ICON INVESTMENTS

April 12, 2012

Submitted via *pubcom@finra.org*

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

Re: *FINRA Regulatory Notice 12-14: Customer Account Statements*

Dear Ms. Asquith:

On behalf of ICON Securities Corp., a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"), and its affiliates, ICON Capital Corp. and ICON Investment Group, LLC, which collectively do business as ICON Investments ("ICON"), we appreciate the opportunity to comment on FINRA's proposed modifications to NASD Rule 2340.[1] With more than 25 years of experience in the alternative asset management industry, ICON has managed equipment finance investments for approximately 56,000 investors, raised approximately $1.7 billion in equity and made more than $4.2 billion in total investments. ICON also provides distribution services and advisory and formation services to non-traded real estate investment trusts ("REITs") sponsored and managed by The Lightstone Group. In addition to these active business lines, ICON has also filed registration statements for a publicly registered, non-traded oil and gas fund that will seek to raise capital to primarily invest in oil and natural gas development wells located in the Mid-Continent region of the U.S. and a publicly registered, non-traded business development company (a "BDC").

ICON strongly believes in the importance of protecting the investing public by providing transparency in its public programs while at the same time balancing the need for sponsors of quality direct participation programs ("DPPs") and the FINRA members that sell these products to be able to efficiently raise capital without an overly burdensome regulatory scheme. To that end, ICON commends FINRA's efforts to bring further transparency regarding the valuation of the securities of publicly registered, non-traded DPPs and REITs and the understanding that investors have of such investments.

[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 12-14 would be made to NASD Rule 2340 or new FINRA Rule 2231, depending upon the timing of final approval of this Regulatory Notice.

In Regulatory Notice 11-44, FINRA proposed amendments to NASD Rule 2340 (*Customer Account Statements*) (the "Original Proposed Amendments") to address how FINRA member firms report per share estimated values of publicly registered, non-traded DPPs and REITs on customer account statements. The Original Proposed Amendments, among other things:

(a) Limited the time period for which the per share estimated value may be based upon the gross offering price to an initial three-year offering period; [2]
(b) Required firms to deduct organization and offering expenses from the gross offering price to reach a per share estimated value or net offering price;
(c) Prohibited a FINRA member firm from using a per share estimated value from any source if it "knows or has reason to know the value is unreliable"; and
(d) Omitted a per share estimated value on a customer account statement if the most recent annual report of the DPP or REIT did not contain a value that complied with the rule.

As most of these proposed changes did not raise significant concerns regarding the types of DPPs that ICON sponsors, we did not comment on the proposed changes; however, the changes proposed in Regulatory Notice 12-14, taken together with those in Regulatory Notice 11-44, precipitated our need to address some of the potential unintended consequences of the proposed changes to Rule 2340.

In Regulatory Notice 12-14, FINRA has revised its original proposal to amend Rule 2340 in response to various comments submitted on Regulatory Notice 11-44 (the "Revised Proposed Amendments"). The Revised Proposed Amendments would, among other things:

(a) Require every DPP to adopt "net asset value" or "NAV" as the measure for estimating the value of its securities;
(b) Require general securities members to provide a per share estimated value once an issuer provides an estimate based upon an appraisal of assets and liabilities in a periodic or current report filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act");
(c) Allow, during the effective period of the first registration statement for the DPP or REIT securities,[3] members to use either a modified net offering price with an explanation of methodology by which such price was determined or designate the securities as "not priced"; and
(d) Require certain disclosures to accompany the per share estimated value as set forth in the Revised Proposed Amendments.

[2] The initial offering period was defined in Regulatory Notice 11-44 and by Rule 415 under the Securities Act of 1933, as amended, as lasting up to three years plus an additional 180-day extension period if a follow-on public offering has been registered.
[3] The effective period of the first registration statement for the DPP or REIT securities is not defined in Regulatory Notice 12-14. Based upon the definition of "initial offering period" in Regulatory Notice 11-44, ICON would expect that the time period during which a net offering price could be used would be three years plus an additional 180-day extension period if a follow-on public offering had been registered.

