Capital and Credit

# Pandemic Risk

## Issue

Pandemic risk is perhaps the largest unhedged risk in the economy. The COVID-19 pandemic exposed and exacerbated a protection gap in what the business and non-profit sectors assumed to be a resilient financial protection system of commercial insurance. Pandemic-related coverage in various lines of commercial insurance has been withdrawn or restricted going forward. Expanding coverage gaps present challenges for businesses across many industries and could stall economic growth.

## Talking Points

- The magnitude of the pandemic's impact on the financial condition and general well-being of the nation has exposed significant vulnerabilities in our country's economic preparedness for and resilience to systemic catastrophic events.
- This includes coverage gaps in insurance protection for pandemic-related losses from various commercial insurance lines.
- The COVID-19 crisis led to government-mandated shutdowns of non-essential businesses and shelter-in-place directives that severely disrupted economic activity in the U.S. and pointed to a lack of economic preparedness from such events.
- Going forward, it is important to protect American jobs and to ensure a sustainable and speedy economic recovery from future pandemics and government-ordered shutdowns. If not remedied, these insurance gaps could hinder economic growth.
- The Roundtable is working with industry partners, stakeholders, and policymakers through the Business Continuity Coalition (BCC) to develop and enact an effective, prospective federal public-private backstop program for pandemic risk insurance coverage across a variety of commercial insurance lines. Similar to the Terrorism Risk Insurance Act (TRIA) enacted the year following the 9/11 attacks, this program would provide the economy with the coverage it needs to provide businesses with pandemic-related coverages in the face of a future pandemic.
- The BCC recommends that all of the impacted lines of insurance, including event cancellation insurance, be supported with both a "make-available" requirement and a robust federal backstop for private insurers making the insurance available.

# Pandemic Risk

## Talking Points (Continued)

- The U.S. Government Accountability Office (GAO) is working on a CARES Act-related study on pandemic risk insurance. The study will focus on the role that various property/casualty (P/C) insurance lines played in addressing business losses related to the COVID-19 pandemic. It will also explore various policy options for a federal role in supporting various commercial insurance lines or disaster assistance for business losses from a pandemic, including the advantages and drawbacks of each. Our BCC coalition is working constructively with the GAO to ensure that our perspectives are adequately represented.
- A number of frameworks have been proposed—all of which envision programs where insurers offer pandemic coverage policies to businesses with the federal government bearing most or all of the coverage costs.
- In testimony to the Senate Banking Committee's Subcommittee on Securities, Insurance, and Investment, the BCC urged Congress to move expeditiously to pass bipartisan legislation that creates a public-private insurance solution to share the financial risk of losses related to pandemics. This urgent task is an essential precondition to the prompt recovery of this nation's economy and going forward will help protect jobs and reduce economic damage from further pandemics.
- Senate Subcommittee on Securities, Insurance, and Investment Chairman Bob Menendez (D-NJ) is working with Senators Sinema (D-AZ), Moran (R-KS), and Tillis (R-NC) to develop bipartisan legislation in the Senate. The BCC is working with this bipartisan working group with the goal of introducing legislation in the Senate.

Capital and Credit

# LIBOR Reform

## Issue

The London Interbank Offer Rate (LIBOR) benchmark is used as a reference rate in over $200 trillion of financial contracts, including some $1.3 trillion of commercial real estate loans. In anticipation of the complete phase-out of the LIBOR benchmark by June 30, 2023, The Roundtable has been working with policymakers to ensure a smooth transition to a replacement benchmark. The Federal Reserve Bank of New York's Alternative Reference Rates Committee (ARRC) is working to transition to use of the Secured Overnight Financing Rate (SOFR), which has been published on an overnight basis since 2018.

