INDEPENDENT TRUSTEES.
  - d. Such indemnification or agreement to hold harmless is recoverable only out of REIT net assets and not from SHAREHOLDERS.
2. Notwithstanding anything to the contrary contained in Section II.G.1, the TRUSTEES, ADVISORS or AFFILIATES and any persons acting as a broker-dealer, associated person, investment adviser or investment adviser representatives shall not be indemnified by the REIT for any losses, liabilities or expenses arising from or out of an alleged violation of federal or state securities laws or CONDUCT STANDARDS by such party unless one or more of the following conditions are met:
  - a. There has been a successful adjudication on the merits of each count involving alleged securities law or CONDUCT STANDARDS violations as to the particular indemnitee.
  - b. Such claims have been dismissed with prejudice on the merits by a court of competent jurisdiction as to the particular indemnitee.
  - c. A court of competent jurisdiction approves a settlement of the claims against a particular indemnitee and finds that indemnification of the settlement and the related costs should be made, and the court considering the request for indemnification has

been advised of the position of the Securities and Exchange Commission and of the published position of any state securities regulatory authority in which securities of the REIT were offered or sold as to indemnification for violations of securities laws.

3. The advancement of REIT funds to the TRUSTEES, ADVISORS or AFFILIATES for legal expenses and other costs incurred as a result of any legal action for which indemnification is being sought is permissible only if all of the following conditions are satisfied:
  - a. The legal action relates to acts or omissions with respect to the performance of duties or services on behalf of the REIT.
  - b. The legal action is initiated by a third party who is not a SHAREHOLDER or the legal action is initiated by a SHAREHOLDER acting in his or her capacity as such and a court of competent jurisdiction specifically approves such advancement.
  - c. The TRUSTEES, ADVISORS or AFFILIATES undertake to repay the advanced funds to the REIT, together with the applicable legal rate of interest thereon, in cases in which such TRUSTEES, ADVISORS or AFFILIATES are found not to be entitled to indemnification.

#### H. Arbitration Provisions

The DECLARATION OF TRUST may contain provisions relating to the use of arbitration as a means of dispute resolution; provided, however, it may not require arbitration for allegations involving breach of contract, negligence, violations of state or federal securities laws, breach of fiduciary duty or other misconduct by the TRUSTEES or ADVISOR, nor shall it provide for mandatory venue. A DECLARATION OF TRUST which contains arbitration provisions shall prominently disclose such fact on the cover page of the DECLARATION OF TRUST. Allocation of the cost of arbitration may be made a matter for determination in the proceedings. This Section is not intended to prohibit arbitration agreements entered into as a condition for opening or maintaining an account with a broker-dealer, who may also be a SPONSOR. In addition, this Section should not be interpreted to prohibit separate arbitration agreements between SPONSORS and SHAREHOLDERS if the agreements are not a condition of making an investment in the REIT.

### III. SUITABILITY OF SHAREHOLDERS, CONDUCT STANDARD AND CONCENTRATION LIMITS

#### A. General Policy

1. The SPONSOR shall establish minimum income and net worth standards for PERSONS who purchase SHARES in a REIT for which there is not likely to be a substantial and active secondary market.

2. The SPONSOR shall propose a minimum income and net worth standards which are reasonable given the type of REIT and the risks associated with the purchase of SHARES. REITS with greater investor risk shall have minimum standards with a substantial NET WORTH requirement. The ADMINISTRATOR shall evaluate the standards proposed by the SPONSOR when the REIT'S application for registration is reviewed. In evaluating the proposed standards, the ADMINISTRATOR may consider the following:
  - a. the REIT'S use of leverage;
  - b. tax implications;
  - c. balloon payment financing;
  - d. potential variances in cash distributions;
  - e. potential SHAREHOLDERS;
  - f. relationship among potential SHAREHOLDERS, the SPONSOR and ADVISOR;
  - g. liquidity of REIT SHARES;
  - h. prior performance of SPONSOR and ADVISOR;
  - i. financial condition of the SPONSOR;
  - j. potential transactions between the REIT and the SPONSOR and ADVISOR; and
  - k. any other relevant factors.

B. Income and Net Worth Standards

1. Unless the ADMINISTRATOR determines that the risks associated with the REIT would require lower or higher standards, SHAREHOLDERS shall have:
  - a. a minimum annual gross income of \$~~9570~~,000 and a minimum NET WORTH of \$~~9570~~,000; or
  - b. a minimum NET WORTH of \$~~34250~~,000.
2. NET WORTH shall be determined exclusive of home, home furnishings, and automobiles.
3. In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary, account, or, by the donor or grantor, who directly or indirectly supplies the funds to purchase the SHARES if the donor or grantor is the fiduciary.
4. The SPONSOR shall set forth in the final PROSPECTUS:
  - a. the investment objectives of the REIT;
  - b. a description of the type of PERSON who might benefit from an investment in the REIT; and

- c. the minimum standards imposed on each SHAREHOLDER in the REIT.

C. Determination that Sale, Recommendation, or Investment Advice to a SHAREHOLDER is Suitable and Appropriate and in compliance with applicable CONDUCT STANDARDS.

