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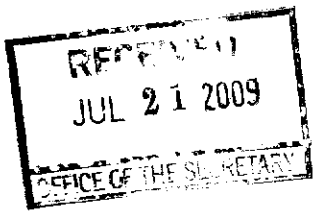
EADVISOR COMPLIANCE, INC

July 8, 2009



Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Custody of Funds or Securities of Clients by Investment Advisers
File No. S7-09-09

I am writing to express my opposition to the proposed rule 206(4)-2(4) requiring ***all*** registered investment advisers with custody of client assets to obtain an annual surprise examination by an independent public accountant. Advisers who are defined as having custody solely because they deduct advisory fees from clients' accounts should be excluded. Such requirement for registered investment advisers who otherwise would not have custody except for how compensation is being collected from their clients imposes a considerable financial/regulatory burden!

THE COMMISSION PROPOSES ANOTHER "SET OF EYES"

The Commission noted in the Release that "in light of the significant enforcement actions" recently brought against investment advisers for alleged fraudulent conduct, the Commission believes a surprise examination by an independent public accountant would provide another "set of eyes" on client assets, and thus additional protection. However I noted the "significant enforcement actions" brought by the Commission on those investment advisers, mentioned in footnote 11 of the Release, were the results of numerous acts of fraudulent conduct none of which had to do with violations of the custody rule solely on how fees were being deducted. Moreover, the investment advisers named in the Release had devised elaborate schemes to defraud their clients that could have been prevented if the Commission and FINRA had aggressively enforced existing regulation and listened to repeated warnings!

1. **What "set of eyes" is more important than that of the clients?**

   Current regulations already require a second "set of eyes" on an account – those of the client – that provide a clear "checks-and-balance" simple act of accountability to govern the investment advisers' activities and prevent abuse. Such regulations, when properly enforced, provide clear safeguards to deter an investment adviser from fabricating statements and hiding unauthorized transactions and losses in clients' accounts.

2. **Whose "set of eyes" are going to pay closer attention to what's going on in a client's account, those of the client or the independent public accountant?**

   There is no one more interested in what transpires in an account then the one who is the beneficiary of the account – the one greatest whistleblower is the client!

   Regardless of the qualifications, experience, and/or integrity of the independent public accountant, history has shown that for the right price you can get a "set of eyes" to look the other way! CPA practitioners are dealing with their own fraudulent activities and scandals that have added to the

collapse of consumer confidence and our financial markets to in turn demand more rigorous accountancy ethics and standards, i.e., Public Company Accounting Oversight Board ("PCAOB") standards. This extra layer of protect the Commission is proposing may decrease these criminal acts for a time; however, there isn't a law that can be written to prevent wrongs by those who make a willful choice to defraud others. One can't regulate ethical values and morality by increasing regulatory oversight. Such increased regulation penalizes the whole who are already working hard to do what is right with unnecessary, costly, and burdensome regulation to prevent violations from a few. Swift aggressive enforcement of existing laws already on the books on those committing these heinous crimes is the only answer!

SUGGESTIONS

My first suggestion is: 1) leave the custody rules as they are currently; 2) require the more extensive accounting standards for custody as the Commission has proposed; and, 3) the Commission more aggressively enforces existing laws.

My secondary suggestions address the Commission's question, "Should [the Commission] except from the surprise examination requirement advisers that have custody of client funds or securities solely as a result of their authority to withdraw advisory fees from client accounts?"

Leave the Existing Safeguards in Place

When it comes to an investment adviser – who otherwise would not have custody except for the fact they deduct advisory fees directly from clients' accounts – what would the independent public accountant conduct an examination of when there is no physical custody of any client funds and securities? Would it be an examination of the investment advisers control procedures? If so, what PCAOB control objectives, as suggested might be relevant in Section II.B.2. on page 23 of the Release, would be required for this type of investment adviser with custody? If the control objectives are the safeguards currently required by the existing custody rule, why require a costly $8,100[1] surprise examination when there have been no apparent violations by investment advisers in this area?

I would suggest the Commission continue to require the following safeguards for investment advisers, who otherwise would not have custody except for the fact they deduct advisory fees directly from clients' accounts:

- Clients' funds or securities maintained with an independent qualified custodian.
- The qualified custodian sends out account statements, at least quarterly to either the client or an independent representative designated by the client who is also independent of the investment adviser.
- The investment adviser must have a "reasonable belief" that the qualified custodian is providing periodic account statements directly to clients or an independent representative designated by clients.
- The quarterly account statements from qualified custodians clearly identify all transactions and disbursements in clients' accounts for the period including the amount of funds and securities held in the accounts.

[1] This is the average cost the Commission had determined an investment adviser would pay to have a surprise examination done by an independent public accountant registered with, and subject to regular inspection by, the PCAOB.

Require Invoices be Sent to Clients

Prior to April 2004, investment advisers relied on various no-action letters, e.g., *Investment Counsel Association of America, Inc.*, SEC Staff Letter (June 9, 1982); John B. Kennedy, SEC Staff Letter (June 5, 1996); *Securities America Advisers Inc.*, SEC Staff Letter (April 4, 1997), which required invoices be sent to clients showing the amount of the advisory fee, the value of the client's assets on which the fee was based, and the specific manner in which the investment adviser's fee were calculated. Requiring an invoice be sent to the client, or to an independent representative designated by the client, is providing for another "set of eyes" to validate the accuracy of the fees deducted from the account, and therefore creating less chance of fraudulent activity.

In the July 2002 proposed custody rule (File No. S7-28-02) the Commission asked, "Should [the Commission's] rules require advisers that deduct fees from clients' accounts to send such invoices to the clients?" The North American Securities Administrators Association (NASAA), responded to this question with "...it is extremely important to investor protection that clients be provided with information on how fees deducted directly from accounts are calculated," because "...custodian statements typically only show the date and total amount paid and perhaps a notation of the adviser's name or a notation such as 'advisory fees'"[2].

In April 2004, NASAA adopted model custody rules, one of which requires investment advisers send invoices to clients showing proper calculation of the advisory fees for clients to compare with account statements sent by the qualified custodian. These custody rules have been adopted by the majority of State Regulatory Authorities.

I suggest the Commission follow suit by amending existing laws to include this requirement for those advisers who otherwise would not have custody except for deducting fees from clients' accounts in lieu of requiring a surprise examination by an independent public accountant.

OTHER CUSTODY QUESTIONS

What about investment advisers who are defined as having custody because they serve as a trustee to a client's trust account or who offer a bill pay service to clients and have no physical custody of client funds or securities? Just as was previously asked, what would the independent public accountant conduct an examination of when there is no physical custody of any client funds and securities? Would it be an examination of the investment advisers control procedures? If so, what PCAOB control objectives, as suggested might be relevant in Section II.B.2. on page 23 of the Release, would be required for this type of investment adviser with custody? If the control objectives are the safeguards currently required by the existing custody rule, why require a costly $8,100 surprise examination when there have been no apparent violations by investment advisers in this area?

I appreciate the opportunity the Commission has allowed for me to express my opposition on this matter and request that consideration be given to my suggestions.

God Bless,

Lance D. MacKenzie

[2] See NASAA response to File No. S7-28-02, Proposed Rule on Custody of Funds or Securities of Clients by Investment Advisers (September 25, 2002), page 2.