## Talking Points

- In December, the Federal Reserve Board adopted a final rule that implements Roundtable-supported legislation–the Adjustable Interest Rate (LIBOR) Act–that was enacted on March 15, 2022. The measure will protect trillions in "tough legacy" contracts that use LIBOR as a reference rate for financial transactions.
- The final rule establishes a process at the federal level to add SOFR, or an appropriately adjusted form of SOFR, to certain legacy contracts that do not have sufficient fallback language. This rule is intended to promote a smooth transition away from LIBOR by promoting legal certainty and consistency, while limiting legal disputes. The measure will provide borrowers, investors, and all of those in the financial space with certainty as to what happens when LIBOR is no longer published.
- Through The Roundtable's LIBOR working group, we have constructively engaged with the U.S. Treasury and the IRS regarding clarification of any tax implications for implementing the new benchmark. On December 30, 2021, the IRS issued final regulations clarifying how parties can replace LIBOR as a reference rate in mortgages and other financial contracts without triggering negative tax consequences.
- As The Roundtable recommended, the Treasury's final regulations give borrowers and lenders the flexibility they need to replace LIBOR with virtually any other index that reflects objective changes in the cost of borrowing money—such as a broad index of Treasury or corporate borrowing rates— in addition to a list of rates suggested by various regulators.
- REPAC's LIBOR Working Group continues to work to ensure the implementation of an effective, new replacement benchmark that does not impair liquidity, needlessly increase borrowing costs, or cause market disruptions.

## Capital and Credit

# Corporate Transparency Act

## Issue

The Corporate Transparency Act (CTA) establishes uniform beneficial ownership information reporting requirements for certain types of corporations, limited liability companies, and other similar entities created in or registered to do business in the U.S. The CTA authorizes the Treasury Department's Financial Crimes Enforcement Network (FinCEN) to collect that information and disclose it to authorized government authorities and financial institutions, subject to effective safeguards and controls. The measure is intended to help prevent criminals, terrorists, proliferators, and corrupt oligarchs from hiding illicit money or other property in the U.S. A final rule implementing the beneficial ownership information reporting requirements of the CTA was issued in September 2022. These regulations go into effect on January 1, 2024.

The Roundtable and its coalition partners have provided input to FinCEN in response to its Advance Notice of Proposed Rulemaking (ANPRM).

## Talking Points

- In the CTA, the term "beneficial owner" applies to an individual who directly or indirectly exercises "substantial control" over an entity or owns or controls not less than 25% of an entity. The definition of "substantial control" is expected to be addressed in the FinCEN regulations. FinCEN released proposed regulations on Dec. 7, 2021, seeking to implement the "beneficial ownership information" (BOI) requirement of the Corporate Transparency Act (CTA).
- Although the measure is intended to provide support for law enforcement investigations into shell companies engaged in money laundering, tax evasion, and terrorism financing, it places many costs and legal burdens on small businesses, especially those in the real estate industry.
- In 2021, The Roundtable and its coalition partners submitted detailed comments to FinCEN regarding the development, disclosure, and maintenance of a new federal registry that will contain beneficial ownership information.
- The real estate coalition's extensive comments emphasize the "scope of the CTA is far-reaching and will impact many commercial residential real estate businesses who are frequent users of the LLC structure for conducting business. If not implemented with a clear set of rules and regulations, the CTA could result in an outcome of confusion, missteps, and ultimately fines on law-abiding businesses."

# Corporate Transparency Act

## Talking Points (Continued)

- The coalition's comments detail "concerns and recommendations for establishing regulations to implement reporting requirements—as well as provisions regarding FinCEN's maintenance and disclosure of reported information effectively and fairly."
- The coalition raised several specific implementation issues, including how small companies targeted by the CTA will face compliance burdens. The time-consuming and challenging process of gathering required information on all beneficial owners of a reporting company that may have been created years ago is also addressed.
- In 2022, The Roundtable and its coalition partners submitted comments to the U.S. Department of the Treasury (DOT) and FinCEN that support efforts to thwart illegal money laundering in real estate, while encouraging policymakers to find a balanced approach that does not unfairly burden law-abiding businesses.
- The Roundtable is part of a broad coalition of business trade groups that supports a legal challenge by the National Small Business Association (*NSBA v. Janet Yellen*), which challenges the constitutionality of the CTA. The coalition stated, "It is clear whatever marginal benefit the CTA affords law enforcement will be far outweighed by the costs borne by small businesses and their owners."
- The Roundtable continues to work with industry partners to address the implications of FinCEN's proposed rules and the impact it could have on capital formation and the commercial real estate industry.