ICON believes that the market benefits when the focus highlights investor protection and transparency relating to non-traded REITs and other types of DPPs. However, ICON believes that while the Revised Proposed Amendments may work for the design and structure of non-traded REITs, they do not work in the same way for other types of investment products that are regulated as DPPs pursuant to FINRA's rules. ICON's programs are structured differently, have different economic terms for investors and some of ICON's programs have shorter offering periods than the non-traded REITs and therefore require different considerations when determining the appropriate timing and calculation of an estimated per share value than the non-traded REITs. Set forth below are ICON's general comments on the Revised Proposed Amendments that ICON believes require clarification or additional information, as well as specific comments as to the three classes of DPPs with which ICON is involved as a sponsor.

General Comments

In addition to the specific issues raised below regarding the applicability of the Revised Proposed Amendments to certain DPPs, ICON requests the following:

- that, as discussed below in further detail in the sections concerning Equipment Funds and Oil and Gas Funds, Rule 2340 retain the use of the term "per share estimated value" in lieu of "net asset value" or "NAV";
- that FINRA confirm ICON's understanding based on discussions with FINRA staff that the phrase "from the issuer's most recent periodic or current report filed with the SEC" contained in proposed Rule 2340(c)(A)(i) modifies the words "the per share NAV" and not "based upon an appraisal of assets and liabilities";
- that the amended rule provide clarification on whether an appraisal of a DPP's "assets and liabilities" requires an appraisal of each and every *financial statement* asset and liability of the DPP, which for many DPPs (e.g., equipment funds and BDCs) could include items such as prepaid expenses, deferred revenue and other accruals that would be costly to have appraised with little benefit to a valuation process, or just the DPPs investments with associated liabilities deducted from the appraised value of such investments;
- that the amended rule provide clarification on whether an appraisal of a DPP's "assets and liabilities" requires an appraisal of each and every *investment* asset and liability of the DPP, which for many DPPs (e.g., equipment funds and BDCs) is contrary to accounting and/or valuation policies as such DPPs may have a large number of investments that would, if required to be appraised each year, incur significant costs, which costs would be borne by the investors of the DPP; and

- that the amended rule provide guidance on the transition and/or grandfathering of the proposed rules, which, in particular, takes into account distinctions in the type and age of the non-traded REIT or DPP (e.g., the cost of compliance with the rule change for equipment funds about to enter into or that are currently in liquidation would seem to outweigh the benefits), such guidance to include the effective date of the rule and the impact on non-traded REITs and DPPs currently in their offering periods, as well as late stages of operation and/or liquidation.

Non-Traded REITs vs. DPPs

While publicly registered, non-traded REITs represent a significant portion of the non-traded REIT/DPP industry, there are a variety of DPPs that are or have been in the marketplace in recent years. These investment products are similar inasmuch as the products are publicly registered and non-traded and are typically sold through the same retail distribution channel. Yet, there are significant differences among these investment products, many of which highlight the need for proceeding deliberately and cautiously when adopting (and amending) rules of general application. The following chart highlights some of the differences that are relevant to the Revised Proposed Amendments:

	REITs	**Equipment Funds**	**Oil & Gas Funds**[4]	**BDCs**
Offering Period	3 years	2 years	2 years	3 years
- 6 month extension?	Yes	No	No	Yes
- Follow-on offering?	Yes	Typically no	Typically no	Yes
Operations:				
- Immediate investment during offering period?	Typically yes	Typically yes	Typically no – investment commences following offering period	Typically yes
- Commencement of Distributions	Often immediately after escrow break	Often immediately after escrow break	After wells produce revenue	After first quarter of operations
- Reinvestment of cash from operations?	Yes – no restrictions	Yes, but subject to restrictions	Typically no	Yes, but subject to restrictions
- Limited investment/operating period?	No	Typically limited to offering period, plus 5-year investment period	No, but net proceeds typically are fully invested within 1-2 years after offering period ends	No
Asset attributes	Typically appreciate	Typically depreciate	Typically deplete/depreciate	Typically depreciate
Exit Strategy:				
- Listing?	Yes	No	No	Yes
- Merger?	Yes	No	No	Yes

[4] The chart and the discussion regarding oil and gas funds focuses on oil and gas funds that engage in drilling activities, particularly developmental drilling activities, as opposed to exploratory drilling activities. The attributes of oil and gas funds that engage in production purchase activities, royalties, and/or exploratory drilling activities may differ and have different concerns regarding the Revised Proposed Amendments.

