



AMERICAN REALTY CAPITAL

405 PARK AVENUE, 12TH FLOOR
NEW YORK, NY 10022

November 11, 2011

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 11-44 regarding Customer Account Statements

Dear Ms. Asquith,

Please accept this letter in response to Regulatory Notice 11-44 (*FINRA Requests Comment on Proposed Amendments to NASD Rule 2340¹ to Address Values of Unlisted Direct Participation Programs and Real Estate Investment Trusts in Customer Account Statements*) (“Regulatory Notice 11-44”). This letter should also be considered a separate supplement to the NAREIT public nonlisted REIT committee comment letter to which we are also a signatory.

In Regulatory Notice 11-44, Financial Industry Regulatory Authority, Inc. (“FINRA”) has proposed amendments to NASD Rule 2340 (*Customer Account Statements*) (the “Proposed Amendments”) to address how firms report per share estimated values of unlisted Direct Participation Programs (“DPPs”) and unlisted Real Estate Investment Trusts (“REITs”) on customer account statements. The Proposed Amendments would:

- (a) limit the time period that the offering price may be used as the basis for per share estimated value to the period provided under Rule 415(a)(5) of the Securities Act of 1933 (the “Initial Offering Period”);
- (b) require firms to deduct organization and offering expenses from per share estimated value during the Initial Offering Period (for purposes of the Proposed Amendments, organization and offering expenses are generally defined in Regulatory Notice 11-44);
- (c) prohibit a firm from using a per share estimated value, from any source, if it “knows or has reason to know the value is unreliable,” based upon publicly available information or nonpublic information that has come to the firm’s attention; and
- (d) allow a firm to omit a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT does not contain a value that complies with the disclosure requirements of NASD Rule 2340.

¹ As part of the rulebook consolidation process, FINRA has proposed new FINRA Rule 2231 to replace NASD Rule 2340. See SR-FINRA-2009-028. The amendments discussed in Regulatory Notice 11-44 would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of SEC approval.

American Realty Capital and its FINRA member subsidiary, Realty Capital Securities, LLC applaud FINRA's Division of Corporate Financing for proposing the above-referenced actions to ensure enhanced transparency and accountability that would place unlisted DPPs and unlisted REITs on competitive footing with more mainstream investment products. However, in certain respects, we believe FINRA's proposals may not go far enough, and the Proposed Amendments, properly augmented, could prove transformative to the unlisted DPP and unlisted REIT industry.

Regulatory Notice 11-44 proposes three changes to NASD Rule 2340 regarding account statements, set forth below. (Our comments are indicated immediately following in bolded type)

- *First*, in the case of unlisted DPPs and unlisted REITs, valuations would be required to be communicated to the investor based on offering price net of all organization and offering expenses² (*net value*).³

We support this proposal (and will provide further commentary on the importance of a date certain implementation later in this letter) for investment programs that become effective after October 1, 2011, to the extent that the valuation is shown net of underwriting compensation. Such action simply acknowledges what the industry has always known, i.e., underwriting expenses are dilutive to the share price. However, we do not believe that valuation during the Initial Offering Period should be reflected net of: (i) traditional organization and offering issuer expenses, reimbursed from offering proceeds; or (ii) due diligence expenses (exclusive of underwriting compensation), which are amortized over a five (5) year period and are therefore already accounted for. In fact, one of our current product offerings, American Realty Capital Daily Net Asset Value Trust, Inc., reports share price net asset value (NAV) at \$9.00 plus commissions from "Day 1." Another offering we have recently filed, American Realty Capital Global Daily Net Asset Value Trust, Inc., will also report share price NAV from inception in the same way. Both programs will value 25% of their portfolios every quarter, using an independent, third-party valuation firm, employing published valuation criteria applied under the supervision of the programs' management and respective boards of directors.

- *Second*, the period during which a per share NAV can be based on net offering price would be limited to the Initial Offering Period only. After the Initial Offering Period, per share NAV would be based on a calculation valuing assets less liabilities.

We fully support this proposal, but believe it fails to go far enough. We believe that there need to be specific transitional dates established. For the purposes of this letter, we will suggest that investment programs effective prior to October 1, 2011, would continue to be shown at \$10 per share, and would be valued on a date certain suggested immediately

² These organization and offering expenses have three components: (1) issuer expenses that are reimbursed or paid for with offering proceeds, (2) underwriting compensation, and (3) due diligence expenses.

