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VIA E-MAIL (rule-comments@sec.gov)

Ms. Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, Northeast
Washington, D.C. 20549-1090

Re: File No. SR-NASD-2005-114

Dear Ms. Morris:

The Investment Program Association ("IPA") appreciates this opportunity to comment on proposed rule changes by the Financial Industry Regulatory Authority, Inc. ("FINRA") that would amend the provisions of NASD Conduct Rule 2810 regulating compensation, fees and expenses in public offerings of real estate investment trusts ("REITs") and direct participation programs.[1] The proposed rule changes were described in Release No. 34-57199 ("Proposal").[2]

The Proposal contemplates extensive changes to Rule 2810. The IPA commends FINRA for its efforts to clarify and codify policies regarding compensation, fees and expenses in public offerings of direct participation programs and REITs. The IPA will not address all of the proposed changes, but does have comments in the areas described more fully below. The IPA's comments include the following:

- When determining which employees' salaries to include in underwriting compensation, there should be a de minimus exception for dual employees who spend at least 95% of their time performing clerical or ministerial functions.

- The proposed rule should be clarified such that individual items are not counted twice in determining which items of compensation should be included in the 10% cap on underwriting compensation.

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[1] The Investment Program Association, organized in 1985, is a national trade association that represents the interests of sponsors and other industry participants in the promotion of non-traded investment programs, including non-traded real estate investment trusts, real estate programs, equipment leasing programs and oil and gas programs. The members of the IPA include most of the major publicly-offered direct participation program sponsors. The views expressed in this letter do not necessarily reflect the views of all members of the IPA. More information about the IPA is available at our website, http://www.theipaonline.org.

[2] Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3 and 4 Relating to the Regulation of Compensation, Fees, and Expenses in Public Offerings of Real Estate Investments Trusts and Direct Participation Programs, Release No. 34-57199, File No. SR-NASD-2005-114 (January 25, 2008), 73 Fed. Reg. 5885 (January 31, 2008).

- The Proposal contains a footnote which addresses the allocation of compensation received by employees in connection with multiple offerings but limits the allocation method and the situations in which it will be applied, in contradiction to the long-standing policy of the staff of FINRA. The allocation process described in this footnote should be restated and should become an actual part of proposed Rule 2810.

- Proposed Rule 2810(b)(4)(D) should be revised to refine the definition of dual employees eligible for consideration under the rule.

- All Issuer expenses to be included in the calculation of the 15% cap on organization and offering expenses must be reimbursed or paid for with offering proceeds.

- For many reasons, including the significant cost, time and hardship to be incurred, the IPA does not support the adoption of the liquidity and marketability disclosure requirement contained in proposed Rule 2810(b)(3)(D).

There Should Be A De Minimus Exception For Dual Employees Whose Functions Are Predominantly Clerical Or Ministerial

Proposed Rule 2810(b)(4)(C)(ii)c. provides that payments to any dual employees engaged in solicitation, marketing, distribution or sales of the program or REIT securities shall be included in underwriting compensation, with the exception of payments to dual employees whose functions in connection with the offering are solely and exclusively clerical or ministerial. The IPA believes that there should be a de minimus exception for dual employees whose functions are predominantly clerical or ministerial but who on rare occasions find themselves in the position of answering questions or engaged in some other activity that may not be deemed to be clerical or ministerial. It does not seem fair or appropriate to include all of such person's compensation in the 10% cap on underwriting compensation, despite the fact that they spend little time engaged in activities that might be deemed wholesaling. Such an approach could be viewed as anti-competitive because it will cause a particular hardship on new or smaller firms and sponsors who need to have personnel perform multiple functions. Accordingly, we propose that there be an exclusion for a person who engages in solicitation, marketing, distribution and sales activities for less than 5% of their time. To implement the foregoing, the IPA proposes the following language to replace proposed Rule 2810(b)(4)(C)(ii)c.:

> c. to any registered representative who is engaged in the solicitation, marketing, distribution or sales of the program or REIT securities, other than [one whose functions] <u>a registered representative who spends at least 95% of his or her time</u> in connection with the offering <u>engaged in</u> [are solely and exclusively] clerical or ministerial <u>functions</u>; or[3]

[3] For purposes of all recommended language changes to the Proposal contained herein, proposed new language is underlined and proposed deletions are in brackets.