1. Each PERSON selling, recommending, or providing investment advice to a SHAREHOLDER or prospective SHAREHOLDER with regards to SHARES of the REIT shall make every reasonable effort to determine that such sale, recommendation, or investment advice is in compliance with applicable CONDUCT STANDARDS and is a suitable and appropriate investment for each SHAREHOLDER. If REIT SHARES are recommended, offered, or sold to retail customers within the meaning of 17 C.F.R. § 240.151-1(b)(1), then a broker-dealer or associated person recommending the REIT SHARES to a prospective SHAREHOLDER must act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer or associated person making the recommendation ahead of the interest of the retail customer. When making a recommendation to a non-retail customer, broker-dealers and associated persons must have a reasonable basis to believe that a purchase of SHARES of the REIT is suitable and appropriate for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. These requirements do not relieve each PERSON selling, recommending, or providing investment advice regarding SHARES of the REIT from the responsibility to comply with any applicable fiduciary duties under federal or state law.
2. In making this determination, ~~the SPONSOR or~~ each PERSON selling, recommending, or providing investment advice related to the SHARES of the REIT SHARES on behalf of the SPONSOR or REIT shall ascertain that the prospective SHAREHOLDER:
  - a. meets the minimum income and net worth standards established for the REIT;
  - b. can reasonably benefit from the REIT based on the prospective SHAREHOLDER'S overall investment objectives and portfolio structure.
  - c. is able to bear the economic risk of the investment based on the prospective SHAREHOLDER'S overall financial situation; and
  - d. has apparent understanding of:
    - i. the fundamental risks of the investment;
    - ii. the risk that the SHAREHOLDER may lose the entire investment;
    - iii. the lack of liquidity of REIT SHARES;

- iv. the restrictions on transferability of REIT SHARES;
  - v. tax consequences of the investment.
3. ~~The SPONSOR or e~~Each PERSON selling, recommending or providing investment advice regarding SHARES on behalf of the SPONSOR or REIT will make this determination on the basis of information it has obtained from a prospective SHAREHOLDER. Relevant information for this purpose will include at least the age, tax status, investment objectives, investment time horizon, investment experience, income, NET WORTH, financial situation and needs, liquidity needs, risk tolerance and other investments of the prospective SHAREHOLDERS, as well as any other pertinent factors.
  4. The SPONSOR or each PERSON selling SHARES on behalf of the SPONSOR or REIT shall maintain records of the information used to determine that an investment in SHARES is suitable and appropriate for a SHAREHOLDER. The SPONSOR or each PERSON selling SHARES on behalf of the SPONSOR or REIT shall maintain these records for at least six years.
  5. The SPONSOR shall disclose in the final PROSPECTUS the responsibility of the SPONSOR and/or each PERSON selling SHARES or providing a recommendation on behalf of the SPONSOR or REIT to make every reasonable effort to determine that the purchase of SHARES, recommendation or advice is a suitable and appropriate investment for each SHAREHOLDER and/or in compliance with applicable CONDUCT STANDARDS, based on information provided by the SHAREHOLDER regarding the SHAREHOLDER'S financial situation and investment objectives.

D. Concentration Limit.

1. -The SPONSOR shall establish a minimum concentration limit for PERSONS who purchase SHARES in a REIT for which there is not likely to be a substantial and active secondary market.
2. The SPONSOR shall propose a minimum concentration limit which is reasonable given the type of REIT and the risks associated with the purchase of SHARES. REITS with greater investor risk shall have a restrictive concentration limit. The ADMINISTRATOR shall evaluate the standards and any exclusion proposed by the SPONSOR when the REIT'S application for registration is reviewed. In evaluating the proposed standards and any exclusion, the ADMINISTRATOR may consider the following:
  - a. the REIT'S use of leverage;
  - b.- tax implications;



- c.- balloon payment financing;
- d. -potential variances in cash distributions;
- e. -potential SHAREHOLDERS;
- f. -relationship among potential SHAREHOLDERS, the SPONSOR and -the ADVISOR;
- g. -liquidity of REIT SHARES;
- h.- prior performance of the REIT, SPONSOR and the ADVISOR;
- i.- financial condition of the SPONSOR;
- j.- potential transactions between the REIT, the SPONSOR and the ADVISOR;
- k.- complexity of the offering;
- l.- -past disciplinary or legal actions by state or federal securities regulators, self-regulatory organizations or investors;
- m.- administrative rules or statutory provisions of the Administrator's jurisdiction; and
- n.- any other relevant factors.

- 3. Unless the ADMINISTRATOR determines that the risks or other factors in III.D. associated with the REIT would require lower or higher standards, a PERSON's aggregate investment in the REIT, its AFFILIATES, and other non-traded direct participation programs shall not exceed 10% of the PERSON's liquid NET WORTH.
- 4. -"Liquid NET WORTH" shall be defined as that portion of net worth consisting of cash, cash equivalents, and readily marketable securities.
- 5. -In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary, account, or, by the donor or grantor, who directly or indirectly supplies the funds to purchase the SHARES if the donor or grantor is the fiduciary.

ED. Subscription Agreements

- 1. The ADMINISTRATOR may require that each SHAREHOLDER complete and sign a written subscription agreement.

2. The SPONSOR may require that each SHAREHOLDER make certain factual representations in the subscription agreement, including the following:
  - a. The SHAREHOLDER meets the minimum income and net worth standards established for the REIT.
  - b. The SHAREHOLDER is purchasing the SHARES for his or her own account.
  - c. The SHAREHOLDER has received a copy of the PROSPECTUS.
  - d. The SHAREHOLDER acknowledges that the SHARES are not liquid.
3. The SHAREHOLDER must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the SHAREHOLDER may not grant any PERSON a power of attorney to make such representations on his or her behalf.
4. The SPONSOR and each PERSON selling SHARES on behalf of the SPONSOR or REIT shall not require SHAREHOLDERS to make representations in the subscription agreement which are subjective or unreasonable and which:
  - a. might cause the SHAREHOLDER to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or
  - b. would have the effect of shifting the duties regarding suitability, imposed by law on broker-dealers, to the SHAREHOLDERS.
5. Prohibited representations include, but are not limited to the following:
  - a. The SHAREHOLDER understands or comprehends the risks associated with an investment in the REIT.
  - b. The investment is a suitable one for the SHAREHOLDER.
  - c. The SHAREHOLDER has read the PROSPECTUS.
  - d. In deciding to invest in the REIT, the SHAREHOLDER has relied solely on the PROSPECTUS, and not on any other information or representations from other PERSONS or sources.
6. The SPONSOR may place the content of the prohibited representations in the subscription agreement in the form of disclosures to SHAREHOLDERS. The SPONSOR may not place these disclosures in the SHAREHOLDER representation section of the subscription agreement.

