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July 28, 2009

By E-Mail to: rule-comments@sec.gov

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

Re: Custody of Funds or Securities of Clients by Investment Advisers - Proposed Amendments to Rule 206(4)-2 Under the Investment Advisers Act of 1940 (Release No. IA-2876; File No. S7-09-09)

Ladies and Gentlemen:

This letter is submitted by the Committee on Federal Regulation of Securities (the "Committee"), Section of Business Law (the "Section"), of the American Bar Association (the "ABA") in response to a request for comment by the U.S. Securities and Exchange Commission (the "Commission") on the proposed amendments to Rule 206(4)-2 (the "Proposed Rule") under the Investment Advisers Act of 1940 (the "Advisers Act") described in Release No. IA-2876, published in the Federal Register on May 27, 2009 (the "Proposing Release"). This letter has been prepared by members of the Subcommittee on Hedge Funds and the Subcommittee on Investment Companies and Investment Advisers (together, the "Subcommittees").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the House of Delegates or Board of Governors of the ABA and, therefore, do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section (or any other ABA Section), nor does it necessarily reflect the views of all members of the Committee.

A-1. Annual Surprise Examination of Client Assets

The Proposed Rule would require all registered investment advisers with custody of client assets to obtain an annual surprise examination.[1] The Proposed Rule responds to the significant enforcement actions the Commission has brought recently that allege misappropriation of client assets.[2] We are mindful of this concern but note that these abuses were perpetrated by a small minority of investment advisers. We believe that for advisers that maintain custody of clients' assets with unaffiliated custodians, the costs of surprise examinations would far outweigh the benefits that those examinations would provide to investors, even if the advisers are "deemed" to have custody of client assets because they are able to withdraw fees or are the general partners of limited partnerships. We submit that in those cases, a less costly and administratively cumbersome approach would provide appropriate investor protection.

Analysis

1. Surprise examinations are costly and burdensome

The Commission estimates that the surprise examination would cost investment advisers an average annual accounting fee of $8,100.[3] We believe this considerably underestimates the actual costs most advisers would incur.

There is no precise way to calculate what the average cost of a surprise examination would be. The Commission's estimate of $8,100 would translate into approximately one auditor for one week of work (estimating an average rate of approximately $200 per hour. As noted in the Proposing Release, a surprise examination generally requires confirmation of all cash and securities held by the custodian.[4] In contrast, annual financial statement audits typically involve confirmation of cash and securities on a sampling basis. For many advisers who advise hedge funds or other private investment entities, this could require confirmation of, in some cases, hundreds or thousands of positions. Securities held at broker-dealers may be straightforward to confirm, but it is now customary for many advisers managing investment pools such as hedge funds to utilize multiple prime brokers, thereby increasing the expense involved. In addition, confirming other holdings, such as credit default swaps, other derivatives and private securities, will likely require significant work. Moreover, because the costs of surprise audits would also increase based on any increase in the number of accounts audited, for advisers with a retail client base that often includes a large number of accounts (with fewer assets in each account), the cost

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[1] Proposing Release, 74 Fed. Reg. at 25,355-25,357.
[2] *Id.* at 15,355-25,356.
[3] *Id.* at 25,370.
[4] *Id.* at 25,355.

of the surprise audit may be disproportionate to the value of the assets at issue and the advisers' profit margins.[5]

In a surprise examination, the auditor also generally reconciles the cash and securities to the books and records of the client accounts maintained by the adviser, confirms with clients all funds and securities in client accounts, and confirms on a test basis closed accounts or securities or funds that had been returned to client since the last examination.[6] Accordingly, we believe that most surprise examinations will require appreciably more than 40 hours of an auditor's time and, in fact, auditors have estimated to us that surprise examinations of large advisers would cost, on average, substantially more than estimated by the Proposing Release.

Additionally, we believe the Commission's $8,100 estimate fails to account for hidden costs of surprise examinations. These include: (a) the time that the advisers' custodians must spend with the surprise examiners, the costs of which would ultimately be passed on to the advisers' clients in the form of higher custody charges; and (b) the substantial amount of work that surprise examinations would require from the advisers' back office and accounting personnel, which would result either in the advisers being required to hire additional staff or to divert the attention of their existing staff from other duties necessary to the proper functioning of the advisers' businesses. These costs will have a substantial effect on advisers' businesses and the costs borne by their clients and must be taken into account in addition to the direct costs in order to assess realistically the full impact of the surprise examination requirement.

