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GIBSON DUNN

Investment Funds and Real Estate Update September 15, 2025

NASAA Updates Non-Traded REIT Guidelines

The changes become effective January 1, 2026 and seek to enhance protections for retail investors in the non-traded real estate investment trust market.

The Board of Directors of the North American Securities Administrators Association (**NASAA**), an organization through which securities administrators in the 53 U.S. jurisdictions, the Canadian provinces and Mexico, coordinate their regulatory and enforcement efforts[1], approved at its annual meeting on September 7, 2025 long-awaited revisions to its Statement of Policy Regarding Real Estate Investment Trusts (the **REIT Guidelines**). The changes become effective January 1, 2026 and seek to enhance protections for retail investors in the non-traded real estate investment trust (**REIT**) market. The REIT Guidelines, which were last amended in 2007, set out restrictions and limitations applicable to non-traded REITs that are subject to state "Blue Sky" qualification and registration requirements, including with respect to investment and leverage restrictions, suitability and conduct standards, advisor compensation and fees, related party transactions, shareholder rights, and disclosure and marketing.[2]

We expect that the impact of these amendments – which impose investor concentration limits and address heightened conduct standards – may further accelerate the growth of retail-oriented private placement offerings in the real estate, real asset and real estate credit sectors.

A redline of the prior iteration of the REIT Guidelines (the **Prior Guidelines**) against the current REIT Guidelines may be referenced HERE. The key takeaways from the updates follow below:

- ***Concentration Limits, with Accredited Investor Exception***: Sponsors must now establish a minimum concentration limit for shareholders who are not "accredited investors" (as defined in Rule 501(a) of Regulation D), and the REIT's state securities administrator may consider a variety of factors to determine if the limit proposed by a sponsor is acceptable.[3] Unless the state securities administrator determines that higher or lower standards are appropriate, sponsors may no longer accept shareholders who are not accredited investors if such person's investment in the REIT, together with such person's investments in other non-traded REITs, business development companies (**BDCs**) and other non-traded direct participation programs,[4] would in the aggregate exceed 10% of the person's liquid net worth at the time of the investment. Although accredited investors are generally exempted from the concentration limit, the state securities administrator may determine that the risks or other factors associated with a particular REIT would require the concentration limit to also apply to accredited investors in the offering. These provisions will require sellers of shares to gather more information about a prospective shareholder's liquid net worth (which definition, notably, does not take into account leverage on readily marketable securities (i.e. margin loans)) and other investments in similar products. In practice, we expect that these provisions may lead to sponsors declining to accept non-accredited investors in their offerings at all, as additional legwork and diligence will be required to make sure that non-accredited investors do not trip concentration limits. Sponsors may be reluctant to take on this extra work and risk. The inclusion of an accredited investor exception in the ultimate rule reflects pressure from industry groups, as the proposed REIT Guidelines granted the state administrator discretion to exclude accredited investors from concentration limits but did not include a blanket exception. Further, in response to industry comments, the final rule provides that the concentration limits will not apply to investments made as a result of participation in a distribution reinvestment plan.

- ***Higher Minimum Investor Income/Net Worth Thresholds***: Under the REIT Guidelines, as amended, investors in a non-traded REIT generally need to have (a) both an annual gross income and net worth of $100,000 (increased from $70,000 in the Prior Guidelines) or (b) a minimum net worth of $350,000 (increased from $250,000 in the Prior Guidelines). These numbers will be adjusted for inflation every five years.