³ Under the proposal as currently drafted, the net estimated value required on customer account statements for such programs would be the NAV and could not include any commissions, nor any other organization or offering expense associated with the offering.

below. This valuation should be governed by published criteria applied by an expert, disinterested third party, supervised by the program’s management and board of directors, and should be asset based, rather than reflective of an enterprise or strategic valuation. Programs effective after October 1, 2011, would be shown at \$10 less underwriting compensation and then valued on a date certain suggested immediately below. The dates certain would vary depending on whether a program was already effective or still in registration, as follows:

<i>Type of Offering</i>	<i>Implementation Deadline for Valuation</i>
<i>Effective Offerings (effective prior to October 1, 2011)</i>	<i>Earliest to occur of:</i> <ul style="list-style-type: none"> • <i>Three years from effective date of offering;</i> • <i>Closing of offering plus six months; and</i> • <i>December 31, 2013.</i>
<i>New Offerings (effective after October 1, 2011) and Subsequent Offerings</i>	<i>Earliest to occur of:</i> <ul style="list-style-type: none"> • <i>\$500 million in equity raise;</i> • <i>Three years from effective date of offering; and</i> • <i>Closing of offering plus six months.</i>

- ***Third***, the current requirements of NASD Rule 2340 would be adjusted to prohibit a firm from using a per share estimated value, from any source, if it “knows or has reason to know the value is unreliable,” based upon publicly available information or nonpublic information that has come to the firm’s attention.

Although this proposed change seems reasonable, it is worth mentioning that this would create an additional requirement that member firms perform due diligence on the legitimacy of the per share valuation. From this perspective, we would recommend that the proposed amendments be reviewed to determine any potential unintended consequences to clearing firms and selling group participants.

American Realty Capital and Realty Capital Securities respectfully suggest that FINRA consider taking the Proposed Amendments a step farther. In particular, we believe that FINRA should more comprehensively address the following:

- **“Follow-on” Offerings.** Follow-on offerings are not in the best interest of investors, especially if sold at a stated share price that does not accurately reflect current NAV. Moreover, size matters, and too large an offering creates an inherent barrier to exit, depriving stockholders of a reasonably timed full-cycle liquidity event. Therefore, we believe follow-on offerings should be prohibited, except to the extent: (1) an offering fails to reach its target equity raise during its Initial Offering Period and such follow-on offering would allow a program additional time to reach its target equity raise (for example, if a \$1.0 billion offering raised only \$500 million during its Initial Offering Period, it would be permitted to file a follow-on offering for the remaining \$500 million only); plus (2) any over-allotment or “green shoe” option, limited to a maximum of 15% of the originally-

contemplated offering amount. Notwithstanding the foregoing, and regardless of whether a follow-on offering occurs, a current valuation should be conducted consistent with the valuation guidelines suggested above, based on a third-party's opinion of value and subject to published valuation criteria. American Realty Capital presently prohibits follow-on offerings for all companies on our platform, consistent with these guidelines.

- **“Grandfathering.”** We believe that “grandfathering” must be utilized judiciously in order to provide a consistently applied standard for all currently effective offerings and to minimize market disruptions resulting in potential harm to investors. We believe that offerings now effective should be “grandfathered” and permitted to continue to show a net share price of \$10 until the valuation dates set forth above. Newly effective offerings (after October 1, 2011), as well as any offerings currently in registration which become effective, should be required to immediately adopt a net share price of \$9 plus commissions until the evaluation date set forth above.

American Realty Capital and Realty Capital Securities remain committed to ensuring we conduct ourselves and our companies in accordance with industry “best practices.” We embrace this principle for our entire suite of investment programs. By collectively working to improve the industry from the standpoint of reporting, valuation and transparency, we believe unlisted REITs will become more competitive with other investments, making them better investments, and growing the unlisted REIT market larger, so that it might assume its rightful place in the investment hierarchy.

Thank you in advance for your repeated courtesies and your consideration.

Respectfully,

Michael Weil



CEO, Realty Capital Securities, LLC, Dealer Manager for:

American Realty Capital Trust, Inc.
American Realty Capital New York Recovery REIT, Inc.
American Realty Capital Trust III, Inc.
American Realty Capital Daily Net Asset Value Trust, Inc.
American Realty Capital Healthcare Trust, Inc.
American Realty Capital – Retail Centers Of America, Inc.
Phillips Edison – ARC Shopping Center REIT, Inc.
United Development Funding IV, Inc.

Nicholas S. Schorsch



Chairman & CEO, American Realty Capital,
parent company to Realty Capital Securities
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public non-traded real estate offerings