~~FE~~. Completion of Sale

1. The SPONSOR or any PERSON selling SHARES on behalf of the SPONSOR or REIT may not complete a sale of SHARES to a

SHAREHOLDER until at least five business days after the date the SHAREHOLDER receives a final PROSPECTUS.

2. The SPONSOR or the PERSON designated by the SPONSOR shall send each SHAREHOLDER a confirmation of his or her purchase.

G. Minimum Investment

The ADMINISTRATOR may require minimum initial and subsequent cash investment amounts.

IV. FEES, COMPENSATION AND EXPENSES

A. Introduction

1. The PROSPECTUS must fully disclose and itemize all consideration which may be received in connection with REIT activities directly or indirectly by the SPONSOR, TRUSTEES, ADVISOR and underwriters, what the consideration is for and how and when it will be paid. This shall be set forth in one location in tabular form.
2. The INDEPENDENT TRUSTEES will determine, from time to time but at least annually, that the total fees and expenses of the REIT are reasonable in light of the investment performance of the REIT, its NET ASSETS, its NET INCOME, and the fees and expenses of other comparable unaffiliated REITS. Each such determination shall be reflected in the minutes of the meeting of the Trustees.

B. ORGANIZATION AND OFFERING EXPENSES

The ORGANIZATION AND OFFERING EXPENSES paid in connection with the REIT'S formation or the syndication of its shares shall be reasonable and shall in no event exceed an amount equal to 15% of the proceeds raised in an offering.

C. ACQUISITION FEES and ACQUISITION EXPENSES

1. The total of all ACQUISITION FEES and ACQUISITION EXPENSES shall be reasonable, and shall not exceed an amount equal to 6% of the contract price of the property, or in the case of a mortgage loan, 6% of the funds advanced.
2. Notwithstanding the above, a majority of the TRUSTEES (including a majority of the INDEPENDENT TRUSTEES) not otherwise interested in the transaction may approve fees in excess of these limits if they determine the transaction to be commercially competitive, fair and reasonable to the REIT.

D. TOTAL OPERATING EXPENSES

1. The TOTAL OPERATING EXPENSES of the REIT shall (in the absence of a satisfactory showing to the contrary) be deemed to be excessive if they exceed in any fiscal year the greater of 2% of its AVERAGE INVESTED ASSETS or 25% of its NET INCOME for such year. The

INDEPENDENT TRUSTEE shall have the fiduciary responsibility of limiting such expenses to amounts that do not exceed such limitations unless such INDEPENDENT TRUSTEES shall have made a finding that, based on such unusual and non-recurring factors which they deem sufficient, a higher level of expenses is justified for such year. Any such findings and the reasons in support thereof shall be reflected in the minutes of the meeting of the TRUSTEES.

2. Within 60 days after the end of any fiscal quarter of the REIT for which TOTAL OPERATING EXPENSES (for the twelve (12) months then ended) exceeded 2% of AVERAGE INVESTED ASSETS or 25% of NET INCOME, whichever is greater, there shall be sent to the SHAREHOLDERS of the REIT a written disclosure of such fact, together with an explanation or the factors the INDEPENDENT TRUSTEES considered in arriving at the conclusion that such higher operating expenses were justified.
3. In the event the INDEPENDENT TRUSTEES do not determine such excess expenses are justified, the ADVISOR shall reimburse the REIT at the end of the twelve-month period the amount by which the aggregate annual expenses paid or incurred by the REIT exceed the limitations herein provided.

E. Real estate commissions on resale of property

If an ADVISOR, TRUSTEE, SPONSOR or any AFFILIATE provides a substantial amount of the services in the effort to sell the property of the REIT, then that PERSON may receive up to one-half of the brokerage commission paid but in no event to exceed an amount equal to 3% of the contracted for sales price. In addition, the amount paid when added to the sums paid to unaffiliated parties in such a capacity shall not exceed the lesser of the COMPETITIVE REAL ESTATE COMMISSION or an amount equal to 6% of the contracted for sales price.

F. Incentive fees

1. An interest in the gain from the sale of assets of the REIT, for which full consideration is not paid in cash or property of equivalent value, shall be allowed provided the amount or percentage of such interest is reasonable. Such an interest gain from the sale of REIT assets shall be considered presumptively reasonable if it does not exceed 15% of the balance of such net proceeds remaining after payment to SHAREHOLDERS, in the aggregate, of an amount equal to 100% of the original issue price of REIT SHARES, plus an amount equal to 6% of the original issue price of the REIT shares per annum cumulative. For purposes of this Section, the original issue price of the REIT SHARES may be reduced by prior cash distributions to SHAREHOLDERS of net proceeds from the sale of REIT assets.

2. In the case of multiple ADVISORS, ADVISORS and any AFFILIATE shall be allowed incentive fees provided such fees are distributed by a proportional method reasonably designed to reflect the value added to REIT assets by each respective ADVISOR or any AFFILIATE.

COMMENT: Distribution of incentive fees to ADVISORS/AFFILIATES, in proportion to the length of time served as ADVISOR while such property was held by the REIT or in ratio to the fair market value of the asset at the time of the ADVISOR'S termination, and the fair market value of the asset upon its disposition by the REIT shall be considered reasonable methods by which to apportion incentive fees.

#### G. ADVISOR compensation

The INDEPENDENT TRUSTEES shall determine from time to time and at least annually that the compensation which the REIT contracts to pay to the ADVISOR is reasonable in relation to the nature and quality of services performed and that such compensation is within the limits prescribed by this Statement of Policy. The INDEPENDENT TRUSTEES shall also supervise the performance of the ADVISOR and the compensation paid to it by the REIT to determine that the provisions of such contract are being carried out. Each such determination shall be based on the factors set forth below and all other factors such as INDEPENDENT TRUSTEES may deem relevant and the findings of such TRUSTEES on each of such factors shall be recorded in the minutes of the TRUSTEES:

1. The size of the advisory fee in relation to the size, composition and profitability of the portfolio of the REIT.
2. The success of the ADVISOR in generating opportunities that meet the investment objectives of the REIT.
3. The rates charged to other REIT's and to investors other than REIT'S by advisors performing similar services.
4. Additional revenues realized by the ADVISOR and any AFFILIATE through their relationship with the REIT, including loan, administration, underwriting or broker commissions, servicing, engineering, inspection and other fees, whether paid by the REIT or by others with whom the REIT does business.
5. The quality and extent of service and advice furnished by the ADVISOR.
6. The performance of the investment portfolio of the REIT, including income, conservation or appreciation of capital, frequency of problem investments and competence in dealing with distress situations.
7. The quality of the portfolio of the REIT in relationship to the investments generated by the ADVISOR for its own account.

