millennium

August 17, 2009

Via Electronic Mail: rule-comments@sec.gov

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

Re: File Number S7-09-09; Custody of Funds or Securities of Clients by Investment Advisers

Dear Ms. Murphy:

Millennium Management LLC ("Millennium") is pleased to comment on the Commission's proposed amendments to Investment Advisers Act Rule 206(4)-2 (the "Custody Rule").[1] Millennium is a New York-based, multi-strategy asset management firm with approximately $10.5 Billion under management.

The concerns expressed in Release IA-2876 (the "Proposing Release") are concerns that we hear expressed by our investors, and we commend the Commission for addressing them. While we have some specific concerns with the proposal contained in the Proposing Release, in concept we are in complete agreement with the goals of the Commission. The revelation of a number of "Ponzi Schemes" over the last several months, of which Bernard Madoff and Mark Stanford are only the largest and most noteworthy, has left investors in private funds with uncertainty as to whether their assets are in fact secure. It is important to provide comfort to such investors, as well as to ferret out instances of fraud wherever they may be found. Certainly one way to do that is to require independent verification of the existence of assets that the funds identify as held by them, and we support the Commission in mandating such verification on a surprise basis in appropriate circumstances.

At the same time, it is important to be reasonable in the approach to such an issue. We believe the estimated cost of $8100 for a full scope surprise custody examination to be low by orders of magnitude for an average-sized asset management firm. For a large, active firm such as those managed by us, we believe the sheer out-of-pocket costs would be overly burdensome. Accordingly,

[1] Custody of Funds or Securities of Clients by Investment Advisers, SEC Release No. IA-2876 (May 20, 2009), 74 FR 25354 (May 27, 2009).

we believe some modification of the proposal, as we understand it, would be appropriate, *at least* where there are in place other controls that would supplement the proposed surprise examination requirement.

It is important to note that in most instances this proposed requirement would only supplement already existing custody controls that have for years been in place. For example, in our own case the financial statements of Millennium's master and feeder funds have been independently audited by a "Big Four" accounting firm since inception more than twenty years ago. We have also retained an independent administrator to provide oversight of our custodial positions and to review the fund's NAV calculation. These controls are fully disclosed to investors, and investors are provided with the audited financials and the NAV calculation. We believe funds have adopted similar practices. As such, implementation of the requirement for some form of surprise examinations under the Custody Rule would be a further layer of verification of fund assets each year. It should prove of significant value to investors and to the markets in providing assurance as to the underlying realities, but it is important that any requirement be carefully balanced so that the cost does not exceed the benefit.

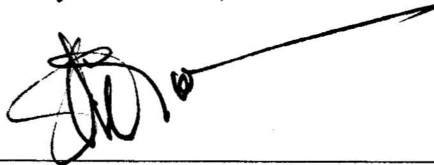
From what we have been told in consultation with our auditors, a significant part of the very substantial cost—as noted above, orders of magnitude greater than the $8,100 suggested in the Proposing Release—of a surprise examination is the result of the need to obtain 100% verification of positions. We believe, however, that virtually all of the benefits of a surprise examination can be obtained well short of a 100% confirmation mandate. If the goal is to ensure that a fund actually holds the positions in question, verification of a significant portion of those positions, with some element of random selection, should be sufficient to accomplish the goal. For example—although the precise determinations warrant further study and examination—it might be appropriate to have a "box count" of positions held physically at the institution itself, verification of a significant percentage of all positions held at intermediaries in excess of some threshold (with the actual positions to be verified determined through a random selection process), and verification of a lower percentage of smaller positions. It would also be practical to allow for some degree of variation in the stated value of positions, as some positions may have reasonable differences in valuations. We would therefore urge that the Commission adopt some form of surprise examination requirement in appropriate circumstances, but would also urge the Commission to adopt a more practical requirement, at least in those circumstances where other elements of safety (such as an independent audit of financial statements by a PCAOB-registered audit firm) are present.

Finally, although not directly pertinent to the subject of the Proposing Rule, we think it would be useful for the Commission to re-examine the basic elements of

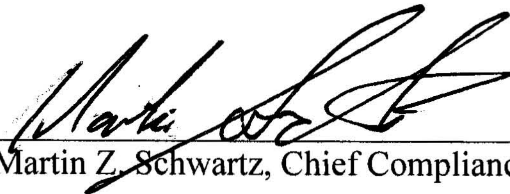
the custody rule itself. Specifically, the rule in its present form seems to assume a legal regime that is inconsistent with the Court of Appeals' decision in *Goldstein v. S.E.C*, 451 F.3d 873 (DC Cir. 2006) and it would be appropriate at the very least to modify the language of the rule to make it consistent with *Goldstein,* and possibly to revise its requirements in light of that decision. The provisions of Rule 206(4)-2(a)(3)(iii), for example, appear to be premised on an assumption that limited partners in a limited partnership are "clients" of the general partner/adviser, when that premise is clearly inconsistent with the court's decision. More important, the definition of "custody" in Rule 206(4)-2-(c)(1)(iii) to the effect that a general partner always has custody over partnership assets warrants revision to provide an ability—regardless of technical legal title to assets—for a general partner to divest itself of custody through contractual arrangements with other custodians that prevent the general partner from transferring assets into its own name or possession in excess of fees (including incentive fees) payable to it under the relevant documents.

Thank you again for the opportunity to provide comment on this important rulemaking effort.

Respectfully submitted,



Simon M. Lorne, Chief Legal Officer



Martin Z. Schwartz, Chief Compliance Officer

Cc: The Hon. Mary Shapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy Paredes, Commissioner
Andrew J. Donohue, Director, Division of Investment Management