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Submitted via *pubcom@finra.org*

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

Re: FINRA Regulatory Notice 11-44

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA"), in response to the request for comments published by the Financial Industry Regulatory Authority, Inc. ("FINRA") in Regulatory Notice 11-44 (September 2011) (the "Proposing Notice"), with respect to proposed amendments to National Association of Securities Dealers, Inc. ("NASD") Rule 2340 (to be renumbered FINRA Rule 2231) to revise the per share estimated value required by Section (c) thereof to be included by FINRA members on customer account statements with respect to the securities of public non-traded direct participation program ("DPP") and real estate investment trust ("REIT") securities (the "Proposal").

This letter was prepared by members of the Subcommittee on FINRA Corporate Financing Rules of the Committee.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

I. Background of NASD Rule 2340 and Recent Regulatory Initiatives

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

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

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

II. General Comments

We support FINRA's efforts to enhance disclosure on customer account statements regarding the illiquidity and valuations of non-traded DPP and REIT securities. The current terms of NASD Rule 2340(c) significantly responded to the original concerns of the House Subcommittee and Division for rulemaking following the real estate market decline in the late 1980s. We agree with FINRA that the protections provided by NASD Rule 2340(c) would be enhanced by prohibiting FINRA members from continuing to disclose the offering price of the

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

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

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

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

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

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

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

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

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

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

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

III. Per Share Estimated Value Disclosure

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

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

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

The Initial Offering Period

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As a result, the Net Offering Price disclosed on customer account statements would be artificially low in deducting both estimated expenses and any O&O expenses (including any underwriting compensation) that are paid by the sponsor or advisor or from the operations of the program as "back-end" fees (including "trail commissions"). We believe that the resulting Net Offering Price disclosed on customer account statements would be misleading and confusing to investors, since it will not be consistent with disclosure in the prospectus. For example, a Program offered at $10 per share may estimate that maximum O&O will not exceed 15%, of which 9% represents underwriting commissions deducted directly from offering proceeds and up

to 1% paid by the Program to reimburse FINRA member expenses, with the Advisor paying the remaining 5% of O&O expenses. The Proposal would require that customer account statements list a per share estimated value of $8.50, whereas issuer proceeds disclosed on the cover page and in the "Use of Proceeds" section (and other sections) of the prospectus would be $9.10 per share and the prospectus would disclose that the Program would only be obligated to pay up to 1% for expense reimbursements (all of which expenses may not be incurred).

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

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

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

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

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

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

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

The Per Share Estimated Value Based on an Appraisal

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

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

This gap between the issuer's Net Offering Price disclosure in the Program's most recent annual report prior to the end of the Initial Offering Period and the need for FINRA members to obtain an Appraised Estimated Value from the issuer for disclosure on customer account

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

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

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

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

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

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

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

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

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

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

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

[8] In "Investor Alert on Public Non-Traded REITs," dated October 4, 2011, FINRA pointed out that "Many factors affect the pricing, including the portfolio of real estate assets owned, strength of the trust's balance sheet (assets versus liabilities), overhead expenses, cost of capital and more. The Boards and managers of non-traded REITs might even rely on third-party sources to estimate a per-share value."

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

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

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

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

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

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

V. Scope of Amended NASD Rule 2340

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

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

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

VI. Implementation of the Proposal

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

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

VII. Burden on Competition and Capital Formation

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

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

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

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

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Once again, the Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with FINRA and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin
Chair, Federal Regulation of Securities Committee

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