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VIA EMAIL: rule-comments@sec.gov

May 8, 2023

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

RE: Safeguarding Advisory Client Assets (Release No. IA-6240)
File No. S7-04-23; RIN 3235-AM32

Dear Ms. Countryman:

The Alternative & Direct Investment Securities Association (ADISA)¹ appreciates the opportunity to submit comments on the proposal issued by the Securities and Exchange Commission (Commission or SEC) to amend and redesignate rule 206(4)-2 under the Investment Advisers Act of 1940, as amended (the "Proposal" or the "Proposed Rule"). ADISA also requests a 60- or 90-day extension to the comment period provided by the Commission so that additional industry input on the proposed rule can be supplied to the Commission for its consideration.

1. The Proposed Rule – Scope and Application beyond Funds and Securities

The SEC's Proposed Rule would engender far-reaching changes from the existing custody rule and would significantly change the approach(es) currently taken by investment advisers to safekeeping the assets of their clients. It would, if adopted, broaden the application of the Act's custody regulations to cover a much larger array of assets, not just funds and securities, and make several other important changes.² The SEC's approach is founded on its understanding that that investment advisers "provide services related to an array of financial products beyond just funds or securities," and its consequent belief that the Act's custody requirements should reach "substantially all types of client assets held in an advisory account."

The SEC has founded the Proposal in both legislative as well as industry developments. It points to actions taken by Congress to expressly vest the Commission with authority to promulgate rules requiring

¹ ADISA is the largest association of the retail direct investment industry in the United States. ADISA has approximately 4,500 members who employ over 220,000 investment professionals, together serving the interests of more than 2 million investors throughout the country. Direct and alternative investment programs serve a critical need in the creation and ongoing management of diversified investment portfolios.

² As acknowledged by the Commission, the proposed amendments would expand the scope of the current custody rule to include "any client assets of which an adviser has custody."

advisers to take steps to safeguard client assets over which they have custody.³ Specifically in relation to the Proposed Rule, the SEC noted that Congress had heard testimony that certain client investments were not covered by the custody rule because they were neither funds nor securities, putting them at greater risk of loss, theft, misappropriation, or being subject to the financial reverses of an adviser.⁴ In terms of industry developments, moreover, the SEC noted that “[w]e have seen changes in technology, advisory services, and custodial practices create new and different ways for client assets to be placed at risk of loss, theft, misuse, or misappropriation that may not be fully addressed under the current rule.”⁵

ADISA and its members understand and appreciate the SEC’s desire to ensure that advisory client losses attributable to the negligence or misconduct of advisers be kept to a minimum. The Commission’s focus on ensuring that private fund interests and other assets acquired and held in advisory accounts are not vulnerable to loss, theft or misappropriation, particularly as they grow in importance in client portfolios, is laudable. Advisers typically take a wholistic view of their clients’ wealth, which might be made up of assets from various classes, not just cash and securities, many of which are not traded or tracked on exchanges or safekept by regulated entities. As with funds and securities, ADISA’s view is that it is appropriate for the SEC to ensure that such assets are protected from loss, misappropriation, etc., through reasonable steps or means.

The Proposed Rule appears to place insufficient importance, however, on whether the protection(s) sought to be imposed or adopted are reasonably tailored to the nature of the advisory business and the fee structures that exist in the marketplace. ADISA members are focused on the sale and/or use of alternative investments, by broker-dealers and investment advisers, many of which are (both by design and by nature) securities. Both investment advisers and broker-dealers are defined in large part by reference to their provision of advice or other services regarding securities. Expanding the existing custody rule to impose potentially onerous and expensive safekeeping requirements regarding instruments, etc., that may not be securities and that may not be part of the advisory services provided, is inconsistent with the scope of the Advisers Act.⁶ By extending the role of “qualified custodians” in the chain of custody, the SEC is effectively requiring the use of entities that are not, as of yet, necessarily in a position to provide the necessary safekeeping services even as to securities much less more esoteric assets.

It is ADISA’s view that the SEC should review the Proposed Rule and consider revising its provisions so as to ensure that it applies principally to assets which are securities. If the intent of the Proposal is to ensure the safekeeping of interests in private funds and other private or non-traded securities held in client accounts, then the Proposed Rule should seek to accomplish that end without sweeping in assets

³ Congress added section 223 to the Investment Advisers Act in the Dodd-Frank Wall Street Reform and Consumer Protection Act. That section provides that “[a]n investment adviser registered under this subchapter shall take such steps to safeguard client assets over which such adviser has custody, including, without limitation, verification of such assets by an independent public accountant, as the Commission may, by rule, prescribe.”

⁴ The SEC release of the Proposed Rule cites to the testimony of one individual who appeared on behalf of the “Coalition of Private Investment Companies.”

⁵ In this regard, the release notes that advisory services have expanded and developed in recent years. The release points in particular to the growth in private funds holdings as well as “crypto” and other assets held on a distributed ledger technology. The Proposed Rule reflects the Commission’s understanding that it needs to balance “the desire of investment advisers to provide advisory services regarding novel or innovative asset types” with the “need to ensure that such assets are properly safeguarded,” irrespective of their status as funds or securities.

⁶ Many advisers take other assets into account but do not charge fees on such assets.

that are not necessarily securities and not necessarily within the adviser's control or remit. To the extent that the SEC wants to establish specific custody requirements relating to crypto instruments or other assets that use or employ distributed ledger technology, moreover, the SEC should adopt rules regarding the safekeeping of such assets without imposing special rules on investment advisers when their clients participate in those markets.

2. The Proposed Rule – Narrow Window for Comments

As noted above, the Proposal is broad based and complex, previewing changes that will drastically and permanently alter the custody business model used by investment advisers as well as the market for custody services. The release accompanying the Proposed Rule sets forth numerous (hundreds) of points on which the SEC is seeking comment, which reflects the far-reaching approach being contemplated in the Proposal. The SEC issued the proposal on February 15, 2023, and provided for a 60-day comment period from date of publication in the Federal Register. Comments are due, therefore, on or before May 8th of this year.

The Proposal is yet another significant regulatory change aimed squarely at investment advisers. This and other changes effected or contemplated by the SEC will dramatically impact the economics of advisory firms and force an expansion of the services that they, along with others, will have to provide or oversee. The full impact of the Proposal and the burdens associated with its implementation will take time to assess. In light of the breadth of the Proposal and the number and magnitude of far-reaching changes contained therein, ADISA and its members do not believe that the existing comment deadline will provide sufficient time for the industry to perform the level of analysis that the Proposal warrants, much less submit informed comments on the language, etc., set forth in the Proposed Rule.

For these reasons, ADISA believes and joins with those other industry members and advocacy groups that have or are requesting that the SEC extend the comment period for the Proposal by 60 or even 90 days from the current May 8th deadline.

Thank you again for the opportunity to provide our thoughts on the Proposal. We would welcome the chance to discuss these issues further with the SEC.

Respectfully submitted,



Michael Underhill
President

Drafting Committee: John H. Grady, Catherine Bowman