2. Advisers that maintain self-custody or use affiliated custodians

Advisers can have custody of client assets because: (a) they maintain self-custody or use affiliated custodians; (b) they can withdraw their fees from the client accounts ("Withdrawal-Based Custody Advisers")[7]; or (c) they serve as general partners of limited partnerships or in similar capacities for other pooled investment vehicles, and in those capacities have the authority to withdraw assets from the entities ("GP-Based Custody Advisers").[8]

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[5] Nearly 64% of registered advisers provide advisory services to "retail" (*i.e.*, non-high net worth) individuals. Furthermore, advisers with between $25 million amount under management ("AUM") and $100 million AUM had a median of 140 accounts with an average value of $237,000, and advisers with between $100 million AUM and $1 billion AUM had a median of 225 accounts with an average value of $600,000 per account. In comparison, advisers with between $1 and $5 billion, $5 and $10 billion, and $10 and $50 billion AUM had a median number of accounts of 48, 63, and 112, respectively, and average account values of $544,000, $1.2 million, and $2.4 million, respectively. INVESTMENT ADVISER ASSOCIATION & NATIONAL REGULATORY SERVICES, EVOLUTION REVOLUTION 2009 (forthcoming July 2009).

[6] Proposing Release, 74 Fed. Reg. at 25,355.

[7] *Id.* at 25,356.

[8] *Id.*

We agree with the Commission that when advisers maintain self-custody of assets, or maintain assets with an affiliated custodian, there is increased potential risk to clients.[9] The absence of an independent custodian increases risks -- both that the advisers may misappropriate assets as a result of collusion with their affiliated custodians, and that the advisers will withdraw excess fees. Although, as noted below, a surprise examination is more effective in deterring misappropriation of assets than in deterring overcharging of fees, we believe that the cost of a surprise examination is justified for advisers that use affiliated custodians. Advisers that maintain self-custody or use affiliated custodians potentially realize appreciable cost savings by doing so, and the additional expense associated with surprise examinations would be an appropriate cost associated with their achieving these savings, and provide investor protection in situations where client protection might otherwise be compromised. We therefore generally concur with the Commission's proposal that advisers that maintain self-custody or use affiliated custodians be subject to surprise examinations.

As discussed below, we believe that for GP-Based Custody Advisers, the requirement of surprise examinations is not necessary for positions held at unaffiliated custodians. At times, those advisers maintain self-custody or affiliated custody for a small portion of their clients' assets (normally privately placed securities). The requirement of surprise examinations for such advisers should be limited to assets which are held by the adviser, or assets maintained at an affiliated custodian. Even with respect to these assets, we recommend that the Commission consider whether an annual audit by an independent accounting firm registered with the Public Company Accounting Oversight Board ("PCAOB") would provide sufficient investor protection without the need for a surprise examination. An additional safeguard could be to enable an adviser, in lieu of being subject to the surprise examination, to obtain annually an internal control report regarding the controls for the securities that are self-custodied or maintained at an affiliated custodian. We recommend the Commission consider whether client assets will be sufficiently safeguarded if the adviser is subject to an annual audit by an independent and PCAOB-registered firm and either: (1) a surprise examination with respect to the assets held by the adviser or maintained at an affiliated custodian; or (2) an internal controls report with respect to the controls for the assets held by the GP or maintained at an affiliated custodian.

We also believe that the Commission should consider whether wrap accounts maintained by dual-registrants (or with broker-dealer affiliates of advisers) present the same risks with respect to the safeguarding of assets. Wrap accounts, which are maintained by executing brokers (rather than introducing brokers), are different than traditional advisory relationships. The adviser to the wrap account often does not have discretion with respect to trading in the account. Instead, the adviser may have discretion with respect to hiring and firing the underlying managers, or the adviser may assist the investor in choosing the underlying managers. Because the adviser to the wrap account in these situations is removed from investment decision-making,

[9] *Id.* at 25,359.

the risk of misappropriation of client assets may be lessened. We therefore recommend that the Commission consider exempting from the surprise examination requirement wrap accounts when additional protections are in place: (1) the adviser does not have discretion with respect to investing the assets; (2) the assets are maintained at an affiliated custodian that is a "qualified custodian" that is a broker-dealer registered under Section 15(b)(1) of the Securities Exchange Act of 1934, and subject to Section 15(c)(3); (3) the qualified custodian delivers periodic account statements to the clients; and (4) the qualified custodian is subject to the requirement of obtaining a written internal control report pursuant to Proposed Rule 206(4)-2(a)(6). These additional protections are analogous to the safeguards that apply to registered investment companies that use affiliated custodians (see Section B-4 below).