#### V. CONFLICTS OF INTEREST AND INVESTMENT RESTRICTIONS

##### A. Sales and Leases to REIT

The REIT shall not purchase property from the SPONSOR, ADVISOR, TRUSTEE, or any AFFILIATE thereof, unless a majority of TRUSTEES (including a majority of INDEPENDENT TRUSTEES) not otherwise interested

in such transaction approve the transaction as being fair and reasonable to the REIT and at a price to the REIT no greater than the cost of the asset to such SPONSOR, ADVISOR, TRUSTEE or any AFFILIATE thereof, or if the price to the REIT is in excess of such cost, that substantial justification for such excess exists and such excess is reasonable. In no event shall the cost of such asset to the REIT exceed its current appraised value.

- B. Sales and Leases to SPONSOR, ADVISOR, TRUSTEES or any AFFILIATE
1. A SPONSOR, ADVISOR, TRUSTEE or any AFFILIATE thereof shall not acquire assets from the REIT unless approved by a majority of TRUSTEES (including a majority of INDEPENDENT TRUSTEES), not otherwise interested in such transaction, as being fair and reasonable to the REIT.
  2. A REIT may lease assets to a SPONSOR, ADVISOR, TRUSTEE or any AFFILIATE thereof only if approved by a majority of TRUSTEES (including a majority of INDEPENDENT TRUSTEES), not otherwise interested in such transaction, as being fair and reasonable to the REIT.
- C. Loans
1. No loans may be made by the REIT to the SPONSOR, ADVISOR, TRUSTEE or any AFFILIATE thereof except as provided under Section V.K.3 or to wholly owned subsidiaries of the REIT.
  2. The REIT may not borrow money from the SPONSOR, ADVISOR, TRUSTEE, or any AFFILIATE thereof, unless a majority of TRUSTEES (including a majority of INDEPENDENT TRUSTEES) not otherwise interested in such transaction approve the transaction as being fair, competitive, and commercially reasonable and no less favorable to the REIT than loans between unaffiliated parties under the same circumstances.
- D. Investments
1. The REIT shall not invest in joint ventures with the SPONSOR, ADVISOR, TRUSTEE, or any AFFILIATE thereof, unless a majority of TRUSTEES (including a majority of INDEPENDENT TRUSTEES) not otherwise interested in such transactions, approve the transaction as being fair and reasonable to the REIT and on substantially the same terms and conditions as those received by the other joint venturers.
  2. The REIT shall not invest in equity, securities unless a majority of TRUSTEES (including a majority of INDEPENDENT TRUSTEES) not otherwise interested in such transaction approve the transaction as being fair, competitive, and commercially reasonable.
- E. Statement of Objectives
1. The PROSPECTUS must state specific investment objectives of the REIT. It should indicate whether the primary objective is to obtain current income, tax benefits, or capital appreciation for its SHAREHOLDERS.

The REIT may not have an investment objective or strategy to source regular distributions with gross offering proceeds from the sale of SHARES.

2. The INDEPENDENT TRUSTEES shall review the investment policies of the REIT with sufficient frequency and at least annually to determine that the policies being followed by the REIT at any time are in the best interests of its SHAREHOLDERS. Each such determination and the basis therefor shall be set forth in the minutes of the TRUSTEES.

F. Multiple PROGRAMS

The method for the allocation of the acquisition of properties by two or more PROGRAMS of the same SPONSOR or ADVISOR seeking to acquire similar types of assets shall be reasonable. The method shall be described in the PROSPECTUS. It shall be the duty of the TRUSTEES (including the INDEPENDENT TRUSTEES) to ensure such method is applied fairly to the REIT.

G. Other Transactions

All other transactions between the REIT and the SPONSOR, ADVISOR, TRUSTEE or any AFFILIATE thereof, shall require approval by a majority of the TRUSTEES (including a majority of INDEPENDENT TRUSTEES) not otherwise interested in such transactions as being fair and reasonable to the REIT and on terms and conditions not less favorable to the REIT than those available from unaffiliated third parties.

H. Appraisal of Real Property

The consideration paid for real property acquired by the REIT shall ordinarily be based on the fair market value of the property as determined by a majority of the TRUSTEES. In cases in which a majority of the INDEPENDENT TRUSTEES so determine, and in all cases in which assets are acquired from the ADVISORS, TRUSTEES, SPONSORS or AFFILIATES thereof, such fair market value shall be as determined by an INDEPENDENT EXPERT selected by the INDEPENDENT TRUSTEES.

I. Roll-Up Transaction

1. In connection with a proposed ROLL-UP, an appraisal of all REIT assets shall be obtained from a competent, INDEPENDENT EXPERT. If the appraisal will be included in a PROSPECTUS used to offer the securities of a ROLL-UP ENTITY, the appraisal shall be filed with the SEC and the states as an Exhibit to the Registration Statement for the offering. Accordingly, an issuer using the appraisal shall be subject to liability for violation of Section 11 of the Securities Act of 1933 and comparable provisions under state laws for any material misrepresentations or material omissions in the appraisal. REIT assets shall be appraised on a consistent basis. The appraisal shall be based on an evaluation of all relevant information, and shall indicate the value of the REIT'S assets as of a date immediately prior to the announcement of the proposed ROLL- UP

transaction. The appraisal shall assume an orderly liquidation of REIT assets over a 12-month period. The terms of the engagement of the INDEPENDENT EXPERT shall clearly state that the engagement is for the benefit of the REIT and its investors. A summary of the independent appraisal, indicating all material assumptions underlying the appraisal, shall be included in a report to the investors in connection with a proposed ROLL-UP.