- Liquidation?	Yes	Yes – formal liquidation period commences after end of operating period	Only after wells are uneconomical to maintain in light of reduced production	Yes

Equipment Funds

ICON's equipment funds primarily provide secured financing to businesses in industries such as marine, manufacturing, transportation, automotive, energy and power, telecommunications, and industrial and mining. The funds generally have a two-year offering period, followed by an estimated five-year operating period and then an estimated two to three year liquidation period. Unlike the non-traded REITs, ICON's equipment funds have never had a follow-on offering that extends the offering period beyond the two-year period and in only one, very limited circumstance, was a fund permitted to extend its offering period beyond two years. ICON has historically provided a per share/interest estimated value by disclosing an equipment fund's ERISA value[5] in such fund's first Annual Report on Form 10-K ("Form 10-K") following the end of the fund's offering period. The first Form 10-K reporting an ERISA value has typically been filed within three years after the initial effective date of the registration statement for the fund. Thus, historically, ICON and its equipment funds begin providing such an estimated per share/interest value sooner than required under FINRA's current rules.

The total return received by investors in an ICON equipment fund is based not only on the cash flow received from investments made from the net offering proceeds, but also on the cash flow received from reinvesting a portion of the proceeds from the fund's investments multiple times throughout the life of the fund. This dependency on reinvestment and the resulting compounding of returns from earlier investments is principally necessitated by two factors: the need to overcome the front-end underwriting compensation incurred to raise capital in the retail distribution channel and the fact that equipment funds largely invest in depreciating assets. This unique operating model also explains why ICON (often to its detriment and to the confusion of investors and registered reps alike) has used a very conservative proxy of a per share/interest estimated value – ERISA value – for Rule 2340 purposes for many years.

[5] This reflects that the estimated value per interest has been calculated based using the instructions for IRS Form 5500, which provides that the value provided by custodians/trustees on Form 5500 shall be "current value," which is defined to mean "fair market value where available . . . [or] the fair value as determined in good faith . . . assuming an orderly liquidation at the time of determination". In this case, the estimated value per interest is the amount that a holder of an interest in the fund would receive if all of the fund's assets were sold in an orderly liquidation as of the close of the fiscal year and all proceeds from such sales, without reduction for transaction costs and expenses, together with any cash held by the fund, were distributed to the partners upon liquidation. To estimate the amount that limited partners would receive upon such liquidation, the fund calculates the sum of: (i) the unpaid finance lease and note receivable payments on its existing finance leases and notes receivable, discounted at the implicit yield for each such transaction; (ii) the fair market value of its operating leases, equipment held for sale or lease, and other assets, as determined by the most recent third-party appraisals obtained by the fund for certain assets or ICON's estimated values of certain other assets, as applicable; and (iii) the fund's cash on hand. From this amount, the fund then subtracts its total debt outstanding and then divides that difference by the total number of interests outstanding.

The Original Proposed Amendments included the requirement to calculate a per share estimated value based upon "an appraisal of the assets, liabilities and operations" of the DPP or REIT. In the Revised Proposed Amendments, FINRA deleted the language "and operations." For an equipment fund, calculating a per share estimated value based solely on an appraisal of the assets and liabilities of the fund at any given moment in time would typically result in a significant understatement of the estimated value of the fund, the magnitude of which would depend in part upon when the valuation was performed. ICON did not comment on the Original Proposed Amendments because it believed that the flexibility of having an appraisal that included an assessment of the fund's operations would give it the ability to more closely approximate an "estimated value" given the structure of its equipment funds. However, with the limitations on appraising just assets and liabilities in the Revised Proposed Amendments, ICON believes that a significant aspect of the value of its equipment funds to an investor would be omitted. Further, the resulting estimated value would not reflect an accurate estimate of the value of the fund and would cause confusion amongst investors, who would not have an accurate snapshot of the estimated value of their investment in the fund. Allowing a calculation of estimated per share value for an equipment fund that takes into account more than just a sum of its assets and liabilities as if the fund suddenly liquidated, in contravention to its investment structure, on an arbitrary date would more closely approximate the economic deal that an investor has made by more closely approximating an "enterprise value" for the fund. Therefore, we believe that there is sufficient justification and need for the amended rule to provide flexibility for equipment funds to base estimated per share value on an appraisal of the fund's assets, liabilities and operations. For similar reasons to those stated above, we also note that the terminology "net asset value" and "NAV" would not be appropriate for determining an estimated value of an interest in an equipment fund. Finally, because equipment funds are unique in having a predefined exit strategy that requires the fund to enter liquidation immediately after the end of the operating period, we believe that the amended rule should provide an accommodation for equipment funds (and other similarly situated DPPs) to avoid the cost and expense of appraisals outside the ordinary course of a fund's accounting and impairment policies during the liquidation period.