3. Advisers that use unaffiliated custodians

We believe that surprise examinations are not warranted for Withdrawal-Based Custody Advisers and GP-Based Custody Advisers that use unaffiliated custodians, because the costs of such examinations outweigh their likely benefits. The main benefit of a surprise examination is that it verifies the assets purported to be held in the client's account and thus may detect and deter misappropriation of assets by the adviser. Where the custodian is not affiliated with the adviser, the risk of the adviser misappropriating the clients' assets is reduced. In the case of advisers to pooled investment vehicles that rely on the audit exception provision of the current Rule (206(4)-2(b)(3)), the annual audit reduces the risk of misappropriation of assets. An additional safeguard the Commission might consider is requiring the annual audit to be conducted by an independent auditing firm registered with the PCAOB.

We acknowledge that even when an unaffiliated custodian is used, there may still be a risk of an adviser withdrawing excess fees. An adviser may withdraw excess fees simply by submitting inaccurate withdrawal requests to the custodian, which is not obligated to confirm the accuracy and legitimacy of the fee calculations. This is true whether or not the custodian is affiliated with the adviser. Because an annual surprise examination is focused mainly on verifying the assets in the account and does not monitor the adviser's fee withdrawals in any direct or contemporaneous way, it would not be very effective in preventing such abuse. If the Commission believes that improper fee withdrawals present a significant danger to investors (and we are not aware of any evidence that they do), a more targeted way to address the risk of advisers withdrawing excess fees would be to restore the requirement in place prior to the current custody rule.

The prior rule with regard to Withdrawal-Based Custody Advisers required the adviser to send duplicate bills showing the fee calculation directly to the investor and the custodian at the same time. This procedure enabled the client to verify the fee calculation at the time of the withdrawal, without the added the cost of a surprise examination. Such a requirement would serve as a safeguard against both intentional and accidental overcharging by advisers.

Accordingly, we recommend that this procedure be reinstated for those advisers that use unaffiliated custodians (if, as noted above, the Commission finds that it is necessary for the protection of investment adviser clients and/or investors in pooled investment vehicles) and therefore would not -- pursuant to our recommendation above -- be subject to surprise examination. In the case of pooled investment vehicles and GP-Based Custody Advisers, investors are not in a position to verify the appropriateness of fees taken and other withdrawals made by the adviser. We recommend the Commission consider permitting GP-Based Custody Advisers that maintain custody with unaffiliated custodians to use the PIMS/Bennett procedures[10] -- entailing independent review of all payments to the adviser -- to address the risk of excessive withdrawals and misappropriation.[11]

We also recommend that the Commission give guidance with respect to those situations where the custodian makes all fee calculations based on the advisory contract. Under existing guidance from the Commission staff, advisers in such situations are deemed not to have Withdrawal-Based Custody.[12] We believe that the custodian's role in these situations safeguards against improper fee deductions and therefore the surprise examination is not necessary.

A-3. Privately Offered Securities

Private securities that are registered on the books of the issuer and meet other conditions are exempt from the requirements of the current Rule.[13] The Proposed Rule would continue to exempt uncertificated securities from the requirement of being held by a qualified custodian but would required that such securities be subject to a surprise examination.[14] We agree with the approach set forth in the Release, but would suggest that private securities held by the adviser or an affiliated custodian be subject to surprise examinations, while private securities held by an independent custodian be treated the same as publicly traded securities held by unaffiliated custodians. If an adviser holds private securities, or they are held at an affiliated custodian, and public securities are held at an unaffiliated custodian, the surprise exam should be required to cover only the private securities. Limiting the surprise examination in this way would reduce the cost and target the assets at greatest risk of misappropriation.

