

May 4, 2023

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE, Washington, DC
20549-1090

Re: File Number S7-04-23

Submitted to: rule-comments@sec.gov

Dear Ms. Countryman:

Thank you for the opportunity to comment on the Securities and Exchange Commission's (SEC or the Commission) proposed safeguarding rule under the Investment Advisers Act of 1940 (the Advisers Act).¹ I respectfully submit the following comments:

I commend the Commission for reexamining its rule regarding how investment advisers safeguard their customers' assets. The Commission is wise to ensure that its rules reflect investors' needs in an evolving marketplace.

I also commend the Commission for proposing its new safeguarding rule under Section 223 of the Advisers Act.² Congress wisely granted the Commission new authority to adopt rules requiring registered investment advisers to safeguard client assets. I support the Commission's proposal to adopt a safeguarding rule under this substantive provision of the Advisers Act.

I am honored that the Commission considered and addressed the concerns that I raised in my petition for rulemaking.³ As my petition indicated, I believe that the Commission will not have solved the "Madoff" problem unless the SEC requires a registered investment adviser to use a custodian that is independent of that adviser.

The Proposing Release notes that the Commission "continue[s] to believe that self-custody and related person safeguarding arrangements provide practical benefits for advisory clients; however, we remain wary of the potential risks of such arrangements that do not have an independent party involved in safeguarding client assets."⁴ It further explains that in addition to the existing safeguards, other aspects of the proposed rule provide additional protection. The Proposing Release explains that safeguards such as "requiring an adviser to obtain reasonable assurances in

¹ Release No. IA-6240 (Feb. 15, 2023); 88 FR 14672 (March 9, 2023) (Proposing Release).

² 15 USC §80b-18b; Pub. L. 111-203, section 411.

³ Proposing Release, at note 148.

⁴ Proposing Release, at 14693.

writing that the [qualified] custodian comply with the client protections required in the proposed rule and discussed below would improve safekeeping of client assets.”⁵ For most advisers affiliated with a custodian, these safeguards will be helpful. They may help the overwhelmingly honest advisers and custodians avoid omissions that could cause problems.

Nonetheless, if the adviser and broker-dealer are corrupt, as was the case with Madoff, all the assurances in the world will not matter. After witnessing the havoc that Madoff caused, I do not think that it is prudent for an adviser and its custodian to be under common control.⁶

Requiring the custodian and the adviser to be independent would provide another benefit. If the Commission were to require an adviser to use an independent custodian, it would force an unbundling of custodial services. Investment advisers would have an opportunity to shop for custodial services in a more transparent and competitive market. Such competition might improve service and lower costs, as well as providing the additional investor protection of an independent custodian.⁷

Thank you for the opportunity to comment. I would be pleased to meet with Members of the Commission or the Staff to discuss my concerns.

Sincerely,

/s/

Stuart J. Kaswell, Esq.

⁵ Proposing Release, at 14693 (footnote omitted).

⁶ Kaswell, *The Bernie Madoff I Knew: How He Gained the Confidence of Regulators and Legislators*, Business Law Today, American Bar Association, June 30, 2021; and Kaswell, *Netflix Accurately Portrays Bernie Madoff, But There Are Some Misses*, Business Law Today, American Bar Association, February 8, 2023.

⁷ See also Section 202(c) of the Advisers Act.