2. In connection with a proposed ROLL-UP, the PERSON sponsoring the ROLL-UP shall offer to SHAREHOLDERS who vote "no" on the proposal the choice of:
  - a. accepting the securities of the ROLL-UP ENTITY offered in the proposed ROLL-UP; or
  - b. one of the following:
    - i. remaining as SHAREHOLDERS of the REIT and preserving their interests therein on the same terms and conditions as existed previously; or
    - ii. receiving cash in an amount equal to the SHAREHOLDERS' pro-rata share of the appraised value of the net assets of the REIT.

COMMENT: With respect to the options specified in Subsection V.I.2.(b), the PERSON sponsoring the ROLL-UP needs only offer one of these alternatives to dissenting investors who do not wish to accept the security of the ROLL-UP ENTITY.

3. The REIT shall not participate in any proposed ROLL-UP which would result in SHAREHOLDERS having democracy rights in the ROLL-UP ENTITY that are less than those provided for under Sections VI.A., VI.B., VI.C., VI.D., VI.E of these Guidelines.
4. The REIT shall not participate in any proposed ROLL-UP which includes provisions which would operate to materially impede or frustrate the accumulation of shares by any purchaser of the securities of the ROLL-UP ENTITY (except to the minimum extent necessary to preserve the tax status of the ROLL-UP ENTITY). The REIT shall not participate in any proposed ROLL-UP which would limit the ability of an investor to exercise the voting rights of its securities of the ROLL-UP ENTITY on the basis of the number of REIT SHARES held by that investor.
5. The REIT shall not participate in any proposed ROLL-UP in which investors' rights of access to the records of the ROLL-UP ENTITY will be less than those provided for under Section VI.E of these Guidelines.
6. The REIT shall not participate in any proposed ROLL-UP in which any of the costs of the transaction would be borne by the REIT if the ROLLUP is not approved by the SHAREHOLDERS.

J. Leverage



The PROSPECTUS shall include an explanation of the borrowing policies of the REIT. The aggregate borrowings of the REIT, secured and unsecured, shall be reasonable in relation to the NET ASSETS of the REIT and shall be reviewed by the TRUSTEES at least quarterly. The maximum amount of such borrowings in relation to the NET ASSETS shall, in the absence of a satisfactory showing that higher level of borrowing is appropriate, not exceed 300%. Any excess in borrowing over such 300% level shall be approved by a majority of the INDEPENDENT TRUSTEES and disclosed to SHAREHOLDERS in the next quarterly report of the REIT, along with justification for such excess.

K. Other Limitations.

The REIT may not:

1. Reserve the right that gross offering proceeds from the sale of SHARES will be reserved or used to source regular or declared distributions.
21. Invest more than 10% of its total assets in UNIMPROVED REAL PROPERTY or mortgage loans on UNIMPROVED REAL PROPERTY.
32. Invest in commodities or commodity future contracts. Such limitation is not intended to apply to future contracts, when used solely for hedging purposes in connection with the REIT's ordinary business of investing in real estate assets and mortgages.
43. Invest in or make mortgage loans unless an appraisal is obtained concerning the underlying property except for those loans insured or guaranteed by a government or government agency. In cases in which a majority of the INDEPENDENT TRUSTEES so determine, and in all cases in which the transaction is with the ADVISOR, TRUSTEES, SPONSOR or AFFILIATES thereof, such an appraisal must be obtained from an INDEPENDENT EXPERT concerning the underlying property. This appraisal shall be maintained in the REIT's records for at least five years, and shall be available for inspection and duplication by any SHAREHOLDER. In addition to the appraisal, a mortgagee's or owner's title insurance policy or commitment as to the priority of the mortgage or the condition of the title must be obtained. Further, the ADVISOR and TRUSTEES shall observe the following policies in connection with investing in or making mortgage loans:
  - a. The REIT shall not invest in real estate contracts of sale, otherwise known as land sale contracts, unless such contracts of sale are in recordable form and appropriately recorded in the chain of title.
  - b. The REIT shall not make or invest in mortgage loans, including construction loans, on any one property if the aggregate amount of all mortgage loans outstanding on the property, including the loans of the REIT, would exceed an amount equal to 85% of the appraised value of the property as determined by appraisal unless substantial justification exists because of the presence of other

underwriting criteria. For purposes of this subsection, the "aggregate amount of all mortgage loans outstanding on the property, including the loans of the REIT," shall include all interest (excluding contingent participation in income and/or appreciation in value of the mortgaged property), the current payment of which may be deferred pursuant to the terms of such loans, to the extent that deferred interest on each loan exceeds 5% per annum of the principal balance of the loan;

COMMENT: Section V.K. ~~43~~(b) provides certain minimum standards in connection with the investment in or making of mortgage loans by a REIT. The standards may be exceeded for a particular registration if the mortgage loans are supported by sound underwriting criteria, such as the net worth of the borrower; the credit rating of the borrower based on historical financial performance; or collateral adequate to justify waiver from application of this section. The standards may also be exceeded where program mortgage loans are or will be insured or guaranteed by a government or a government Agency; where the loan is secured by the pledge or assignment of other real estate or another real estate mortgage; where rents are assigned under a lease where a tenant or tenants have demonstrated through historical net worth and cash flow the ability to satisfy the terms of the lease; or where similar criteria is presented satisfactory to the ADMINISTRATOR.

c. The REIT shall not make or invest in any mortgage loans that are subordinate to any mortgage or equity interest of the ADVISOR, TRUSTEES, SPONSORS or any AFFILIATE of the REIT.

~~54.~~ Issue redeemable equity securities.

~~65.~~ Issue debt securities unless the historical debt service coverage (in the most recently completed fiscal year) as adjusted for known changes is sufficient to properly service that higher level of debt.

