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January 2, 2024

Submitted electronically to <https://www.regulations.gov>

Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Avenue, NW Washington, DC 20210

Re: RIN 1210-AC02 Retirement Security Rule: Definition of an Investment Advice Fiduciary; and related exemption

Ladies and Gentlemen:

Nareit is the worldwide representative voice for REITs¹ and listed real estate companies with an interest in U.S. real estate and capital markets. Nareit's members are REITs and other real estate businesses throughout the world that own, operate and finance residential and commercial real estate. Nareit's member REITs include both listed REITs, which are registered with the SEC and listed on an established stock exchange and Public Non-listed REITs, or PNLRs, which are public, SEC-registered real estate companies whose securities are not listed on an established stock exchange and are the subject of this submission.

PNLRs participate at Nareit through the PNLR Council, which consists of 20 Nareit PNLR corporate members. The mission of the PNLR Council is to advise Nareit's Executive Board on matters of interest and importance to PNLRs. On behalf of Nareit's PNLR Council, I am happy to submit the attached comments from Nareit's PNLR Council responding to the Department of Labor's (DOL or the Department) recent proposal, the Retirement Security Rule: Definition of an Investment Advice Fiduciary (the "Proposal")².

Nareit supports the Department's goal of ensuring that investment advice provided to plans, plan participants and IRA owners is in their best interests and submitted comments³ supporting the Securities

¹ Through the diverse array of properties they own, finance, and operate, REITs help provide the essential real estate that revitalize neighborhoods, enable the digital economy, power community essential services, and build the infrastructure of tomorrow, while creating American jobs and economic activity along the way. REITs of all types collectively own more than [TO BE UPDATED]\$4T in assets, public REITs own \$2.5T, market cap is \$1.3 trillion, 150 million Americans own REITs. The best place to find these is always: <https://www.reit.com/data-research/data/reits-numbers>

² 88 Fed. Reg. 75890 (November 3, 2023).

³ See, Nareit, Comment Letter on Proposed Rule on Regulation Best Interest (August 6, 2018) available at <https://www.sec.gov/comments/s7-07-18/s70718-4171495-172202.pdf>



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and Exchange Commission's 2018 proposal⁴ that became Reg. Best Interest (BI) in 2019.⁵ However, Nareit's PNL Council's assessment is that the DOL's Proposal is unnecessary in light of the SEC's existing Reg BI, and that it would add unnecessary cost and complexity to the provision of retirement services to investors.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven A. Wechsler".

Steven A. Wechsler
President & CEO
Nareit

⁴Regulation Best Interest, 83 Fed. Reg. 21,574 (May 9, 2018).

⁵ Regulation Best Interest: The Broker-Dealer Standard of Conduct, 17 C.F.R. § 240 (2019).



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Re: RIN 1210-AC02 Retirement Security Rule: Definition of an Investment Advice Fiduciary; and related exemption

Ladies and Gentlemen:

The Public Non-Listed REIT (PNLR) Council of Nareit¹ appreciates this opportunity to respond to the Department of Labor's (DOL or the Department) recent proposal, the Retirement Security Rule: Definition of an Investment Advice Fiduciary (the "Proposal")².

As we previously emphasized in comments responding to similar previous DOL proposals in 2015³ and 2017⁴, Nareit's PNLN Council shares the Department's goal of ensuring that investment advice provided to plans, plan participants and IRA owners is in their best interests. For this reason, the Council was pleased to support the Securities and Exchange Commission's 2018 proposal⁵ that became Regulation Best Interest (Reg. BI),⁶ because it represents a principles-based approach that requires broker-dealers "to act in the best interest of the retail consumer" at the time a recommendation is made to an investor, "without placing the financial or other interests ahead of their retail customers."

However, the Council has serious concerns about DOL's current proposal, which we believe is unnecessary and inconsistent with respect to existing federal regulations such as the SEC's Reg BI. We share concerns that were expressed by several witnesses at DOL's Dec. 12 and 13 public hearings that the Proposal would likely limit access of retirement savers and pension fund beneficiaries to meaningful advice and education and serve to limit their choice of investments. Accordingly, the Council has concluded that, if adopted, the Proposal would likely not serve the best interests of most investors.

¹ Nareit is the worldwide representative voice for REITs and listed real estate companies with an interest in U.S. real estate and capital markets. Nareit advocates for REIT-based real estate investment with policymakers and the global investment community. Public Non-Listed REITs (PNLRs) participate at Nareit through the PNLN Council, which consists of 20 Nareit PNLN corporate members. The mission of the PNLN Council is to advise Nareit's Executive Board on matters of interest and importance to PNLNs.