<u>Oil and Gas Funds</u>

ICON's oil and gas fund intends to invest in oil and natural gas development wells located in the Mid-Continent region of the U.S. ICON's oil and gas fund is comprised of three separate limited partnerships that intend to raise a maximum of $200,000,000 in the aggregate for all three partnerships. Each limited partnership within the fund is intended to have an offering period of up to a maximum of one year, but in no event to cross over taxable years, so one limited partnership could raise capital for six months and then the second limited partnership could raise capital for up to 12 months and if there were any securities remaining, the third limited partnership could raise capital for up to another 12 months, but in no event would the aggregate offering period exceed two years. Once the offering for a limited partnership is closed, the net offering proceeds will be used by such limited partnership to locate potential sites and begin drilling. There will be no income generated by the fund and no distributions made to limited partners until such time as oil or natural gas has been produced, gathered and sold into the market. Therefore, it is not expected that there will be any distributions paid to investors for at least nine to 12 months from the date that a program's offering period has been closed and operations have begun.

Compliance with the Proposed Revised Amendments for ICON's oil and gas fund and other similar funds presents a number of issues. First, deriving an estimated per share/interest value for an ICON oil and gas fund from an appraisal of the fund's "assets and liabilities" risks significantly overstating or understating the fund's value. This is because the principal asset of an oil and gas fund that engages in drilling is comprised of the fund's cost to purchase its interest in one or more wells, less estimated depletion, with the principal liability being the estimated cost of retiring the fund's wells if and when the wells are retired. For example, basing the appraisal at cost could result in overstating (if the wells ultimately would not produce enough oil and gas to recoup the cost to purchase the interest in the wells) or understating (if the wells, as one might expect from making an investment in the wells in the first place, produce more than enough oil and gas to recoup the cost to purchase the interest in the wells) the value of the fund's assets. Instead, the appraisal should be able to take into account more reliable factors, such as the estimated value of the fund's oil and gas reserves and the estimated costs of producing, gathering and selling those assets.

As noted above, the Original Proposed Amendments included the requirement to calculate a per share estimated value based upon "an appraisal of the assets, liabilities and operations" of the DPP or REIT. In the Revised Proposed Amendments, FINRA deleted the language "and operations." ICON did not comment on the Original Proposed Amendments because it believed that the flexibility of having an appraisal that included an assessment of the fund's operations would give it the ability to more closely approximate an "estimated value" of an oil and gas fund by permitting it to take into account more reliable factors than the fund's balance sheet assets and liabilities. However, with the limitations on appraising just assets and liabilities in the Revised Proposed Amendments, ICON believes that the most significant aspects of the value of its oil and gas fund to an investor would be omitted and the resulting estimated value would not reflect an accurate estimate of the value of the fund. Allowing a calculation of an estimated per share value for an oil and gas fund that takes into account more than just a sum of its assets and liabilities on an arbitrary date, such as the fund's oil and gas (i.e., the potential value of the natural gas or oil to be gathered and sold by the fund) and the costs associated with producing, gathering and selling such assets, would more closely approximate the economic deal that an investor has made by more closely approximating an "intrinsic value" of the fund. Therefore, we believe that there is sufficient justification and need for the amended rule to provide flexibility for oil and gas funds to base estimated per share value on an appraisal of the fund's assets, liabilities and operations. For similar reasons to those stated above, we also note that, the terminology "net asset value" and "NAV" would not be appropriate for determining an estimated value of an interest in an oil and gas fund.