- ***New "Conduct Standards" for Brokers and Advisers Recommending REIT Investments***: The updates include a new, broad definition of "Conduct Standards" which captures standards of conduct required of or owed by those individuals selling, recommending, or providing investment advice related to the shares of a non-traded REIT to actual or prospective shareholders. Non-exclusive examples of applicable Conduct Standards may include Regulation Best Interest (**Regulation BI**), federal or state fiduciary duties, and recommendations by self-regulatory organizations (e.g., FINRA suitability rules). The REIT Guidelines now explicitly state that broker dealers and investment advisers, among others, cannot assume that compliance with the REIT Guidelines is sufficient to fulfill its own Conduct Standards obligations. The takeaway for those considering selling interests in a REIT is that whether an investor meets the product's minimum eligibility requirements (i.e., minimum net worth, maximum concentration limit, etc.) is not dispositive as to whether a registered representative of a broker-dealer or a state-registered investment adviser has met the applicable standard of care (whether best interest or fiduciary) when recommending that its client purchase a non-traded REIT.[5] In other words, if a broker dealer and/or its registered representatives are the subject of an individual or coordinated regulatory enforcement action by a state, or an investor in a REIT brings suit directly against the person who sold them an interest in the REIT, in each case, wherein the party bringing the action or suit asserts that the seller breached an applicable Conduct Standard such as Regulation BI or fiduciary duty, merely pointing to the fact that the REIT operated in compliance with the REIT Guidelines will not constitute dispositive proof that the individual also complied with the relevant Conduct Standard. While this is newly added to the REIT Guidelines, this stance is consistent with the States' longstanding position that the product's eligibility criteria is only a floor and is distinct from the requisite suitability analysis that a registrant must conduct before soliciting the sale of a security.[6] It is worth noting that the proposed REIT Guidelines contained an additional provision that explicitly provided that if REIT shares are recommended to "retail customers" then a broker-dealer or associated person recommending such shares must act in the best interest of the retail customer without placing the financial or other interest of the broker-dealer/associated person ahead of the interest of the retail customer. This provision did not make it into the final REIT Guidelines.

- ***Sponsors Potentially Required to Exercise Additional Oversight over Those Selling REIT Shares.*** Sponsors and anyone selling shares in a non-traded REIT must now make "every reasonable effort" to determine that the purchase of shares is (a) in compliance with applicable Conduct Standards and (b) a suitable and appropriate investment for each shareholder. The obligation added in "(a)" is new, while "(b)" remains unchanged from the Prior Guidelines. The introduction of the language in "(a)" introduces additional uncertainty and oversight obligations for sponsors, who may now be required to confirm, for example, that broker-dealers involved in the offering have complied with Regulation BI. It is unclear how sponsors in practice may conduct this level of oversight over their distribution partners, but sponsors should consult with counsel to include, at a minimum, provisions in their contractual agreements with sellers that address this oversight requirement.

While the REIT Guidelines have historically set the benchmark for the non-traded REIT market, it is important to recognize that NASAA is not a governmental agency, but rather an association of state securities regulators in the United States, Canada and Mexico, and that the REIT Guidelines do not automatically have the force of law. In the coming months, individual state regulators will consider whether to adopt the amended REIT Guidelines wholesale or adopt variations. Absent formal adoption, the registration department within states securities administrators may use the REIT Guidelines to inform qualification review.

[1] NASAA Website ("Who we are" https://www.nasaa.org/)

[2] Offerings by REITs with securities listed on a national stock exchange, REITs that are registered as investment companies pursuant to the Investment Company Act of 1940 (the **1940 Act**), and REITs with securities issued in private placements under Regulation D, are generally exempt from these state compliance requirements.

[3] These factors may include the REIT's use of leverage, tax implications, affiliate relationships, liquidity of REIT shares, the sponsor's prior performance and financial condition, complexity of the offering, and any other relevant factors.

[4] "Direct participation programs" includes REITs, business development companies (BDCs), oil and gas programs, equipment leasing programs, and commodity pools, but excludes federal and state exempt private offerings (e.g., private placement offerings under Reg D) and any investment company registered pursuant to the 1940 Act.

[5] In April 2025, NASAA published its Model Rule for Regulation Best Interest implementation by the States.

[6] The States' Regulation Best Interest initiatives have focused on application of the heightened standard of conduct with respect to the sale of complex products, included non-traded REITs. NASAA included discussion on this topic in its Report and Findings of NASAA's Regulation Best Interest Implementation Committee.

The following Gibson Dunn lawyers prepared this update: David Perechocky, Lauren Cook Jackson, and Shannon Errico.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding the issues and considerations discussed above. For further information, please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's Investment Funds, Real Estate, Financial Institutions, or Securities Regulation & Corporate Governance practice groups, or the authors:

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