# KLEPTO ACT: Fact Sheet

## Issue

The *Kleptocrat Liability for Excessive Property Transactions and Ownership (KLEPTO) Act*, (S.4075) was introduced by a bipartisan group of Senators in April 2022, and arms law enforcement with the information required to track down kleptocrats' luxury assets in the U.S. financial system. It would impose stricter rules on disclosing information about who is purchasing a wide range of assets often used for money laundering. The legislation would force FinCEN to require parties involved in real estate sales to disclose the "beneficial owner" of a company involved in the transaction.

The Roundtable strongly supports efforts to identify and impede illegal investments by Russian Federation oligarchs in U.S. real estate and condemns the use of limited liability corporations (LLCs), or any form of real estate ownership structure, to finance illicit acts, launder money, or support terrorism. Authoritarian states, human rights violators, drug cartels, kleptocrats, and terrorists must not be permitted to undermine and destabilize U.S. real estate markets by laundering the illegal proceeds of corruption and other criminal activity.

## Talking Points

- Requires the Treasury Department's Financial Crimes Enforcement Network (FinCEN) to mandate disclosure of beneficial ownership information (the identity of the real person behind an entity) for all real estate transactions through legal entities.
- Requires the Federal Aviation Administration to collect beneficial ownership information for all aircraft registered in the U.S.;
- Requires FinCEN to extend anti-money laundering safeguards to the real estate sector;
- Requires FinCEN to extend anti-money laundering safeguards to businesses that sell boats, planes, and automobiles;
- Clarifies that any foreign entity that buys or holds real estate in the U.S. should be considered a "reporting company" under the Corporate Transparency Act;
- Requires the Treasury Department to report on how digital ledger technology could be used to create a tamper-proof, permanent record of real estate transfers; and
- Mandates a subsequent Treasury pilot testing such a program.

# SAFE Banking Act and CRBs

## Issue

Legal cannabis-related businesses (CRBs) face the challenge of obtaining bank accounts, and commercial property owners face legal challenges of taking on CRB tenants without safe harbor protections.

## Talking Points

- 47 states and DC currently legalize marijuana to varying degrees. Yet use, possession, and sale remains illegal under federal law.
- Real estate owners, lessors, brokers, and financiers need certainty when they transact with legitimate CRBs.
- The bipartisan *Secure and Fair Enforcement (SAFE) Banking Act*, (H.R. 1996) would eliminate the need for CRBs to operate on a cash basis, bring them into the banking system, and allow them to obtain accounts and credit cards. Commercial property owners would get a safe harbor if they lease space to a CRB, and their mortgages could not be subject to corrective action by a bank.
- To date, the *SAFE Banking Act* has passed the U.S. House numerous times, but it has yet to pass the Senate.

# National Flood Insurance Program

## Issue

The National Flood Insurance Program (NFIP) is currently operating under a continuing resolution. Since the end of FY 2017, over a dozen short-term NFIP reauthorizations have been enacted. As policymakers continue to debate potential changes and improvements to the program, their challenge is to find a balance between improving the financial solvency of the program, reducing taxpayer exposure, and addressing affordability concerns. Without congressional reauthorization, the program will sunset on September 30, 2023.

