Advisor Group Holdings, Inc.

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Advisor Group

Submitted via Electronic Submission

May 8, 2023

Via E-Mail to rule-comments@sec.gov
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Vanessa A. Countryman, Secretary

Re: **File Number S7-04-23, Request for Comment: Safeguarding Advisory Client Assets**

Dear Ms. Countryman:

Advisor Group Holdings, Inc. ("Advisor Group") appreciates the opportunity to comment on the Securities and Exchange Commission ("Commission") Notice of Proposed Rulemaking on the Safeguarding Advisory Client Assets Rule (the "Proposal"). We support the Commission's intention to protect advisory client assets, but are concerned that, if adopted without modification, the rule will significantly impinge on our ability to serve advisory clients and will ultimately limit the advisory services available to investors working to save for retirement and other life goals.

Advisor Group is the corporate parent of one of the largest networks of independent wealth management firms in the United States, with approximately 11,000 affiliated financial professionals. Our independent financial professionals provide both brokerage and investment advisory services to retail clients across the country. Our stated mission is, "[t]o empower entrepreneurial financial professionals to *fulfill their clients' dreams* and build amazing businesses." We seek to accomplish this goal by providing access to, and supporting compliance for, the investment products and services our clients need to achieve their personal savings and investment goals. As responsibility for retirement investing and personal savings continues to migrate to the individual investor, we believe access to investment advisory services is increasingly important.

This comment letter does not address every concern we have identified with the Proposal, but rather focuses on key issues that we believe are most likely to negatively impact the availability of advisory services to our independent financial professionals' clients. We join and support the comments and arguments included in the letter the Securities Industry and Financial Markets

Securities and investment advisory services are offered through the firms: FSC Securities Corporation, Royal Alliance Associates, Inc., SagePoint Financial, Inc., Triad Advisors, LLC, Infinex Investments, Inc., and Woodbury Financial Services, Inc., broker-dealers, registered investment advisers, and members of FINRA and SIPC. Securities are offered through Securities America, Inc. and American Portfolios Financial Services, Inc., broker-dealers and members of FINRA and SIPC. Advisory services are offered through Arbor Point Advisors, LLC, Ladenburg Thalmann Asset Management, Inc., Securities America Advisors, Inc., American Portfolios Advisors, Inc., and Triad Hybrid Solutions, LLC, registered investment advisers. Advisory programs offered by FSC Securities Corporation, Royal Alliance Associates, Inc., SagePoint Financial, Inc., Triad Advisors, LLC, Securities America Advisors, Inc., and Woodbury Financial Services, Inc., are sponsored by VISION2020 Wealth Management Corp., an affiliated registered investment adviser. Advisor Group is an affiliate of these firms.

Association ("SIFMA") submitted regarding the Proposal on May 8, 2023. If the Commission decides to proceed with this rulemaking, it should modify the final rule to mitigate the potential adverse consequences SIFMA and we have identified. We hope the Commission finds our comments helpful, and we are open to providing additional comments or clarifications upon request.

The Proposal Will Limit Our Ability to Provide Independent Advisory Services to Our Clients

As noted above, while we support the Commission's intention to protect advisory client assets, we are concerned that, unless it is modified, the Proposal will harm investors by significantly reducing access to discretionary advisory services, investment products and choice of adviser. We are particularly concerned with the Proposal's operational challenges and legal risks which the written agreement and assurances requirements create, and the Proposal's preference for non-discretionary advice models over discretionary advice.

A. The written agreement and assurances requirements are unworkable and will greatly limit our ability to provide holistic discretionary advice.

The Proposal requires that registered investment advisers enter into written agreements with each qualified custodian – at its heart inserting the adviser contractually into the contractual relationship between a qualified custodian and a retail client. Under the proposed rule, the written agreement would require that the qualified custodian agree to, among other things: (i) provide records to the SEC upon request; (ii) send account statements to the client on an at least a quarterly basis; (iii) provide the client with an annual internal control report that would include the opinion of an independent public accountant; and (iv) specify the retail adviser's agreed upon authority to effect transactions. Moreover, the Proposal requires that the adviser obtain written assurances that the custodian will exercise due care, indemnify the client against losses, segregate client assets, and not subject client assets to security interests or liens.

