

# Brookfield

Via electronic submission to [NASAAComments@nasaa.org](mailto:NASAAComments@nasaa.org), [Andrea.Seidt@com.ohio.gov](mailto:Andrea.Seidt@com.ohio.gov), and [Mark.Heuerman@com.ohio.gov](mailto:Mark.Heuerman@com.ohio.gov)

August 24, 2022

NASAA Corporation Finance Section  
Andrea Seidt, Section Chair  
Mark Heuerman, Project Group Chair  
North American Securities Administrators Association, Inc. (NASAA)  
750 First Street, N.E., Suite 1140  
Washington, D.C. 20002

*Re: Proposed Revisions to NASAA Statement of Policy Regarding Real Estate Investment Trusts*

Dear NASAA, Commissioner Seidt and Mr. Heuerman:

On behalf of Brookfield Asset Management, I am reaching out to convey our concerns on the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "Proposal"). Brookfield is a large asset manager that is the sponsor of Brookfield REIT, a non-listed REIT that would fall within the scope of the Proposal.

The Proposal would dramatically and unnecessarily expand state regulation of non-listed REITs. Moreover, the Proposal states that it will serve as a template for future guidance about other products that investors find helpful to invest in to ensure diversified investment portfolios. Given the Proposal's breadth and future significance, and NASAA's apparent misunderstanding about the characteristics of non-listed REITs, we believe the rules proposed by NASAA will stifle economic growth in the real estate sector and severely limit diversification, and its related benefits, for individual investors. We further believe that the Proposal overreaches in going beyond the applicable federal standards and is the product of a lack of understanding of how non-listed REITs work.

*Real Estate and Small Business Investment Fosters Economic Growth.* Real estate development is fundamental to economic growth and employment in the various states. The Proposal would unduly constrain growth in the real estate sector at an unpropitious time of high inflation and possible recession. Indeed, more, not less, capital is necessary in the real estate sector to address significant issues like making housing affordable to middle income families. Recent surveys of public non-listed REITs indicated that approximately 63% of their investments in multifamily housing support workforce housing, defined as multifamily housing with rent less than 25% of mean family income in the surrounding area. By way of example, as of June 30, 2022, fifty five percent (55%) of the Brookfield Real Estate Income Trust's (Brookfield REIT) real estate equity investments were in multifamily housing.

*Investors Need Diversification.* REITs continuously offered and regularly redeemed at net asset value (“NAV REITs”) are the only non-listed REITs offered today. Investors buy NAV REITs for many reasons, including portfolio diversification away from the stock and fixed income markets. Diversification particularly important during a time of stock market volatility. NAV REITs can also provide a hedge against inflation, long-term capital appreciation and a source of income. The Proposal would obstruct investors’ ability to invest in and enjoy the benefits of these portfolio-diversifying investments.

Furthermore, asset managers with more than one product are unduly and unfairly penalized under the Proposal because the proposed 10% concentration limit also applies to securities of “affiliates,” which is defined very broadly, and in other non-traded direct participation programs. Brookfield has many products in the market at any one time and the definition of affiliate would seemingly capture all of the Brookfield REITs, its registered investment companies and private funds, not just our non-listed REIT, and thus all of these products would count towards the concentration limit unless the reference to affiliates is removed.

*A National Product Deserves a National Standard.* Any state action should comport to the federal standards, including Regulation Best Interest, and should not conflict with federal regulation. We agree that the 2007 guidelines are out of date because of the transformation of the industry and new federal regulations. The Proposal, which merely adds new, additional requirements to the outdated 2007 guidelines rather than actually updating the guidelines, is not the answer. Ensuring that requirements are consistent across state boundaries and do not conflict with federal standards, would better protect investors.

*The Proposal is a Product of Bias and Lack of Understanding.* The Proposal would harm retail investors and stunt economic growth because it is the product of bias and a lack of understanding concerning the NAV REIT market. The Proposal is simply unsupported by the facts. NASAA has provided little data – except for a discredited article<sup>1</sup>, a discredited NASAA survey, and the mischaracterization of FINRA data. NASAA provides no economic analysis to support any part of the Proposal. In addition, state regulators need to better understand NAV REITs as the Proposal seems rooted in a lack of understanding of how they operate, fundraise, and are regulated. We have attached a factsheet providing additional information.

*Existing Regulatory Safeguards.* The Proposal likewise fails to take into account the existing regulatory safeguards that are currently in place to ensure investors have appropriate and relevant information upon which the investor may make an investment decision, and financial intermediaries, and their representatives, who offer shares in NAV REITS NAV REITs are appropriately licensed and regulated. For example, NAV REITs must register their public offerings with the SEC and file annual, quarterly and current SEC reports. In addition, existing FINRA Rule 2231 ensures enhanced transparency regarding the impact of upfront fees on investment value and changes in investment value over time.