## Talking Points

- Floods are the most common, costliest natural peril in the U.S. The NFIP was enacted in 1968 due to a lack of private insurance and increases in federal disaster aid. The Program is administered by the Federal Emergency Management Agency (FEMA) and is essential for homeowners, renters, and small businesses in affected areas.
- The level of flood damage from recent storms makes it clear that FEMA needs a holistic plan to prepare the nation for managing the cost of catastrophic flooding under the NFIP.
- The NFIP is important for residential markets, overall natural catastrophe insurance market capacity, and the broader economy. However, under the NFIP, commercial property flood insurance limits are low—$500,000 per building and $500,000 for its contents. NFIP has approximately five million total properties, only 6.7% are commercial. Nearly 70% of NFIP is devoted to single-family homes and 20% to condominiums. In the total program, 80% pay actuarial sound rates, however, in the commercial space, only 60% pay actuarial sound rates.
- Congressional hearings have illuminated numerous acute problems surrounding the NFIP, such as insolvency, increased risk of flooding across the country, and insufficient and inaccurate flood mapping. The unintended negative outcomes generated by the NFIP continue to grow and are now spreading to GSEs (government-sponsored enterprises) Fannie Mae and Freddie Mac.
- Lenders typically require base NFIP coverage, and commercial owners must purchase Supplemental Excess Flood Insurance for coverage above the NFIP limits. The NFIP's low commercial limits make it problematic for most commercial owners. As a result, The Roundtable has been seeking a voluntary exemption for mandatory NFIP coverage if property owners have flood coverage from commercial insurers.

# National Flood Insurance Program

## Talking Points (Continued)

- By permitting certain private issue insurance policies to satisfy the NFIP's "mandatory purchase requirement" for properties in flood plains financed by loans from federally guaranteed institutions, commercial property owners would have the ability to "opt-out" of mandatory NFIP commercial coverage if they have adequate private coverage outside the NFIP program to cover financed assets.
- The Roundtable and its partner associations support a long-term reauthorization and improvements of the NFIP that help property owners and renters prepare for and recover from future flood losses. Given the low coverage amounts provided to commercial properties, it is important to permit larger commercial loans to be exempt from the mandatory NFIP purchase requirements.

# EB-5 Reform and Integrity Act of 2022: Fact Sheet

## Issue

A major overhaul of the EB-5 "regional center" investment visa program passed Congress in March 2022, and President Biden signed it into law as part of the legislation that funds the federal government through September 30, 2022. The EB-5 Reform and Integrity Act represents the first major reforms to the EB-5 program since it was enacted in the early 1990s. Reforms include:

## Reauthorized EB-5 "Regional Center" Program

- 5-year extension through September 30, 2027.

## Expanded Targeted Employment Area (TEA Designations)

- TEA projects qualify for **both** lower investment levels **and** visa set-asides (see below):

### Prioritizing Rural Projects

- In areas outside a Metropolitan Statistical Area, or within the outer boundary of any city or town with a population of 20,000 or more. (No change from prior law).
- U.S. Citizenship and Immigration Services (USCIS) must prioritize processing visas for investors in rural areas.

### New Criteria for Distressed Urban Area Projects ("High Unemployment Areas")

- Codified the 2019 USCIS regulation ("donut" approach in which a project must be within a census tract—or any "contiguous" census tracts that "touch" the project's tract—where the average unemployment rate is 150% of the national average.
- DHS Secretary has the discretion to include a "directly adjacent" tract (to either the "anchor" tract or a "contiguous" tract) to satisfy the requisite 150% high unemployment criteria.
- Distressed Urban TEA designations last for two years. These can be reviewed if the qualifying census tract(s) continue to meet "high employment" criteria.
- If a project was in an Urban TEA but falls out of high unemployment status, an "original" investor does not have to increase investment amounts to the non-TEA upper level.
- Only DHS can approve an Urban TEA "high unemployment" designation—unless the Secretary designates such authority to another federal official. No state or local official can approve.