~~76.~~ Issue options or warrants to purchase its SHARES to the ADVISOR, TRUSTEES, SPONSORS or any AFFILIATE thereof except on the same terms as such options or warrants are sold to the general public. The REIT may issue options or warrants to persons not so connected with the REIT but not at exercise prices less than the fair market value of such securities on the date of grant and for consideration (which may include services) that in the judgement of the INDEPENDENT TRUSTEES, has a market value less than the value of such option on the date of grant. Options or warrants issuable to the ADVISOR, TRUSTEES, SPONSORS or any AFFILIATE thereof shall not exceed an amount equal to 10% of the outstanding SHARES of the REIT on the date of grant of any options or warrants.

~~87.~~ Issue its shares on a deferred payment basis or other similar arrangement.

## VI. RIGHTS AND OBLIGATIONS OF SHAREHOLDERS

### A. Meetings

1. There shall be an annual meeting of the SHAREHOLDERS of the REIT upon reasonable notice and within a reasonable period (not less than 30 days) following delivery of the annual report. The TRUSTEES, including the INDEPENDENT TRUSTEES, shall be required to take reasonable steps to ensure that this requirement is met.

2. Special meetings of the SHAREHOLDERS may be called by the chief executive officer, by a majority of the TRUSTEES or by a majority of the INDEPENDENT TRUSTEES, and shall be called by an officer of the REIT upon written request of SHAREHOLDERS holding in the aggregate not less than 10% of the outstanding SHARES of the REIT entitled to vote at such meeting. Upon receipt of a written request, either in person or by mail, stating the purpose(s) of the meeting, the SPONSOR shall provide all SHAREHOLDERS within ten days after receipt of said request, written notice, either in person or by mail, of a meeting and the purpose of such meeting to be held on a date not less than fifteen nor more than sixty days after the distribution of such notice, at a time and place specified in the request, or if none is specified, at a time and place convenient to SHAREHOLDERS.

B. Voting Rights of SHAREHOLDER

1. A public offering of equity securities of a REIT other than voting shares will be looked upon with disfavor.
2. The voting rights per share of equity securities of the REIT (other than the publicly held equity securities of the REIT) sold in a private offering shall not exceed voting rights which bear the same relationship to the voting rights of the publicly held shares of the REIT as the consideration paid to the REIT for each privately offered REIT share bears to the book value of each outstanding publicly held share.
3. The DECLARATION OF TRUST must provide that a majority of the then outstanding SHARES may, without the necessity for concurrence by the TRUSTEES, vote to:
  - a. amend the DECLARATION OF TRUST;
  - b. terminate the REIT;
  - c. remove the TRUSTEES.
4. The DECLARATION OF TRUST must provide that a majority of SHAREHOLDERS present in person or by proxy at an Annual Meeting at which a quorum is present, may, without the necessity for concurrence by the TRUSTEES, vote to elect the TRUSTEES. A quorum shall be 50% of the then outstanding shares.
5. Without concurrence of a majority of the outstanding SHARES, the TRUSTEES may not:
  - a. amend the DECLARATION OF TRUST, except for amendments which do not adversely affect the rights, preferences and privileges of SHAREHOLDERS including amendments to provisions relating to, TRUSTEE qualifications, fiduciary duty, liability and indemnification, conflicts of interest, investment policies or investment restrictions;

- b. sell all or substantially all of the REIT's assets other than in the ordinary course of the REIT'S business or in connection with liquidation and dissolution;
- c. cause the merger or other reorganization of the REIT; or
- d. dissolve or liquidate the REIT, other than before the initial investment in property.

COMMENT: A sale of all or substantially all of the REIT's assets shall mean the sale of two-thirds or more of the REIT's assets based on the total number of properties and mortgages, or the current fair market value of these assets.

- 6. With respect to SHARES owned by the ADVISOR, the TRUSTEES, or any AFFILIATE, neither the ADVISOR, nor the TRUSTEES, nor any AFFILIATE may vote or consent on matters submitted to the SHAREHOLDERS regarding the removal of the ADVISOR, TRUSTEES or any AFFILIATE or any transaction between the REIT and any of them. In determining the requisite percentage in interest of SHARES necessary to approve a matter on which the ADVISOR, TRUSTEES and any AFFILIATE may not vote or consent, any SHARES owned by any of them shall not be included.

#### C. Liability of SHAREHOLDERS

The DECLARATION OF TRUST shall provide that:

- 1. The SHARES of the REIT shall be non-assessable by the REIT whether a trust, corporation or other entity.
- 2. The SHAREHOLDERS of the REIT which is not a corporation shall not be personally liable on account of any of the contractual obligations undertaken by the REIT.
- 3. All written contracts to which the REIT which is not a corporation is a party shall include a provision that the SHAREHOLDER shall not be personally liable thereon.

#### D. Reports

- 1. The DECLARATION OF TRUST shall provide that the REIT shall cause to be prepared and mailed or delivered to each SHAREHOLDER as of a record date after the end of the fiscal year and each holder of other publicly held securities of the REIT within 120 days after the end of the fiscal year to which it relates an annual report for each fiscal year ending after the initial public offering of its securities which shall include:
  - a. financial statements prepared in accordance with generally accepted accounting principles which are audited and reported on by independent certified public accountants;
  - b. the ratio of the costs of raising capital during the period to the capital raised:

- c. the aggregate amount of advisory fees and the aggregate amount of other fees paid to the ADVISOR and any AFFILIATE of the ADVISOR by the REIT and including fees or charges paid to the ADVISOR and any AFFILIATE of the ADVISOR by third parties doing business with the REIT;
- d. the TOTAL OPERATING EXPENSES of the REIT, stated as a percentage of AVERAGE INVESTED ASSETS and as a percentage of its NET INCOME;
- e. a report from the INDEPENDENT TRUSTEES that the policies being followed by the REIT are in the best interests of its SHAREHOLDERS and the basis for such determination; and
- f. separately stated, full disclosure of all material terms, factors, and circumstances surrounding any and all transactions involving the REIT, TRUSTEES, ADVISORS, SPONSORS and any AFFILIATE thereof occurring in the year for which the annual report is made. INDEPENDENT TRUSTEES shall be specifically charged with a duty to examine and comment in the report on the fairness of such transactions;

COMMENT: A partial enumeration of such transactions would include the lease or purchase of property by the REIT to or from any TRUSTEE, ADVISOR, SPONSOR or AFFILIATE; and loan transactions involving, directly or indirectly, the REIT and any TRUSTEE, ADVISOR, SPONSOR or AFFILIATE; and any joint venture involving the REIT and a TRUSTEE, ADVISOR, SPONSOR or AFFILIATE thereof.