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<sup>1</sup> NASAA relies on Mallett and McCann, *Further on the Returns to Non-Traded REITs*, The Journal of Wealth Management Winter 2021. Their analysis has been refuted. See Selman, *Non-Traded REIT Performance: A Response to Mallett and McCann*, The Journal of Wealth Management Fall 2022. Likewise, United States Federal courts have observed on a number of occasions that McCann’s work cannot be relied upon. For example, one US Federal court noted that a report produced by McCann was “deeply flawed,” as it “contained several significant errors” that caused McCann to “improperly” and “erroneously” analyze market data. *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174 (S.D.N.Y. Mar. 27, 2012).

Moreover, recommendation of purchases and sales of shares of NAV REITS are made by (1) financial intermediaries such as registered investment advisers who have a fiduciary duty and are regulated by the SEC and the states, and (2) registered representatives of registered broker-dealers under Regulation Best Interest and other SEC and FINRA rules. Given this extensive, existing regulatory framework, there is no need for any additional (and non-investor friendly) regulations such as those included in the Proposal.

Other leading real estate companies are being active in advocacy efforts as well and you should expect to hear from them in the coming days. We are happy to schedule a call in the next few days to discuss or please feel free to email any questions or requests for information. Thanks for your consideration.

Best,

A handwritten signature in blue ink, appearing to read 'Zachary Vaughan', with a stylized flourish at the end.

Zachary Vaughan  
CEO, Brookfield REIT

## Fact Sheet

The Proposal fails to distinguish lifecycle REITs from NAV REITs, the type of non-listed REIT that is almost exclusively sold today. NAV REITs are transparent vehicles with lower fees, largely due to requirements that FINRA imposed on non-listed REITs in 2015, when the federal regulator issued guidance concerning valuation transparency and share pricing.

Characteristics of NAV REITs. NAV REITs are Maryland corporations that elect to be taxed as real estate investment trusts for federal income tax purposes. They are managed by an external advisor under an advisory agreement, subject to oversight by an independent board of directors with a fiduciary duty to the shareholders. They conduct monthly, rigorous calculation of net asset value using an independent valuation advisor. Every REIT property is appraised at least annually, and typically a third-party valuation firm is actively involved in the process. A valuation committee who approves the NAV is comprised of independent board members who have a fiduciary responsibility to the shareholders. The board also appoints an independent valuation advisor who calculates NAV based on internationally recognized guidelines. NAV REITs also continuously offer their common stock at NAV per share.

NAV REITs provide liquidity by a share repurchase plan with monthly (2% of NAV) and quarterly (5% of NAV) limits. They provide portfolio diversification from traditional stocks and bonds through exposure to geographically diverse opportunities across a range of property types.

NAV REITs offered today must be distinguished from the legacy lifecycle REITs that appear to be the concern of NASAA. As their name implied, lifecycle REITs, which are sector focused, have a “lifecycle” that is intended to terminate with a liquidity event such as a share listing or an acquisition. Investors typically paid a 7% load upon purchase and indirectly bear the REIT’s “offering and organization expenses” of up to 5% each year. Lifecycle REITs typically offered regular redemptions by their shareholders, but the older form of lifecycle REIT offered less liquidity than more recent lifecycle REITs.<sup>2</sup>

In contrast, NAV REITs continuously offer their shares at NAV over an indeterminate life. The NAV REIT is not intended to terminate with a liquidity event. It offers redemptions at NAV of up to 2% of its shares per month, 5% per quarter and up to 20% of NAV per year —an approximately *four-fold* increase from the amount of liquidity offered by earlier forms of lifecycle REITs.

NAV REIT fees are lower than those of the lifecycle REITs. The majority of NAV REIT shares are sold without any load through fiduciary investment advisers rather than commissioned broker-dealers.<sup>3</sup> Formerly, it was not uncommon for a legacy lifecycle REITs to include acquisition fees, financing fees, development fees and disposition fees as part of its fee structure. NAV REITs have eliminated the traditional acquisition and disposition fees.<sup>4</sup> NAV REITs primarily pay their external advisors an annual asset management fee (typically no more than 1.25% of NAV or 1.0% of asset cost), and a performance fee based on investor returns, with the intent to better align sponsor and shareholder interests.

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<sup>2</sup> In contrast to older lifecycle REITs, current lifecycle REITs in the market offer liquidity of up to 10-20% per annum.

<sup>3</sup> In 2020, only .8% of non-listed REIT shares sold had a full load commission, while 38.3% of sales were in low load share classes and 61% of sales were in no load share classes purchased on a fee-based platform. (Source Stanger Market Pulse).

<sup>4</sup> NAV business development companies provide similar transparency, independent valuation, and liquidity.

Regulation of NAV REITs. NAV REITs must register their public offerings with the SEC and file annual, quarterly and current SEC reports. FINRA Rule 2231 ensures enhanced transparency regarding the impact of upfront fees on investment value and changes in investment value over time. Updated values are provided to customers on their account statements. Most purchases are recommended by registered investment advisers with a fiduciary duty, regulated by the SEC and the states. NAV REITs also are purchased through registered broker-dealers under Regulation Best Interest and other SEC and FINRA rules.