Institute for Portfolio Alternatives

April 12, 2023

VIA ELECTRONIC SUBMISSION: Roger.Patrick@com.ohio.gov and csipubliccomments@governor.ohio.gov

Ohio Common Sense Initiative
77 S. High St., 30th Floor
Columbus, OH 43215-6117

RE: Ohio Division of Securities Rule 1301:6-3-09 Registration by Qualification

Dear Sir or Madam,

The Institute for Portfolio Alternatives (the "Institute") appreciates the opportunity to have appeared at the Division's stakeholders' meeting on March 21st concerning the proposal to amend Rule 1301:6-3-09 (the "Proposal").[1] We value the Division's willingness to discuss the important issues that the Proposal raises.

More generally, we appreciate the Division's engagement in administrative rulemaking, as requested by the Joint Committee on Agency Rule Review under R.C. 101.352. By submitting the Proposal through this process, the Division is ensuring that it hears from impacted constituents and market participants such as our members.

Among the topics that we discussed at the stakeholders' meeting was the proposed concentration limit, under which Ohio investors would be prohibited from purchasing non-listed REITs or BDCs in an amount that exceeds 10% of the investor's liquid net worth. We acknowledge that the Proposal's concentration limit is less restrictive, and would supplant, the concentration limits that the Division has expected of some issuers when conducting merit review of offerings. Unlike those concentration limits, the Proposal would limit concentration in the securities of a single REIT or BDC. It would not limit concentration in the securities of an affiliate of a REIT or BDC or the securities of other REITs or BDCs. Nevertheless, although the concentration limit in the Proposal is less restrictive than those that are required of issuers today, we continue to oppose the concentration limit in the Proposal for the reasons stated in our comment letters dated February 3, 2023, and February 28, 2023.[2]

[1] The Institute represents, among other firms, the sponsors and distributors of state and federally regulated, non-listed real estate investment trusts ("REITs") and business development companies ("BDCs"), both of which are subject to the Proposal.

[2] As we said in those letters, the language of this provision is unclear, and it presumes that these offerings are inherently fraudulent or deceptive (which they are not). More importantly, the concentration limit would deprive Ohio investors of investment opportunities and limit their investment choice.

During the stakeholders' meeting, however, the Division discussed two possible revisions to the concentration limit that do not appear in the Proposal.[3] By raising them at the stakeholders meeting, the Division acknowledged that these possible changes would impose new requirements that are not contained in the current Proposal. We are taking this opportunity to comment on those two changes that the Division discussed at the meeting. We have not received language showing revisions to the Proposal, so these comments are limited to our understanding of the Division's description of those features at the meeting. Of course, should the Division decide to make the changes that it raised at the meeting, the Division would have to reissue the proposal with new language to reflect these changes, at which stakeholders such as the Institute could comment on the specific rule language.

I. The Proposal Should Expressly Include an Accredited Investor Exemption Aligned with the SEC's Federal Standard

First, the Division stated that it may consider an exception to the concentration limit for "accredited investors" *as defined by the Division*. The Division suggested that it would likely define "accredited investor" as an investor with a net worth over $3 million, excluding the investor's primary residence. This definition would conflict with the long-established federal definition of "accredited investor," as defined by the United States Securities and Exchange Commission's (SEC) under Regulation D of the Securities Act of 1933. The federal definition in Regulation D applies to an investor with a net worth of $1 million (excluding the primary residence).[4]

If the Division moves forward with the Proposal, we strongly encourage that the Division include an accredited investor exception in the proposed concentration limit, but *only* if the Division incorporates the federal "accredited investor" definition under Regulation D. The SEC is required to review the federal definition of accredited investor as it relates to natural persons every four years to determine whether the definition should be modified or adjusted for the protection of investors, in the public interest and in light of the economy.[5] The SEC most recently amended its accredited investor definition in 2020, after conducting a thorough economic analysis and engaging in an extensive comment process.