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[10] The Commission staff provided guidance in the PIMS and Bennett no-action letters providing that an adviser is deemed not to have custody of a fund's assets if all payments to the adviser and its affiliates are reviewed by an independent representative who is an attorney or CPA. *PIMS, Inc.* SEC No-Action Letter (Oct. 21, 1991); *Bennett Management Co.*, SEC No-Action Letter (Feb. 26, 1990).

[11] We would also recommend that the Commission consider whether advisers should be "deemed" to have custody when the assets are maintained at an unaffiliated custodian and there are additional safeguards in place to protect against misappropriation.

[12] *See* SEC Staff Responses to Questions About Amended Custody Rule, Question III.3 (available at http://www.sec.gov/divisions/investment/custody_faq.htm).

[13] Proposing Release, 74 Fed. Red. at 25,358.

[14] *Id.*

B-2. Internal Control Report and PCAOB Registration and Inspection

The Commission proposes additional regulatory requirements in cases in which an independent custodian does not maintain client assets, but instead the adviser or a related person serves as the qualified custodian.[15]

Analysis

One of the additional requirements that the Proposed Rule would impose on investment advisers or related persons that act as qualified custodians for client assets is that the adviser must obtain an annual "internal control report" on the adviser's controls relating to its custodial services and the safeguarding of client assets.[16] This internal control report would be required to be prepared by an independent public accountant registered with, and subject to inspection by, the PCAOB.[17]

We question whether it would be appropriate to impose the internal control report requirements on advisers and related persons that only hold certain limited types of assets. Certain assets that are non-negotiable, or assets that do not confer any benefit to their holder even upon transfer, fall outside of the potentially abusive practices that the Proposed Rule was crafted to address. For example, although Section 206(4)-2(b)(2) of the Proposed Rule would except "privately offered securities" from the requirement to use a qualified custodian, it appears that the Proposed Rule would require an adviser meeting the definition of a qualified custodian and holding privately offered securities for clients to obtain an internal control report. Although there is substantially reduced risk of misappropriation of the private security, the adviser would still face the added expense of retaining a PCAOB-registered firm to prepare an internal control report. In these circumstances, we believe the surprise examination would be adequate without the added cost of an internal control report.

The Commission asks whether separate accountants should be required to conduct the internal control report and the surprise examination.[18] Requiring separate accountants would almost necessarily result in increased expenses for the adviser that in all likelihood would be passed on to its clients. If instead a single accountant performed both functions, it would have a degree of familiarity with the adviser's operations that would allow it to complete both tasks more efficiently and with less expense than if separate accountants oversaw each task. Furthermore, additional costs would be imposed on the adviser to perform due diligence of two accountants instead of just one. Finally, in locations outside the United States where there are

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[15] *Id.* at 25,358.
[16] Proposing Release, 74 Fed. Reg. at 25,358-25,359.
[17] *Id.* at 25,359.
[18] *Id.* at 25,359.

fewer PCAOB-registered accountants, it may be difficult, if not impossible, to retain two separate accountants that are both PCAOB-registered.

B-3. Surprise Examination and PCAOB Registration

The Commission proposes that the surprise examination that would be required of all advisers with custody under the Proposed Rule be performed, in the case of advisers with affiliated custodians, by an independent public accountant registered with, and subject to inspection by, the PCAOB.[19] We believe this additional requirement is unnecessary and may be unduly burdensome with respect to U.S.-registered foreign advisers. While some foreign countries currently have enough local PCAOB-registrants to support a competitive market, many do not. For example, some countries, such as the Bahamas and Barbados, have only a single PCAOB-registrant. We suggest that, while it may make sense to require PCAOB-registration for U.S.-based accountants, with respect to foreign accountants performing services for U.S.-registered foreign advisers, different criteria may be appropriate. The Commission might consider that in such situations, where it would be burdensome to require examination by a PCAOB-registered accountant, the surprise examination be conducted by an accountant registered or inspected by the local government or equivalent of the PCAOB, if any exists.

B-4. Independent Qualified Custodians

The Proposing Release requests comment on whether, as an alternative to requiring internal control reports and surprise examinations by PCAOB-registered accountants, the Commission should simply require all advisers to use an unaffiliated qualified custodian.[20] We do not believe this is a practical approach, as it would impose significant additional costs on many advisers and would damage certain business models currently in use by advisers, such as "wrap fee" products. In some cases, advisers and clients would likely face higher custody fees if advisers were not able to self-custody (or use a related person to serve as the qualified custodian). Furthermore, such a requirement would cause complications for investors that obtain both advisory services and brokerage services from a single (or related) entity, as they would be forced to split their accounts between different service providers. As noted above, we believe the Commission should consider whether the protections available to accountholders at the broker-dealer level make unnecessary the additional protection in the Proposed Rule.