Finally, since ICON's oil and gas fund and similar funds are unique because such funds (i) have a shorter offering period, (ii) do not pay any distributions until investments are made and revenue is received from producing assets (and hence cannot and are not providing any fund performance measures regarding distribution coverage or sustainability), (iii) invest in depreciating/depleting assets and (iv) do not have any type of exit strategy, we believe that the amended rule should provide several accommodations for such funds (and other similarly situated DPPs). First, requiring an estimated per share value to be reported no later than the second quarterly report following the closing of the fund's offering period is not likely to enable the fund (or a partnership in a fund, in a fund structured like ICON's) to assess its estimated value because the fund is not likely to be able to take into account the results from its drilling operations, which may not even have commenced by such time. To address this concern, we believe that the amended rule should provide that an estimated per share value should be required no later than the second quarterly filing following the three year anniversary of the date that the DPP's or REIT's first registration statement was declared effective by the Securities and Exchange Commission. This change would permit DPPs with shorter offering periods, but longer operational lead times (like ICON's oil and gas fund) to provide better estimates of per share value out of the gate while leaving the proposed regulatory regime applicable to investment products with the longer, three year offering periods (REITs and BDCs) unchanged. In addition, the cost of requiring an appraisal of an oil and gas fund in its later years at some point outweighs the benefits to investors because oil and gas funds invest in depleting/depreciating assets and do not have any type of exit strategy, which means the funds typically just self liquidate over time. To address this concern, we believe that the amended rule should provide that an estimated per share value derived from a third party appraisal should not be required for oil and gas funds similar to ICON's (and any other similarly situated funds) at such time that the fund's remaining assets represent less than a specified percentage – such as 20% – of the fund's net offering proceeds.

BDCs

ICON's BDC intends to invest primarily in senior secured loans, including unitranche loans, and to a lesser extent, second lien loans and long-term subordinated loans of private and thinly traded U.S. companies. ICON's BDC intends to raise up to $1,000,000,000 over a three-year offering period. While BDCs are relatively new to the DPP industry, listed BDCs have existed for more than two decades, with most of the prominent names in the listed BDC industry – Ares, Apollo and MCG Capital, among others – dating back to the early 2000s. While early BDCs were typically internally managed, BDCs are almost all now externally managed – including those in the non-traded industry. The result is that these entities, in addition to having independent board of director requirements like REITs, are subject to additional layers of regulation under the Investment Company Act of 1940, as amended (the "1940 Act") and the Investment Advisers Act of 1940, as amended (the "Advisers Act"). These additional regulations should be welcomed as such regulations provide significant, additional protections for those that invest in these products.

One of the requirements under the 1940 Act is that BDCs calculate and publish a net asset value, or NAV, per share. This requirement serves two fundamental purposes: to provide transparency to investors (and the market in general) as to the *current* value of the BDC's investment portfolio and to ensure that the BDC does not dilute its existing stockholders by issuing equity at a price below that current value. As neither Section 2(a)(41) of the 1940 Act nor Rule 2a-4 promulgated thereunder require a BDC to have every asset and liability of the

BDC appraised, yet alone appraised annually, we reiterate our previous request that the amended rule provide greater clarity and/or flexibility on what it is that must be appraised. In addition, while we leave the argument that BDC's may be unfairly prejudiced by having to report NAV as an estimated per share price during the offering period as opposed to the net offering price to others, we do believe that FINRA should retain flexibility in the amended rule for BDCs to calculate a per share estimated value independent of NAV in the future, once FINRA has had the opportunity to become more familiar with the structure and other nuances of non-traded BDCs. As noted in comments submitted by other participants in the industry, NAV is not the equivalent of the intrinsic value of a BDC – historical market data shows that it may be just as likely to overstate as understate the value of a BDC – as, among other things, it only factors in the value of the BDC's investment portfolio as of the date of valuation; the BDC's future value is entirely ignored. If the ultimate goal is, as it should be, to provide a transparent, meaningful and accurate picture of the value of an investor's investment in a BDC, then arbitrarily cutting off all of the future value of the investment seems to be inconsistent with that goal.

Conclusion

ICON believes that transparency and meaningful disclosure to investors is important, but believes that the one-size fits all approach of the Revised Proposed Amendments does not address the significant differences between non-traded REITs and certain DPPs, such as equipment funds, oil and gas programs and BDCs. Rather, as we have discussed in further detail above, there should be flexibility in the amended rule that allows for different types of DPPs to provide valuations in ways that make the most sense for that particular investment product. ICON appreciates the opportunity to comment on Regulatory Notice 12-14 and looks forward to a continued dialogue with FINRA on these and other important issues for the protection of investors and the capital markets.

Sincerely,

Mark Gatto
Co-Chairman, Co-President and
Co-Chief Executive Officer
ICON Investments

Michael A. Reisner
Co-Chairman, Co-President and
Co-Chief Executive Officer
ICON Investments

cc: Mr. Joel S. Kress, ICON Investments
Ms. Deborah S. Froling, Arent Fox LLP