² 88 Fed. Reg. 75890 (Nov. 3, 2023).

³ See, letter from the Executive Committee of the Public Non-listed REIT Council of the National Association of Real Estate Investment Trusts (NAREIT), July 21, 2015 to the Department of Labor available at: <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>

⁴ See, letter from the Executive Committee of the Public Non-listed REIT Council of the National Association of Real Estate Investment Trusts (NAREIT), April 17, 2017 to the Department of Labor available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01290.pdf>

⁵ Regulation Best Interest, 83 Fed. Reg. 21,574 (May 9, 2018).

⁶ Regulation Best Interest: The Broker-Dealer Standard of Conduct, 17 C.F.R. § 240 (2019).

REITs and PNLRs: Background

REITs in the United States include public companies whose securities are registered with the SEC and listed on an established stock exchange (so-called Listed REITs) and public companies whose securities are registered with the SEC, but are not listed on an established stock exchange, so-called Public Non-listed REITs or PNLRs.

Both listed REITs and PNLRs own, manage and lease investment-grade, income-producing commercial real estate in nearly all property sectors. PNLRs, like listed REITs, are subject to the statutory operating framework set forth in Section 856 of the Internal Revenue Code (the Code) intended to ensure that REITs confine their activities to the business of real estate as a landlord or lender. Among other Code requirements, REITs and PNLRs must distribute at least 90% of their taxable income each year and satisfy rigorous asset and income tests that effectively require that they primarily invest in qualifying real estate assets and primarily derive their income from such assets.

As SEC-registered public companies, PNLRs must make regular SEC filings, including quarterly and yearly financial reports, which are publicly available through the SEC's EDGAR database. Interests in PNLRs are public offerings, exchanged primarily through broker-dealers registered with and regulated by the SEC, the Financial Industry Regulatory Association (FINRA), and the relevant state securities regulatory authorities.

Nearly all PNLRs issued in recent years are Net Asset Value (NAV) PNLRs. These are perpetual-life products that continuously offer and repurchase shares pursuant to repurchase programs that are fully disclosed in their prospectuses and periodic SEC filings at a price based solely upon the NAV of their underlying real estate assets and liabilities. NAV PNLRs report updated NAVs on a periodic basis. The NAV REIT model contrasts with so-called Lifecycle PNLRs, which are largely no longer being offered and were designed to be limited-life products that undergo a lifecycle of fundraising followed by a future liquidity event of some form that was set forth in their governing documents⁷.

PNLRs may offer benefits to many retirement investors. Because of the IRS REIT distribution requirements, PNLRs typically pay meaningful dividends and offer the potential for moderate, long-term capital appreciation and useful portfolio diversification. As with mutual funds and other pooled investment products, there are typically fees charged in connection with PNLRs. These fees are required to be clearly disclosed to investors in each offering prospectus, which are subject to SEC review, and to the requirements in FINRA Regulatory Notice 15-02⁸.

The Proposal

The Council shares many of the concerns that have been expressed and elaborated upon by other groups, including the U.S. Chamber of Commerce, the Institute for Portfolio Alternatives (IPA), and

⁷ See, https://www.reit.com/sites/default/files/2022-06/2022%20FINAL_REIT%20Types_06.3.22.pdf

⁸ See, [FINRA Regulatory Notice 15-02](#).

SIFMA during DOL's public hearings on the proposal that were held on Dec. 12 and 13, 2023 and subsequently reiterated in their comments filed with DOL. These include:

- Introducing another definition of fiduciary, applicable only in the retirement context, is likely to confuse both plan investors and other investors.
- The Proposal is unnecessary, because existing federal regulations, such as the SEC's Reg BI, already require that all investment recommendations must be in the retail consumer's "best interest;" and prohibit broker-dealers from putting their interests ahead of the customer's interests.
- The Proposal's overly broad scope would cover many investor discussions regarding non-plan assets, inappropriately expanding fiduciary liability and potentially chilling beneficial conversations with investors about PNLRs and other products.
- The Proposal blurs the distinction between advice and education, which paradoxically may serve to curtail the provision of useful educational and other services to retirement investors.
- The Proposal lacks safe harbor protections and carve-outs for sophisticated investors (which prior DOL proposals included), further exacerbating uncertainty for retirement investors and their advisers regarding which activities clearly fall within scope of the proposal.

Accordingly, the PNLR Council joins these other groups in requesting that DOL withdraw this Proposal.

We appreciate the opportunity to provide these comments and would be happy to answer any questions you may have.

Respectfully submitted,



Nareit PNLR Council
C. Allan Swaringen
Chair, Nareit PNLR Council