Despite our size and significant relationships with our clearing firms that act as qualified custodians, we believe we would be challenged to obtain both the contractual provisions and written assurances outlined in the Proposal. We expect that the areas of most concern to our qualified custodians will be the requirement for delivery of an annual internal control report and the requirement that we obtain written assurances that the custodian will exercise due care and indemnify clients against losses. As an example, we receive and carefully review our qualified custodians' internal control reports. Internal control reports are considered to be highly confidential, and it is extremely unlikely that a qualified custodian would agree to a broad circulation of those reports to clients.

If at our size, we do not believe that we can reach consensus with our custodians on the Proposal's requirements, our view is that smaller advisers with little or no bargaining power will be completely unable to meet the requirements of the Proposal.

Moreover, although we have significant relationships with our third-party clearing firms that act as qualified custodians, there are a number of other third-party custodial relationships where we

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have even less bargaining power, such as when a client's assets are held away from our platform, and where advice is provided with respect to the client's 401(k) or other benefit plan account. In these cases, it is unlikely that we will be able to obtain the written agreement and assurances required under the Proposal, which will have a significant impact on our ability to provide holistic investment advisory services.

Just to provide more specificity to our examples, outside of models and adviser managed accounts that are custodied at our clearing firms, we may provide advisory services with respect to client assets that are held away in third-party managed programs ("TAMPs"). In instances where we act as a co-adviser with a TAMP, we may not be able to negotiate any terms with the TAMP's custodian, as we have no direct relationship with that custodian.

Another example relates to 401(k) plans. Plan participants are increasingly asking their investment adviser representatives to provide discretionary advisory services with respect to 401(k) plan accounts, either in isolation or as part of a holistic financial plan. Given that the custodian of a 401(k) plan is typically chosen and hired by the employer plan sponsor's designated fiduciary and individual, self-directed accounts are set up for each plan participant, a retail adviser would have no direct relationship with a plan sponsor or its custodian and would not be in a position to negotiate terms with that custodian. Further, retirement plan recordkeepers/custodians are becoming fairly concentrated and increasingly offering their own advice products, which in the absence an agreement between our advisory firms and the plan custodian would likely disintermediate our advisory services. We believe that limiting investment management services to a plan's recordkeeper/custodian would reduce choice and not be in the best interest of a retail client.

We believe that the Proposal, as written, will greatly reduce or cut off retail clients' access to discretionary advice if qualified custodians do not agree to the contractual and written assurances requirements. This is a predictable result from a Proposal that seeks to exert Adviser's Act custody requirements to entities not otherwise subject to Advisers Act requirements.

B. The written assurances requirement creates legal risks that will result in increased costs and reduced services.

The Proposal's requirement for advisers to obtain written assurances that the custodian will exercise due care and indemnify the client against loss indirectly creates a private right of action which would allow a custodian's clients to enforce a contractual standard of care that does not exist and is not required under current law. In our view, a qualified custodian will be unlikely to be willing to take these obligations on which further supports our view that no matter our bargaining power as a large enterprise, we will not be able to obtain those assurances from our qualified custodians.

It is entirely foreseeable that custodians who agree to provide the assurances and terms so they can continue to be qualified custodians will attempt to shift the risks of this indemnification back to advisers by requiring cross-indemnifications from the adviser or increasing the costs of their services. It is also foreseeable that some custodians either will stop acting as qualified custodians with respect to certain offerings that do not support the revenue needed to justify

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taking on these additional risks, or preference certain advisers or advisory channels at the expense of others. Additionally, advisers may significantly reduce the advisory services they make available (or products they support) to certain client segments where revenues do not support taking on such additional risks and costs passed on by the qualified custodian. This cannot be a desirable outcome for retail clients, who as so much evidence shows are in need of holistic wealth management and discretionary investment advice services.

We and other financial services companies recently experienced challenges in attempting to implement the 2016 U.S. Department of Labor Fiduciary Rule, which also included a regulator-created private right of action. As many observed, we saw firms work to address their concerns with the private right action by shifting to service models that were not affected by this new requirement (i.e., from brokerage to advisory services).[1] It also resulted in greater consolidation of larger firms as smaller firms struggled to address the increased risks and compliance costs the rule imposed. Moreover, it was the fiduciary rule's creation of a private right of action that in large part led the Fifth Circuit Court of appeals to vacate the rule entirely.