Many registered investment companies, especially those whose investment advisers are affiliates of bank holding companies, maintain their assets at affiliated custodians. The law provides additional safeguards that apply to registered investment companies that reduce, if not eliminate, the potential for conflicts. For example, investment companies generally must have boards that consist of a majority of directors who are not "interested persons" of the funds.

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[19] *Id.* at 25,360.
[20] *Id.*

These independent directors provide an added layer of protection that other advisory clients lack. Moreover, the rules under the Investment Company Act of 1940, as amended, provide additional safeguards designed to protect investors. For example, Rule 17f-2(f) requires, in effect, affiliated custodians to conduct unannounced audits of securities held in custody by independent public accounts at least three times per year.[21] The Commission specifically recognizes the value of these safeguards by exempting registered investment companies from the requirement to use independent qualified custodians in section 206(4)-2(b)(4). We suggest that the Commission consider a rule that would create a similar exemption for advisers that use affiliated qualified custodians provided that they are subject to safeguards analogous to those that apply to registered investment companies.

The definition of "qualified custodian" in the current Rule suggests the Commission recognizes that qualified custodians already have obligations to protect client assets.[22] For example, under Rule 15c3-3 under the Securities Exchange Act of 1934, broker-dealers are generally required to maintain physical possession of all customer assets in a segregated account — whether the customer is an affiliate or the client of an affiliate, the broker-dealer is required to comply with the rule.[23] When it originally introduced the term "qualified custodian," the Commission noted it would be limited to "the types of financial institutions that customarily provide custodial services and are regulated and examined by their regulators with respect to those services."[24] As such, the Commission intended to rely on the protections in place from, and enforced by, other regulatory regimes. We believe these other regulatory structures provide significant protection for custodied assets, without respect to whether the qualified custodian is independent from the adviser. Nevertheless we are in accord with the Commission's goal of additional protection for investors. Therefore, while we do not support any requirement that all advisers use an unaffiliated custodian, for the reasons explained above, we do not disagree that, in circumstances in which the adviser finds it necessary to use an affiliated custodian, such advisers should be subject to an annual surprise examination and the custodian be subject to annual control assessments.

C. Delivery of Account Statements and Notice to Clients

The Proposed Rule would eliminate the option for investment advisers with custody to send account statements themselves in lieu of having them sent by a qualified custodian, and would require advisers to have a reasonable basis for believing that the qualified custodian sends

[21] Rule 17f-2(f), 17 CFR 270.17f-2(f).
[22] Rule 206(4)-2(c)(3), 17 CFR 275.206(4)-2(c)(3).
[23] Rule 15c3-3, 17 CFR 240.15c3-3.
[24] Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act, Release No. 2044 (July 18, 2002) [67 FR 48,579 (July 25, 2002)].

the account statements at least quarterly to each client for whom the qualified custodian maintains funds or securities.[25]

Analysis

The SEC was sensitive to advisers' desire to protect the privacy and confidentiality of client lists, and that advisers sought to prevent potential competitors from gaining access to those lists.[26] Accordingly, it made available the "Delivery Alternative" whereby advisers may meet the obligation under the current Rule to send account statements to clients by sending reports directly, without involving the custodian, as long as the adviser undergoes a surprise examination by an independent public accountant at least annually.[27]

The Proposed Rule would eliminate the Delivery Alternative.[28] The Commission explains that, in light of recent frauds, providing greater assurance of the integrity of account statements by requiring delivery from the qualified custodian outweighs adviser or client confidentiality concerns.[29] The Commission also indicates that most advisers do not currently take advantage of the Delivery Alternative, and that the proposed change "will not have a significant effect on a substantial number of advisers or clients."[30] With this, the Commission seems to imply that the original rationale for introducing the Delivery Alternative plays a less significant role today due to its lack of use.[31]

We recommend that the Commission consider this issue based not only upon the number of advisers utilizing the Delivery Alternative, but also the amount of assets managed by those advisers. If a small percentage of the industry's assets are at issue, then it is unclear why the current Rule should be changed to take away the Delivery Alternative. If, on the other hand, a large percentage of the industry's assets are at issue, then we recommend the Commission consider whether the goal of investor protection overrides a client's desire for privacy.