2. The TRUSTEES, including the INDEPENDENT TRUSTEES, shall be required to take reasonable steps to ensure that the above requirements are met.

COMMENT: The above section is not intended to be exhaustive of the type and extent of information to be presented to SHAREHOLDERS in an annual

#### E. Access to Records

Any SHAREHOLDER and any designated representative thereof shall be permitted access to all records of the REIT at all reasonable times, and may inspect and copy any of them. Inspection of the REIT books and records by the ADMINISTRATOR shall be provided upon reasonable notice and during normal business hours. The DECLARATION OF TRUST shall include the following provisions regarding access to the list of SHAREHOLDERS:

1. An alphabetical list of the names, addresses, and telephone numbers of the SHAREHOLDERS of the REIT along with the number of SHARES held by each of them (the "SHAREHOLDER List") shall be maintained as part of the books and records of the REIT and shall be available for inspection by any SHAREHOLDER or the SHAREHOLDER'S designated agent at the home office of the REIT upon the request of the SHAREHOLDER;
2. The SHAREHOLDER List shall be updated at least quarterly to reflect changes in the information contained therein.

3. A copy of the SHAREHOLDER List shall be mailed to any SHAREHOLDER requesting the SHAREHOLDER List within ten days of the request. The copy of the SHAREHOLDER List shall be printed in alphabetical order, on white paper, and in a readily readable type size (in no event smaller than 10-point type). A reasonable charge for copy work may be charged by the REIT.
4. The purposes for which a SHAREHOLDER may request a copy of the SHAREHOLDER List include, without limitation, matters relating to SHAREHOLDERS' voting rights under the REIT agreement, and the exercise of SHAREHOLDERS' rights under federal proxy laws; and
5. If the ADVISOR or TRUSTEES of the REIT neglects or refuses to exhibit; produce, or mail a copy of the SHAREHOLDER List as requested, the ADVISOR, and the TRUSTEES shall be liable to any SHAREHOLDER requesting the list for the costs, including attorneys' fees, incurred by that SHAREHOLDER for compelling the production of the SHAREHOLDER List, and for actual damages suffered by any SHAREHOLDER by reason of such refusal or neglect. It shall be a defense that the actual purpose and reason for the requests for inspection or for a copy of the SHAREHOLDER List is to secure such list of SHAREHOLDERS or other information for the purpose of selling such list or copies thereof, or of using the same for a commercial purpose other than in the interest of the applicant as a SHAREHOLDER relative to the affairs of the REIT. The REIT may require the SHAREHOLDER requesting the SHAREHOLDER List to represent that the list is not requested for a commercial purpose unrelated to the SHAREHOLDER'S interest in the REIT. The remedies provided hereunder to SHAREHOLDERS requesting copies of the SHAREHOLDER List are in addition to, and shall not in any way limit, other remedies available to SHAREHOLDERS under federal law, or the laws of any state.

F. Repurchase of SHARES

Ordinarily, the REIT is not obligated to repurchase any of the SHARES. However, the REIT is not precluded from voluntarily repurchasing the SHARES if such repurchase does not impair the capital or operations of the REIT. The REIT may have excess share provisions that provide for mandatory redemption. The SPONSOR, ADVISOR, TRUSTEES or AFFILIATES are prohibited from receiving a fee on the repurchase of the SHARES by the REIT.

G. Distribution Reinvestment Plans

All Distribution Reinvestment Plans shall, at the minimum provide for the following:

1. All material information regarding the distribution to the SHAREHOLDER and the effect of reinvesting such distribution, including the tax consequences thereof, shall be provided to the SHAREHOLDER at least annually.

2. Each SHAREHOLDER participating in the plan shall have a reasonable opportunity to withdraw from the plan at least annually after receipt of the information required in subparagraph (1) above.

#### H. Distributions

The DECLARATION OF TRUST shall state the manner in which distributions to SHAREHOLDERS are to be determined. The REIT may not source regular or declared distributions from gross offering proceeds.

#### I. Distributions in Kind

Distributions in kind shall not be permitted, except for;

1. distributions of readily marketable securities;
2. distributions of beneficial interests in a liquidating trust established for the dissolution of the REIT and the liquidation of its assets in accordance with the terms of the DECLARATION OF TRUST; or
3. distributions of in-kind property which meet all of the following conditions:
  - a. The TRUSTEES advise each SHAREHOLDER of the risks associated with direct ownership of the property.
  - b. The TRUSTEES offer each SHAREHOLDER the election of receiving in-kind property distributions.
  - c. The Trustees distribute in-kind property only to those SHAREHOLDERS who accept the TRUSTEES' offer.

### VII. DISCLOSURE AND MARKETING

#### A. Sales Material

Sales material, including without limitation, books, pamphlets, movies, slides, article reprints, television and radio commercials, materials prepared for broker/dealer use only, sales presentations (including prepared presentations to prospective SHAREHOLDERS at group meetings) and all other advertising used in the offer or sale of units shall conform to filing, disclosure, and adequacy requirements under any applicable state regulations. Statements made in sales material communicated directly or indirectly to the public may not conflict with, or modify risk factors or other statements made in the PROSPECTUS.

#### B. PROSPECTUS and its Contents

##### 1. PROSPECTUS

A PROSPECTUS which is not part of a Registration Statement declared effective by the Securities and Exchange Commission pursuant to the Securities Act of 1933 shall generally conform to the disclosure requirements which would apply if the offering were so registered. The format and information requirements of applicable Guide(s) promulgated

by the Securities and Exchange Commission shall be followed, with appropriate adjustments made for the different business of the REIT.