The requirement for advisers with custody of client assets to obtain assurances that qualified custodians will provide contractual indemnifications (and other terms) to advisory clients similarly creates a private right of action for a custodian's clients to enforce a standard of care for custodial services.

The result will be decreased access to investment advice and services for our clients and limits on our financial professionals' ability to provide the advisory services that are in our clients' best interests. These consequences will be the result not of market forces, but of regulatory interference by means of an overly broad rule.

C. The Proposal creates an unlevel playing field and preferences non-discretionary advice.

We are concerned that the Proposal, similar to what the industry experienced under the DOL fiduciary rule, preferences certain advice models over others. Specifically, the Proposal favors non-discretionary and brokerage advice over discretionary advisory services from firms that are independent of the custodian, as well as services provided by state-registered investment advisers. The result will likely be a significant curtailment of access to discretionary advisory services as independent firms shift their business models with respect to non-custodied assets to

[1] See, e.g., Deloitte & Touche Study (Aug. 9, 2017) (National accounting firm Deloitte studied 21 financial institutions that represent 43% of U.S. financial advisors and 27% of the retirement savings assets in the market. The study found that "[A]s of the [DOL] Rule's first applicability date on June 9th, 53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimate impact 10.2 million accounts and $900 billion AUM."); Harper Polling (2017) (In a Harper Polling survey of 600 financial professionals, 68% reported that they or their institutions would take on fewer small accounts.); Daisy Maxey, Winners and Losers in a Post-Fiduciary World, Wall St. J., May 24, 2017, https://www.wsj.com/articles/winners-and-losers-in-a-post-fiduciary-world-1495638708; Crystal Kim, BofA, JPMorgan, and the Fiduciary Rule: Will They or Won't They, Barron's, Mar. 15, 2017, https://www.barrons.com/articles/bofa-jpmorgan-and-the-fiduciary-rule-will-they-or-wont-they-1489588442; Imani Moise, Merrill Lynch Does about Face on Fiduciary-ERA Policy, Reuters, Aug. 30, 2018, https://www.reuters.com/article/us-bank-of-america-fiduciary/merrill-lynch-does-about-face-on-fiduciary-era-policy-idUSKCN1LF1R9.

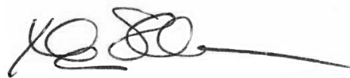
non-discretionary advice models to avoid the operational hurtles and legal risks the Proposal, in its current form, would create. By equating discretionary authority with custody and imposing a new raft of compliance requirements on discretionary advisers that do not apply to non-discretionary advisers or broker-dealers, the Commission is creating an un-level playing field that preferences non-discretionary and brokerage service models in important channels, including retirement savings and for held away assets.

If this Proposal is adopted as proposed the shift to nondiscretionary advisory programs and brokerage service models will harm investors currently benefiting from discretionary advisory services and stop a significant and needed trend towards holistic discretionary advice that began decades ago. As the Commission knows, the investment landscape in America has shifted from one in which an individual could depend on professionally managed corporate pension plans to support their retirement, to one in which each person is left on their own to save, invest, and make the important financial decisions needed to ensure they have enough money to retire and to achieve other life goals. These individuals often lack the expertise, time, and discipline to make optimal investment decisions and benefit from the use of discretionary investment management services. If finalized, the Proposal will limit client access to discretionary advice during a period of economic uncertainty when investors are most in need of independent discretionary investment advice to help them navigate investment and financial turmoil.

We urge the Commission to modify the Proposal consistent with SIFMA's comments, and particularly to eliminate elements that treat discretionary investment authority as custody and require advisers to obtain written agreements and assurances from qualified custodians, including that they will provide contractual indemnities and other terms to advisory clients with respect to assets they custody.

We appreciate the opportunity to offer our comments on the Proposal. If you have any questions or need any further clarification on these comments, we invite you to reach out to the undersigned by email at nina.mckenna@advisorgroup.com or by telephone at 901.302.0499.

Sincerely,



Nina Schloesser McKenna
Chief Legal Officer and General Counsel
Advisor Group Holdings, Inc.

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