We believe that as a general matter it should be left to the client's preferences and the adviser's discretion if he or she wants to protect a client's privacy by using the Delivery Alternative. It is unclear if the alternative means suggested by the Commission, such as

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[25] Proposing Release, 74 Fed. Reg. at 25,361.
[26] Proposing Release, 74 Fed. Reg. at 25,361. *See also Custody of Fund or Securities of Clients by Investment Advisers,* Investment Advisers Act Release No. 2044 (Jul. 18, 2002) [67 Fed. Reg. 48,579 (Jul. 25, 2002)] at Section II.C., *Custody of Funds or Securities of Clients by Investment Advisers,* Investment Advisers Act Release No. 2176 (Sept. 25, 2003) [68 Fed. Reg. 56,692 (Oct. 1, 2003)].
[27] Rule 206(4)-2(a)(3)(ii), 17 CFR 206(4)-2(a)(3)(ii).
[28] Proposing Release, 74 Fed. Reg. at 25,361.
[29] *Id.*
[30] *Id.* Footnote 62 notes that "we estimate 190 advisers relied on the [Delivery Alternative]" in 2008.
[31] *Id.* It is unclear if the use of the Delivery Alternative by 190 advisers represents infrequent use of the Delivery Alternative or not, as this number is not compared with any other.

custodial contracts or agreements outside of the contract that would restrict the custodian's use of the information,[32] would suffice to protect client confidentiality. Alternative means of protecting confidentiality also may involve significant costs which likely would be passed on to clients. Accordingly, we recommend that the Commission consider whether there is a demonstrated need to eliminate the Delivery Alternative.

The Commission also proposes a "due inquiry" requirement whereby all advisers with custody of client assets will be required to have a "reasonable belief" that the qualified custodian delivers account statements to advisory clients or their representatives.[33] Establishing a reasonableness standard may, at least initially, lead to significant uncertainty that will not be justified by any discrete benefit to clients. We recommend that the Commission clarify that it would be sufficient for an adviser to confirm once each year that the custodian is sending the account statements.

D. Liquidation Audit

The Commission proposes to add a provision to the current Rule that would require most pooled investment vehicles to prepare and distribute to investors an audit upon liquidation of the pooled vehicle.[34] Proposed Rule 206(4)-2(b)(3)(ii) provides that a pooled vehicle is exempted from the requirement to send account statements if it is subject to both an annual audit distributed within 120 days of the end of its fiscal year *and* a liquidation audit distributed promptly after completion of the audit.[35]

Analysis

In the Proposing Release the Commission states: "The proposed amendment would *clarify* the availability of the annual audit exception to pooled investment vehicles that liquidate and make final distributions other than at year end. This amendment is designed to assure that the proceeds of the liquidation are appropriately accounted for so that investors can take timely steps to protect their rights." (emphasis added).[36] Although the Proposing Release states that the purpose of this provision is to clarify the current Rule, the current Rule does not indicate that an audit is required in every instance in which a pooled investment vehicle liquidates prior to the end of its fiscal year.

An audit upon liquidation may often be in the interests of the investors in a pooled vehicle. There may, however, be circumstances in which investors themselves would prefer that the fund not incur the expense of an audit. For example, often times the only remaining

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[32] *Id.* at 25,361.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 25,374.
[36] *Id.* at 25,361-25,362.

positions in the pooled vehicle are one or two illiquid positions. Because there is little trading activity, and no contributions or withdrawals, there is very little value to an audit of the pool's financial statements. We suggest the Proposed Rule provide that an investment adviser would not be subject to the audit requirement when the fund is liquidated prior to the end of its fiscal year, as long as the investors in the fund have consented to forego the audit.

* * *

We appreciate the Staff's attention to this matter and its consideration of the issues we have raised. We would be pleased to discuss with you and other members of the Staff any aspect of this letter. Questions may be directed to Paul N. Roth at (212) 756-2450 or to Jay G. Baris at (212) 715-7515.

Respectfully submitted,

/s/ Keith F. Higgins

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