Items of Compensation Should Not Be Counted Twice in the Calculation of the 10% Cap on Underwriting Compensation

Proposed Rule 2810(b)(4)(C)(ii)b. and c. provide that underwriting compensation will include payments to any registered representative of a member who receives transaction-based compensation or who is engaged in the solicitation, marketing, distribution or sales of securities. The IPA believes that the wording of subsections b. and c. could result in double counting the compensation to be included in the 10% cap on underwriting compensation. As currently written, under proposed Rule 2810(b)(4)(C)(ii)a., an issuer would be required to count a payment made to a third-party retailing firm and then, under subsections b. and c., the issuer would need to count the payments made by that third-party retailing firm to its registered representatives (which payments were made using the payment that the issuer had already counted under subsection a.). Not only would it be double counting, but for purposes of tracking the payments to be counted under subsections b. and c., the issuer and its affiliated member firm would have no way of knowing what payments or reimbursements an unaffiliated, third-party retailing firm is making to its registered representatives.

Further, the IPA believes the language of subsections b. and c. should be revised in order to eliminate the result that items of compensation would be counted twice in situations in which the member affiliated with the sponsor receives payments under subsection a. and also makes payments to its registered representatives under subsections b. and c. Therefore, the IPA believes that subsections b. and c. of proposed Rule 2810(b)(4)(C)(ii) should be revised as follows:

> b. To any registered representative of a member <u>affiliated with a sponsor</u> who receives transaction-based compensation in connection with the offering, <u>except to the extent that any amount of such compensation has been included in a. above;</u>
>
> c. To any registered representative [who] <u>of a member affiliated with a sponsor</u>, <u>which registered representative</u> is engaged in the solicitation, marketing, distribution or sales of the program or REIT securities, <u>except to the extent that any amount of such compensation has been included in a. above and</u> other than [one whose functions] <u>a registered representative who spends at least 95% of his or her time</u> in connection with the offering <u>engaged in</u> [are solely and exclusively] clerical or ministerial <u>functions</u>; or

Footnote Regarding Allocation of Compensation for Dual Employees Involved in Multiple Offerings Should Be Clarified and Incorporated into Rule 2810

The IPA believes that the concepts set forth in footnote 36 to the Proposal should be clarified and incorporated into the rule, rather than relegated to a footnote to the Proposal. Due to the placement of the footnote in the Proposal, a member could be led to believe that the footnote only applies in situations to which the exceptions for small companies and highest paid executives apply (as set forth in proposed Rule 2810(b)(4)(D)). The IPA believes that the ability to allocate among multiple offerings should apply in all cases (consistent with what we believe FINRA's current policy is) and not just when the two aforementioned exceptions apply. The allocation process should be restated and the revised concept should be included in the text of Rule 2810.

The IPA believes that footnote 36 is intended to reflect the long standing policy of the staff of FINRA that only compensation received in connection with the specific offering under consideration is included in the 10% cap on underwriting compensation. However, as presently written, the footnote limits the methods of addressing the allocation. The footnote presently provides that if a dual employee receives compensation in connection with more than one offering, such compensation may be allocated among offerings based on the time in which s(he) was engaged in each of the offerings or the relative size of the offerings. The IPA believes that FINRA should include language in Rule 2810 that would permit sponsors to allocate compensation for dual employees involved in multiple offerings on a reasonable basis, which would include but not be limited to time spent on each offering and the relative size of the offerings. The IPA believes that a "reasonable basis" standard, rather than the narrowly defined bases set forth in the footnote will accommodate the varied circumstances of sponsors. For example, for a sponsor offering multiple products simultaneously, the most reasonable basis for allocation might be the number of offerings in which the dual employee was involved. For a sponsor whose offerings differ from each other significantly in terms of aggregate subscriptions, the most reasonable basis for allocation might be the number of investors in each offering.

Alternatively, if FINRA were to find the "reasonable basis" standard to be unreasonable, the IPA believes that the language of footnote 36 should at a minimum be changed to specifically permit sponsors to allocate compensation using either or both of the two bases set forth in the footnote.

Proposed Rule 2810(b)(4)(D) Should Be Revised to Clarify the Definition of Dual Employees Eligible For Consideration Under the Rule

The IPA believes that the language of Rule 2810(b)(4)(D) is not clear and will be difficult to apply with respect to who is a dual employee and when a dual employee's compensation may be allocated. Because the intent of this provision is to provide a bright line test, it is important that the provision be restated.