# EB-5 Reform and Integrity Act of 2022: Fact Sheet

## Expanded Targeted Employment Area (TEA Designations) (Continued)

**Defining "Infrastructure Projects"**

- A "capital investment project" administered by a "government entity"—that serves as the "job-creating entity" funded by EB-5 investors, and that contracts with a regional center—qualifies as an "Infrastructure Project."
- Must be a "public works project." No particular type of infrastructure "asset class" is specified.
- Only DHS can designate an Infrastructure Project—unless the Secretary designates such authority to another federal official. No state or local official can approve the designation.

## Qualified Investment Amounts & Adjustments

- 800,000 in TEAs
- $1,050,000 in non-TEAs
    - On January 1, 2027, and every five years thereafter, investment amounts adjust for inflation. Non-TEA level "adjusts up" for inflation.
    - TEA level "adjusts up" to 75% of the non-TEA level (with the goal of keeping the $250K delta between investment levels intact).

## Clarifying Visa Set-Asides

- Set-asides are a percentage of the roughly 10,000 EB-5 visas available every year.
- 20% for Rural projects
- 10% for Distressed Urban/High Unemployment Area projects
- 2% for Infrastructure Projects
- Unused visas "carry over" in the same category in the following year.
- Unused visas in any "set aside" category made generally available for any project, in the year immediately following the "carry over" year.

# EB-5 Reform and Integrity Act of 2022: Fact Sheet

## "Aging Out" Criteria

- An investor's "child" who is admitted to the U.S. on a "conditional" basis and who turns 21 shall continue to be considered a "child" if:
  - she/he remains unmarried **and**;
  - the principal investor is approved as a permanent resident **and**;
  - the principal investor files a petition for the child to remain in the U.S. no later than one year after the child's conditional status has terminated.
- The principal investor can only file one "aging out" petition after the child turns 21.
- Unused visas "carry over" in the same category in the following year.
- Unused visas in any "set aside" category made generally available for any project, in the year immediately following the "carry over" year.

## Allowing the Broad Deployment of Capital

- DHS to enact regulations that allow the new commercial enterprise to deploy capital **anywhere** in the U.S. to keep the investment "at risk."

## Sovereign Wealth Funds

- Capital from a "bona fide" SWF may be stacked with EB-5 capital to finance a project.
- The SWF can be involved with the equity "ownership"—but not the administration—of the job-creating entity.
- DHS to implement regulation for SWF funding in an EB-5 project.

## Job Creation Criteria

- Ten jobs must be created per investment (same as prior law).
- One job must be a "direct" job. It can be "modeled," and it is not necessary to produce a W-2 for a particular employee.
- The other nine jobs can be "indirect," modeled, and estimated (same approach under prior law).

# EB-5 Reform and Integrity Act of 2022: Fact Sheet

## Job Creation Criteria (Continued)

- Construction jobs that last less than two years can satisfy 75% of the estimated “indirect” jobs.

## Allowing the Concurrent Filing of I-526 and I-485

- Investors can **concurrently** file their I-526 petitions (showing EB-5 compliance and investment) and their I-485 petitions (application for a “conditional” green card, which adjusts status from a “non-immigrant” to a conditional permanent resident). This can only be done if there is already a visa number available and current.
- Concurrent filing can reduce the time to adjust status once an I-526 is approved.

## “Grandfathering” Existing Investors

- If Congress fails to reauthorize regional centers after the Act’s expiration on September 30, 2027, DHS will continue to process petitions filed on or before September 30, 2026.
- Applies to I-526 petitions and I-829 petitions (to remove conditional status and allow permanent residency without conditions).
- DHS may not deny an I-526 or I-829 simply because the regional program might expire in the future.
- An investor is eligible to file the I-829 two years after filing the I-526.

## New “Integrity Measures” to Deter Fraud and Safeguard National Security

- USCIS to conduct an audit of each regional center at least once every five years.
- Explicit authority granted to USCIS to deny regional center “business plans” where an applicant has engaged in fraud, criminal conduct, or where plan approval would threaten national security.
- Confirms the application of U.S. securities laws over regional center offerings and investment advice.

