

# Congress of the United States

Washington, DC 20515

January 22, 2024

The Honorable Gary Gensler  
Chair  
U.S. Securities and Exchange Commission  
100 F St NE  
Washington, DC 20549

Dear Chair Gensler,

We write you today to express our concerns regarding the negative impact on real estate assets associated with the U.S. Securities Exchange Commission's (SEC) proposed rule, titled Safeguarding Advisory Client Assets.<sup>1</sup> While we appreciate the goals of the proposal and the SEC's efforts to modernize how investment advisers safeguard client assets, we believe any final rule should exclude real estate.

As you know, the proposed rule would expand current custodial requirements to cover all assets of an investment advisor's clients, including physical assets like real estate. These existing requirements protect investors from loss, misuse, theft, or misappropriation of their assets, and we support efforts to ensure adequate coverage of such assets. In the instance of real estate assets, however, the proposal's range of new custodial requirements will likely create significant operational and practical challenges. These challenges and the resulting unintended consequences would materially inhibit an advisor's clients' access to investment strategies relating to real estate, compounding pressures that a lack of affordable housing, high interest rates, and office vacancies are already placing on residential and commercial real estate markets.

Furthermore, we believe ample protections already exist to promote the safekeeping of real estate assets held in advisory accounts or funds, which assets are not subject to high risk of loss or theft. Physical assets like real estate cannot be easily misappropriated due to their inherent physical characteristics,<sup>2</sup> and a host of gatekeepers already have strong incentives to confirm that real estate is not stolen. Lenders typically have security interests in the real estate to protect them from failure to repay loans, and in modern real estate transactions in the United States, buyers and lenders obtain title insurance. This commonplace practice adds yet another gatekeeper to help verify the chain of ownership of a real estate asset during a transaction. Lastly, the ownership of a real estate asset is tracked by mortgages and deeds recorded by municipalities, further decreasing the likelihood of theft.

The proposal's new safeguarding requirements for physical assets could potentially produce situations where custodians refuse to custody real estate assets because of the increased expenses and responsibilities associated with their maintenance and safekeeping, creating significant adverse effects on the current real estate market. In addition, placing a third-party custodian in the middle of real estate transactions could severely disrupt ordinary transactions and place advisory clients at a significant disadvantage. Acknowledging this, the proposal's custodial requirements, when applied to real estate assets, may exacerbate the fragile state of today's real estate markets without delivering additional investor protection.

While we applaud the Commission's work to strengthen investor protections and address market and

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<sup>1</sup> Safeguarding Advisory Client Assets, 88 Fed. Reg. 14,672 (Mar. 9, 2023) available at <https://www.federalregister.gov/documents/2023/03/09/2023-03681/safeguarding-advisory-client-assets>.

<sup>2</sup> The Commission has already acknowledged that real estate may not be easily subject to theft or loss and therefore may not need safeguarding protections, but has declared that there is still a risk of misuse, misappropriation, or loss when an adviser has an ability or authority to change beneficial ownership of real estate. *See supra* note 1 at 14,704.

technological developments, the current proposal will not result in meaningful and beneficial change for investors with real estate assets. With this in mind, it is imperative that the Commission operate cautiously to ensure it does not place additional pressure on residential and commercial real estate markets.

We respectfully ask that the Commission exclude real estate from the scope of any final rule. Thank you for your prompt attention to this important matter.

Sincerely,



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Joseph D. Morelle  
Member of Congress



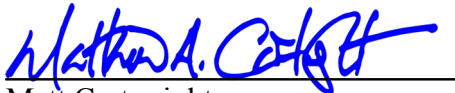
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Betty McCollum  
Member of Congress



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Henry Cuellar  
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