The IPA does not believe that a dual employee should need to be an executive, but merely that s(he) be one of the highest paid employees. The IPA also believes that the language of the proposed rule should be clarified such that in determining whether there are fewer than ten people engaged in wholesaling, only those persons engaged in wholesaling for the particular program or REIT will be counted, rather than all registered representatives who are employed by the sponsor or affiliate and engaged in wholesaling some other product of the sponsor or affiliate. Further, because dual employees may be employed by and receive compensation from the advisor or an affiliate and not necessarily by the program or REIT (which is often the case with respect to smaller sponsors), the IPA believes that the language of the Rule needs to be revised to reflect the way the sponsor organizations are structured. Accordingly, it would be preferable to change the language of proposed Rule 2810(b)(4)(D) as follows:

> (D) Notwithstanding subparagraphs (b)(4)(C)(ii)b. and c. above, information may be provided to [NASD] <u>FINRA</u> from which the Corporate Financing Department can readily determine that some portion of a registered representative's non-transaction based compensation should not be deemed to be underwriting compensation if the registered representative is either: a dual employee of a [program or REIT] <u>member and of the sponsor, advisor or an affiliate of the program or REIT,</u> with fewer than ten people engaged in

wholesaling in connection with such program or REIT; or a dual employee who is one of the top ten highest paid dual employees [executives] based on non-transaction based compensation [in] paid in connection with any program or REIT.

Issuer Expenses to be Included in the Calculation of the 15% Cap on Organization and Offering Expenses Must be Reimbursed or Paid for With Offering Proceeds

The IPA believes that the phrase "including overhead expenses" in proposed Rule 2810(b)(4)(C)(i) should be moved to clarify that all issuer expenses (and not merely "overhead expenses") must be "reimbursed or paid for with offering proceeds" in order to be required to be included in the 15% cap. Therefore, the IPA proposes the following language to replace proposed Rule 2810(b)(4)(C)(i):

> (C) The organization and offering expenses subject to the limitations in subparagraph (b)(4)(B)(i) above include the following:
>
> (i) issuer expenses [,including overhead expenses] that are reimbursed or paid for with offering proceeds, including overhead expenses, which issuer expenses include, but are not limited to, expenses for: . . .

The Proposed Liquidity and Marketability Disclosure Requirement Should Not Be Adopted

FINRA has proposed to amend Rule 2810(b)(3)(D) to require members or persons associated with a member to inform prospective participants in a public offering of a program or REIT of all "pertinent facts relating to the liquidity and marketability of the program or REIT during the term of the investment." Such "pertinent facts" include information regarding whether the sponsor has offered prior programs or REITs for which there was disclosure in the offering materials as to a date or time period at or during which the program or REIT might be liquidated and whether the prior program(s) or REIT(s) in fact liquidated on or around that date or during the time period. The IPA believes that proposed Rule 2810(b)(3)(D) would be (i) extremely difficult to implement, (ii) very costly to implement and (iii) due to ambiguities in the proposed rule, difficult for members to apply. For all of these reasons, this new requirement could impede capital formation.

The IPA believes that proposed Rule 2810(b)(3)(D) could be extremely difficult to implement due to the requirement that the member or person associated with the member inform investors of the "pertinent facts" prior to executing a purchase transaction. In order to dutifully comply with the requirement, a member's due diligence might require a review of every page of prior registration and other disclosure statements, many of which could be very old (and unavailable on EDGAR) in order to determine whether any type of the disclosure concerning liquidation timing had been made. This could be a very difficult and time-consuming process, especially in light of the fact that the proposed rule does not include a time limitation on the required review of disclosure by prior programs and REITs. A member may be required to review disclosure regarding both public and private offerings that bare no resemblance to the current offering.

The cost of the process could be significant, as third party due diligence providers and others charge for (i) the time and expense of obtaining the prior registration and disclosure statements, (ii) reviewing every page of the registration and disclosure statements and (ii) the

follow-up necessary to determine whether the liquidation occurred as predicted in the registration and disclosure statements.

After going through this entire due diligence process, potentially at considerable time and expense, the member may still not be able to determine how to apply the proposed rule when communicating with its clients prior to executing a purchase transaction. The proposed rule is ambiguous as to what prior disclosure would constitute the type of liquidation disclosure required to be disclosed to investors. For example, if the sponsor had disclosed that a particular program or REIT would begin to liquidate by a certain date – it is not clear what that prior program or REIT would have to have done by that date (i.e., sold a property, contracted to sell, put the property up for sale, etc.) in order for a member to be satisfied that the program or REIT had "made good" on its initial estimate of the time period for liquidation. Just trying to reconstruct what activities had actually occurred by such date could be an extremely difficult, time consuming and costly task. We do not believe that there is a clear benefit to investors which would outweigh the cost, effort and burden imposed by such a requirement. Further, it is not clear to us that these disclosure rules are within the purview of FINRA and not of the U.S. Securities and Exchange Commission.

For all of the foregoing reasons, the IPA does not support the adoption of proposed Rule 2810(b)(3)(D).

Thank you for your consideration of these comments. If you have any questions or wish to discuss them further, please do not hesitate to call me at the number above.

Very truly yours,

Jack L. Hollander
Chairman, IPA Executive Committee

Cc: Joseph Price, Vice President
Corporate Financing Department, FINRA