# EB-5 Reform and Integrity Act of 2022: Fact Sheet

## New "Integrity Measures" to Deter Fraud and Safeguard National Security (Continued)

- Regional center must submit annual statements of investment activities to USCIS. Failure to submit or falsify an annual statement results in sanctions that can include fines, temporary suspension, and a permanent "de-bar" of individual and regional centers that fail to comply with new oversight requirements.
- No person convicted of a crime (in the last 10 years) or fraud-related civil offense (that resulted in liability greater than $1M USD) can participate in EB-5 activities.
- With a limited exception for bona fide sovereign wealth funds, no foreign government representative may provide EB-5 capital or be involved in the administration or ownership of a regional center, new commercial enterprise, or job-creating entity.
- Requires fingerprints and other biometrics of persons involved in EB-5 activities to be submitted to USCIS.
- Strict new "source of funds" requirements to ensure that an investor's funds are derived from legitimate and lawful sources.
- Establishment of a new "EB-5 Integrity Fund," capitalized by regional center program feeds, to support amplified USCIS oversight and site visits.

## Sources

- EB-5 Reform and Integrity Act of 2022 (Division BB of the Consolidated Appropriations Act of 2022)

# SEC Proposed Rules: Private Fund Advisers, Form PF

## Issue

In 2022, the Securities and Exchange Commission (SEC) proposed two rules that would significantly overhaul the regulation of the private fund industry—a key capital source for income-producing real estate. The first proposed rulemaking would amend the Form PF reporting requirements for certain private fund managers and the second proposed rule would impose new investor reporting requirements on certain Private Fund Advisers under the Investment Advisers Act of 1940.

## Talking Points

- The SEC approved the two proposals despite strong dissents issued by Commissioner Hester Peirce, who voted no on each proposal and raised concerns that the rules would take away the SEC's resources for protecting retail investors. Chairman Gary Gensler, however, indicated that he views the rules as protecting retail investors whose retirement plans invest in private funds.
- With the stated goal of enhancing the Financial Stability Oversight Council's (FSOC's) monitoring and assessment of systemic risk and protecting investors, the SEC proposal would transform Form PF into a current reporting form for large hedge fund advisers and advisers to private equity funds, while maintaining the existing quarterly or annual reporting obligations applicable to private fund advisers regardless of size. The SEC's proposal also (1) expands Section 4 of Form PF by reducing the reporting threshold applicable to large private equity advisers from $2 billion to $1.5 billion in private equity fund assets under management, and (2) introduces a new large liquidity fund adviser reporting requirement that essentially requires such advisers to report the same information that money market funds report on Form N-MFP (as proposed to be amended in December 2021).
- As stated in our March 21, 2022, Form PF comment letter, the proposed addition of new reporting requirements presents significant compliance and operational challenges for private real estate fund sponsors with no added benefit to investors and no relation to the intent of Form PF in monitoring systemic risk. As a result, the proposed amendments are not required and should not be adopted. At the very least, the SEC must provide adequate evidence that the proposed amendments bear some reasonable resemblance to systemic risk and provide meaningful cost-benefit analyses to support the increased burdens inherent in adopting the compliance infrastructure necessary for such reporting.

# SEC Proposed Rules: Private Fund Advisers, Form PF

## Talking Points (Continued)

- The "Private Fund NPRM" would add new and amended rules under the Investment Advisers Act that the SEC believes would increase transparency and avoid adviser conflicts of interest. If adopted as proposed, a private fund adviser would need to adopt policies and procedures to comply with these requirements and evaluate whether its governing documents, offering memoranda, and side letters should be updated to reflect the new regulatory requirements and prohibitions. The proposed rules apply to exempt reporting advisers in some instances, but the SEC has posed questions for comment asking whether other parts of the proposed rules should apply to such advisers. The proposed rules have the potential to significantly increase regulatory burdens across registered and exempt private fund advisers.
- While we support efforts taken by Commission to protect investors and monitor risk, our April 25, 2022 comment letter raises concerns that, if finalized, the private fund proposal could hinder real estate capital formation, the development and improvement of real properties, essential economic activity, and jobs.