While the Division might disagree with the SEC's determination of how "accredited investor" should be defined, Congress requires the SEC and not individual states to determine which investors have the financial sophistication or resources to evaluate and to bear certain investment risks. Furthermore, the SEC's current regulatory agenda includes consideration of the

[3] Additionally, as noted in our letter dated February 28, 2023, but not addressed at the stakeholder meeting, the Division has also issued new conditions on registration filings related to repurchase programs of non-listed REITs and BDCs that do not appear in the Proposal. As these new conditions constitute principles of law or policy, these should be submitted to JCARR.

[4] Rule 501(a), Regulation D.

[5] Section 413(b)(2)(A) of the Dodd-Frank Act.

federal accredited investor definition. We respectfully ask that the Division carefully and objectively assess a final SEC rule on this important issue before making any determination on a different accredited investor definition in Ohio.

In short, the Division should not disrupt this federal system of regulation. There is no justification for a single state to configure its own "accredited investor" definition – a standard that would conflict with federal law and lack all of the economic and policy analysis in which the SEC engaged less than three years ago.

Importantly, an Ohio-only accredited investor definition would impede compliance by federally registered broker-dealers and investment advisers (including major wire houses and independent financial advisors) who distribute these investment offerings nationally. These firms would be forced to create new state-specific operational and compliance programs, recode their internal systems for multiple accredited investor standards, and track their application throughout the firm arising from a patchwork of federal and state standards. This would entail significant compliance and operational costs, and create confusion and uncertainty among firms, advisors and clients. The effect would be to impede the ability of investment advisers and broker-dealers, acting in their customers' best interest, to recommend these portfolio-diversifying investments.

For these reasons, the Institute would support an accredited investor exception, provided that it incorporates the federal accredited investor definition in Regulation D.

II. If the Division Moves Forward with Amending the Proposal, the Proposal should not Extend to Product Type and Affiliates

Second, the Division suggested that it might revise the concentration limit in the Proposal so that it applies to the investment in the affiliates of non-listed REITs and BDCs and in other non-listed REITs and BDCs. These revisions to the Proposal apparently would revert the concentration limit to the limits that the Division imposes today through its merit review of offerings.[6] They also could resemble language in NASAA's recently proposed REIT guidelines. The new language, however, would prevent an Ohio investor who held one share of a non-listed REIT (or BDC) from purchasing in the aggregate *any security* issued or managed by an affiliate of the REIT (or BDC), and any security issued by any other non-listed REIT (or BDC), in excess of 10% of her liquid net worth.

The mere fact that securities are issued or managed by an affiliate does not warrant their subjugation to the concentration limits. A non-listed REIT and a non-listed BDC are different products with dissimilar investment objectives and strategies, and the fact that they are managed by the same asset management company does not justify the application of an aggregate concentration limit to both. Indeed, the suggested concentration limit could even apply to products like index funds, mutual funds or ETFs managed by a non-listed REIT or BDC

[6] The Division said at the stakeholders' meeting that it is also contemplating a 20% concentration limit on aggregate investment in non-listed REITs and BDCs. We are unsure how this 20% limit would relate to the 10% concentration limit. At any event, we oppose any concentration limit, whether applied to the purchase of a single non-listed REIT or BDC, or to the aggregate investment of all non-listed REITs and BDCs in an Ohio investor's portfolio.

sponsor – securities that the Division does not regulate but that the SEC does comprehensively regulate under the Investment Company Act of 1940.

We respectfully note that any imposition of these new concentration limits outside of the Proposal would constitute the promulgation of a principle of law or policy that necessitates administrative rulemaking under R.C. 101.352. In other words, if the Division wishes to apply these new concentration limits to issuers it must propose new rule language, give the public a reasonable opportunity to comment, and follow the CSI and JCARR processes. Because the Division has not provided us with this language, our comments are based upon the Division's general description of these possible revisions at the meeting.

For these reasons, the Institute would oppose the suggested aggregate concentration limit as it would severely limit the investment opportunities available to Ohio investors and their ability to exercise investment choice.

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The Institute appreciates the opportunity to appear at the stakeholders' meeting. We look forward to a continued dialogue with the Division and the CSI on this important rulemaking. Should the CSI or the Division have any questions about our comments, please feel free to contact me or Gina Gombar, Associate General Counsel, at (202) 548-7185.

Sincerely,

Anya Coverman
President and CEO
Institute for Portfolio Alternatives