2. Prohibited Representations

- a. In connection with the offering and sale of SHARES in a REIT, neither the SPONSOR(S) nor the underwriter(s) may, in writing or otherwise, directly or indirectly, represent or imply that an Administrator has approved the merits of the investment or any aspects thereof.
- b. Any reference to the REIT'S compliance with these Guidelines or any provisions herein which connotes or implies compliance shall not be allowed.

3. Forecasts and Projections

- a. Neither the PROSPECTUS nor any sales material communicated directly or indirectly to the public shall contain a quantitative estimate of a REIT'S anticipated economic performance or anticipated return to participants, in the form of investment objectives, cash distributions, tax benefits or otherwise, except as permitted by this Section of these Guidelines.
- b. The presentation of predicted future results of operations of programs shall be permitted but not required for SPECIFIED ASSET REITS and shall be prohibited for all other REITS. The cover of the PROSPECTUS must contain in bold face language one of the following statements:
  - i. for SPECIFIED ASSET REITS with forecasts: "Forecasts are contained in this prospectus. Any representation to the contrary and any predictions, written or oral, which do not conform to that contained in the prospectus shall not be permitted"; or
  - ii. for all other REITS: "The use of forecasts in this offering is prohibited. Any representation to the contrary and any predictions, written or oral, as to the amount or certainty of any present or future cash benefit or tax consequence which may flow from an investment in this program is not permitted."

c. Content of Forecasts

Forecasts for SPECIFIED ASSET REITS may be included in the PROSPECTUS and sales material of the REIT only if they comply with all of the following requirements:

- i. Generally, forecasts shall be realistic in their predictions and shall clearly identify the assumptions made with respect to all material features of presentation. Forecasts should be examined by an independent certified public accountant in accordance with the Guide for Prospective



Financial Statements and the Statement on Standards for Accountants Services on Prospective Financial Information as promulgated by the American Institute of Certified Public Accountants. The report of the independent certified public accountant must be included in the PROSPECTUS.

- ii. if any part of the forecast appears in the sales material, the entire forecast must be presented.
  - iii. Forecasts shall generally be for a period equivalent to the anticipated holding period for REIT assets. Forecasts which do not extend through the expected term of the REIT'S life must show the effects of a hypothetical liquidation of program assets under good and bad conditions. Yield information may not be presented for Forecasts which do not extend through the expected term of the REIT'S life.
  - iv. Forecasts shall disclose possible undesirable tax consequences of an early sale of program assets, such as depreciation recapture, the loss of prior year tax credits or the possible failure to generate sufficient cash from the disposition to pay the associated tax liabilities.
  - v. In computing any rate of return or yield to investors, no unrealized gains or value shall be included.
- C. The ADMINISTRATOR may require that the DECLARATION OF TRUST be given to prospective SHAREHOLDERS.

## VIII. MISCELLANEOUS

### A. Provisions of the DECLARATION OF TRUST

The requirements and/or provisions of appropriate portions of the following Sections shall be included in the DECLARATION OF TRUST: I.B.; II.A.; II.B.; II.C.; II.D.; II.E.; II.F.; II.G.; II.H.; III.B.; III.C.; III.D.; III.~~GF~~; IV.A.2; IV.C.; IV.D.; IV.E.; IV.F.; IV.G.; V.A.; V.B.; V.C.; V.D.; V.E.2; V.G.; V.H.; V.I.; V.J.; V.K.; VI.A.; VI.B.; VI.C.; VI.D.; VI.E.; VI.F.; VI.G.; VI.H.; VI.I.

### B. Amendments and Supplements

A marked copy of all amendments and supplements to an application shall be filed with the ADMINISTRATOR as soon as the amendment or supplement is available.

### C. Cross Reference Sheet Requirement

The CROSS REFERENCE SHEET shall be included with the application for registration.

## **REIT GUIDELINES CROSS REFERENCE SHEET**

### **General Instructions**

1. This CROSS REFERENCE SHEET should be completed and submitted with the Application for Registration.
2. Sections which are not applicable should be noted as such.
3. Provisions of the REIT which vary from the Guidelines must be explained by endnote; for example, if the REIT uses a defined term which is different from the Guidelines' definition, the variance must be explained. Endnotes should be numbered sequentially in the column designated "Endnotes" and should be presented on a rider identified as "Endnotes" with each endnote on the rider numerically corresponding to the endnote identified on the CROSS REFERENCE SHEET.

## REIT GUIDELINES CROSS REFERENCE SHEET

Name of Applicant: \_\_\_\_\_

Guideline Section	Section Number Declaration of Trust	Page Number Prospectus	Endnote See Instruction 3
III. Requirements of Sponsor, Advisor, Trustees & Affiliates			
A. Minimum Capital			
B. Number & Election of Trustees			
C. Duties of Trustees			
D. Experience of Trustees			
E. Fiduciary Duty			
F. Advisory Contract			
G. Liability and Indemnification			
H. Arbitration Provisions			
III. Suitability, <u>Conduct Standards and Concentration Limits of Shareholders</u>			
B. Income & Net Worth Standards			
<u>D.</u> <u>Concentration Limit</u>			
<del>ED.</del> Subscription Agreements			
<del>FE.</del> Completion of Sale			
<del>GF.</del> Minimum Investment			
IV. Fees, Compensation & Expenses			
A. Introduction			
B. Organization & Offering Expenses			
C. Acquisition Fees & Acquisition Expenses			
D. Total Operating Expenses			
E. Real Estate Commissions on Resale of Property			
F. Incentive Fees			
G. Advisor Compensation			
V. Conflicts of Interest & Investment Restrictions			
A. Sales & Leases to REIT			
B. Sales & Leases to Sponsor, Advisor, Trustees or Affiliates			
C. Loans			
D. Investment			
E. Statement of Objectives			
F. Multiple Programs			
G. Other Transactions			
H. Appraisal of Real Property			
I. Roll-up Transaction			
J. Leverage			
K. Other Limitations			