# NASAA's Proposed Revisions to its Statement of Policy Regarding Real Estate Investment Trusts

## Issue

On July 12, 2022, the North American Securities Administrators Association, Inc. (NASAA) announced it is seeking public comment on proposed revisions to the NASAA Statement of Policy Regarding Real Estate Investment Trusts (the "REIT Guidelines"). The Roundtable has serious concerns about the Proposal and urges NASAA to withdraw the Proposal.

## Talking Points

- The Proposal could have a profound impact on the $20.7 trillion U.S. commercial and multifamily real estate market, approximately 9.4% of which is comprised of real estate investment trusts (REITs).
- It could have the unintended and unnecessary impact of impeding real estate capital formation, undercutting economic growth, and weakening the strength and stability of U.S. real estate capital markets. Investing in real estate supports economic growth; helps to grow the much needed supply of housing, particularly in the multi-family, workforce, and affordable housing sector; enhances the infrastructure of industrial space, and supports state and local communities across the country.
- Since 1996, the Securities Act of 1933, as amended, has provided a preemption of the substantive state securities law requirements for several types of securities and offerings. However, certain securities offerings, including publicly offered REITs that do not list their securities on a stock exchange ("non-traded REITs"), remain subject to state securities law registration requirements. In addition, they remain subject to review by state securities regulators and the Securities and Exchange Commission (the "SEC"). The REIT Guidelines have been adopted by several state securities regulators or used by their staff in reviewing such offerings.
- The REIT Guidelines were last amended in 2007 and set out requirements for REIT sponsors, advisers, and persons selling REITs, including provisions dealing with the suitability of investors, conflicts of interest, investment restrictions, and rights of shareholders as well as disclosure and marketing.
- NASAA has proposed revisions to the REIT Guidelines in four areas:

# NASAA's Proposed Revisions to its Statement of Policy Regarding REITs

## Talking Points (Continued)

- The proposed revisions would update the conduct standards for brokers selling non-traded REITs by supplementing the suitability section with references to the SEC's best interest conduct standard.
- The proposal includes an update to the individual net income and net worth requirements —-up to (a) $95,000 minimum annual gross income and $95,00 minimum net worth, or (b) a minimum net worth of $340,000—in the suitability section through adjusting upward to account for inflation occurring since the last adjustment in 2007.
- The proposal would add a uniform concentration 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. [NOTE: There is no carveout for accredited or other sophisticated investors.]
- The proposed revisions also include, in multiple sections, a new prohibition against using gross offering proceeds to fund distributions, "a controversial product feature used by some non-traded REIT sponsors . . . having the potential to confuse and mislead retail investors."

- In the request for comment, NASAA points out that if adopted, the revisions to the REIT Guidelines have the potential to influence updates to other Guidelines, including those for Asset-Backed Securities, Commodity Pools, Equipment Leasing, Mortgage Programs, and Real Estate Programs (other than REITs) and the Omnibus Guidelines.
- We are concerned that the Proposal appears to be substantially based on a flawed and outdated impression of the PNLR sector and PNLR products. Many of the issues that NASAA highlights to justify the Proposal—such as liquidity concerns, fee transparency, and sources of distributions—are largely, if not completely, ameliorated with respect to the NAV PNLRs[1] that are now being offered to investors.

[1] REITs that are registered with the SEC but whose shares intentionally do not trade on a national securities exchange. NAV PNLRs, which comprise the majority of PNLRs marketed today, are permanent entities that provide shareholders with regular ability to sell shares back to the REIT at the current Net Asset Value (NAV).

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# NASAA's Proposed Revisions to its Statement of Policy Regarding REITs

## Talking Points (Continued)

- We are working on this issue with a number of other groups and submitted a comment letter raising concerns about the proposal.