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May 7, 2023

Via Email Only @ rule-comments@sec.gov

Ms. Vanessa Countryman
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: SR-SEC- S7-04-23– Proposed Rule Change regarding custody requirements for Registered Investment Advisers

Dear Ms. Countryman:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Securities and Exchange Commission ("SEC") relating to both investor protection and disclosure.

Pursuant to Rule of Practice 192(a) of the Securities and Exchange Commission, PIABA submits this comment to the SEC concerning the SEC's recent rule proposal to create rule 206(4)-11, amend rule 204-2, and amend the Form ADV. The proposed rule changes would affect the ability and duties around a registered investment adviser ("RIA") contracting with a third party for the maintenance of custody of client assets.

PIABA generally supports the rule proposal. Due to the breadth of the proposal, this letter only addresses a few of the items which PIABA views as important for its membership and clients.

First, there clearly need to be changes related to the custody of cryptocurrency assets in order to promote consumer protection. The crypto industry is so rife with fraud that some securities regulators have gone so far as to keep a public running tally of the scams to try to warn the public at large. *See, e.g.*, California Department of Financial Protection and Innovation, *Crypto Scam Tracker*, https://dfpi.ca.gov/crypto-scams/ (last visited May 4, 2023). Many of these scams are actually being perpetrated by entities purporting to operate the trading platform itself, i.e., the

custodians for the assets. Action is absolutely required to try to prevent these scams which are, as of now, far too successful.

To the extent a RIA is trading cryptocurrencies for client accounts, the need for robust safeguards are *greater* than other, traditional, types of assets. Accordingly, PIABA supports a rule change to require advisers to only utilize crypto exchanges and trading platforms that meet or exceed the requirements of other types of custodians.

Similarly, to the extent a RIA holds holding crypto assets for clients, utliziling local computers, hard drives, or other electronic storage devices, those are *more* susceptible to an unknowing conversion of a client's assets by an unscrupulous RIA or custodian, as there is the ability to convert those assets anonymously without a client ever being aware. Accordingly, PIABA believes that any rule sets related to those assets under direct RIA custody must require routine audits of those assets.

Additionally, PIABA supports a proposed requirement to compel all third-party custodians being utilized by RIAs to include contractual protections for the underlying investors. For example, PIABA supports the prohibition, already in the proposal, whereby custodians not seek waivers for their own misconduct in failing to properly secure the assets with which they are being entrusted. Further, PIABA's membership often sees clients with third-party custodian contracts that go beyond a mere waiver and include terms whereby the custodian claims the right to seek indemnification ***from the client*** if the client has the temerity to seek damages for liability arising out of the custodian's misconduct. Such terms are directly contradictory to investor protection, and merely serve to threaten and intimidate a victimized client from trying to make themselves whole again. Accordingly, PIABA would advocate that any such provisions be banned entirely from the use of a custodian seeking to qualify as a "qualified custodian."

PIABA understands that RIAs are not typically parties to these agreements, other than, in some instances, being designated as a limited power of attorney. However, these contracts in practice are entirely contracts of adhesion. No consumer investor has the standing or leverage to negotiate any of the terms being offered by a third-party custodian. Instead, they routinely sign up with whatever company the RIA directs. RIAs, on the other hand, have economic leverage through scale. If <u>all</u> RIAs in the country were required to only utilize custodians who include fair and balanced contractual terms with their clients, there would be sufficient market pressure that companies will amend current terms to capture that amount of potential business.

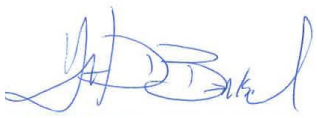
PIABA further supports a requirement that qualified custodians verify a RIA's authorization for transactions. Obviously, one of the principal obligations of the custodian is to ensure that the assets being custodied are not misappropriated by third-party bad actors. Unfortunately, unscrupulous RIAs may serve as such bad actors and misappropriate the assets being held by the third-party custodian. Thus, the third-party custodian should have some basis on which to follow the trade instructions of the RIA – especially when it comes to delivering the assets to recipients that do not appear to be the underlying investors themselves.

PIABA supports a proposal to require RIAs to notify all customers when an account is opened with a qualified custodian, specifically including all necessary identifying information about the custodian, including the custodian's name, address, and the manner in which the investments are maintained. One of the hallmarks of fraudulent investment management and investment vehicles is the lack of information, specifically including where a client's investment assets actually go once the funds are entrusted to the professional. A requirement to notify a client up front of a named, verifiable third party who could be contacted to confirm the relationship and the receipt of assets would help assure that client assets were not simply converted at the outset with promises that the funds had been sent to a custodian.

PIABA supports a proposal that advisors retain documents related to their public accountants, including "(1) all audited financial statements prepared under the safeguarding rule; (2) a copy of each internal control report received by the investment adviser; and (3) a copy of any written agreement between the independent public accountant and the adviser or the client, as applicable, required under proposed rule 223-1." However, PIABA believes that, in addition to requiring that such documents be retained, there should also be a requirement that such documents be provided to the RIA clients. Ultimately, it is the safety of the client assets that is being tested. The information about how it is being tested and the results of those tests should not a secret to the clients whose assets are at risk.

PIABA thanks the Commission and FINRA for the opportunity to comment on this proposal.

Very Truly Yours,



Hugh D. Berkson, President
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