U N I T 4 1 0

May 5, 2023

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Vanessa A. Countryman, Secretary
Via E-Mail to rule-comments@sec.gov

Re: **Securities and Exchange Commission ("SEC") File Number S7-04-23, Proposed Rule Titled Safeguarding Advisory Client Assets ("Proposed Safeguarding Rule" or "Proposal")**

Dear Ms. Countryman:

Unit 410, LLC appreciates the opportunity to comment on the SEC's Proposed Safeguarding Rule. Unit 410 is an engineering firm that provides noncustodial services to institutions at the forefront of emergent blockchain technologies. We engineer secure, state-of-the-art technology solutions that provide the capabilities for such institutions to self-custody, account for, and protect digital assets and do so in a manner that can be independently audited.

1. INTRODUCTION

We support the SEC's goal of having registered investment advisers ("RIAs") safeguard advisory client assets with Qualified Custodians ("QCs"). History has shown, however, that QCs are typically unavailable to support early-stage, emerging assets due to fundamental technological, security, and other limitations as illustrated in Parts 2-3 below.

Accordingly, we welcomed the statement in the SEC's proposing release that "***[the SEC] continue[s] to believe that self-custody … safeguarding arrangements provide practical benefits for advisory clients.***"[1] We similarly agree with the SEC's view that "heightened protections similar to those required under the custody rule would continue to be required in such an arrangement."[2]

Recognizing the importance of QC-level protections, this letter aims to solve a practical issue: as new digital assets and novel network protocols and blockchains ("Networks") rapidly develop and continually evolve, there will invariably be a period when QC custody is not available. This letter proposes enhancements and targeted adjustments to the Proposal to address that gap and highlight areas to consider in light of evolving assets and technologies that exist now or may exist in the future.

Specifically, we urge the SEC to add the concept of a Qualified Self-Custodian ("QSC") to the Proposal. As detailed below, adding a QSC requirement would allow RIAs to self-custody certain technological assets in a manner that is limited in scope and time and subject to heightened protections similar to those required under the Proposal ("Qualified Self-Custody").

The need for the QSC addition is plain. If an RIA (which is not itself a QC) is limited to holding assets with a QC in *all* circumstances and QC options are unavailable for early-stage Network and similar technology opportunities, then the practical effect would be to preclude RIA clients—no matter their sophistication, risk tolerance, and goals—from participating in such opportunities. By indirectly barring RIA clients from such opportunities, the SEC would categorically curtail an RIA's ability to fulfill its fiduciary responsibilities. It would block an RIA client from seeking exposure to such opportunities even when the RIA believes it is in the best interests of its client to participate in such opportunities. While such opportunities may not be appropriate for all RIA clients in all situations, the Proposal should be supplemented so RIAs can clearly make that assessment with their clients.

Qualified Self-Custody is a solution here. It would serve as a limited, temporary measure allowing qualifying RIAs to offer early-stage digital asset and Network opportunities to their clients so long as the RIAs are able to provide QC-level protections. An RIA would only be able to be a QSC when the RIA, consistent with its fiduciary responsibilities and documented decision-making policies and procedures, determines QC options for the asset are unavailable and it is in the client's best interests for the RIA to act as a QSC. Further, RIAs would be required to act as QSCs under terms and assurances analogous to those in the Proposal, ensuring all digital and similar assets can be audited and otherwise safeguarded consistent with existing obligations and a final rule.

The QSC approach aligns with the SEC's policy objectives for safeguarding RIA client assets. It is a mechanism to protect against loss, misuse, and misappropriation of RIA client assets. It allows a secure, workable, and limited option so that the Proposal does not quell US-based participation in and development of new asset classes and important technological advances with and within them. Indeed, the SEC has a long history of prudently accommodating the growth of new markets and technologies while providing sensible

[1] Release No. IA-6240; File No. S7-04-23, 88 FR 14672, 14693 (Mar. 9, 2023) (emphasis added).
[2] *Id.*

guardrails. Blockchain and other Network technologies present an important, emerging asset class that should be fostered within appropriate bounds. Adding the QSC option to the Proposal continues the SEC's policy and legacy of empowering the United States to be a financial and technological leader. It would also help protect retail investors as, among other things, the QSC option allows for an initial phase of institutional maturity for new and novel assets. We respectfully request that the SEC consider the QSC and other proposals below.

2. LACK OF QC OPTIONS FOR NEW ASSETS WITH NOVEL AND COMPLEX TECHNOLOGICAL FEATURES

RIAs using QCs is good policy, when doing so is possible and consistent with an RIA's fiduciary responsibilities. However, as the SEC has recognized,[3] that may not always be the case.

In the rapidly developing world of technology and digitization, some assets have novel and advanced technological features that QCs may not be available to securely and reasonably support—at least not for extended and varying periods. This is true for, but not limited to, novel early-stage Networks and the digital assets they use. Such early opportunities are often more desirable opportunities to some and, as highlighted below, more difficult to securely and reasonably support than later-stage opportunities with more mature Networks as they become less novel. In this letter, we refer to "Technology Functions" to include (i) functions or activities necessary to interact with, use, or support an asset with novel, advanced, or complex technological features and requiring certain specialized technical expertise and (ii) functions, attributes, or uses of such an asset that require such specialized technical expertise.

Digital assets have technological features that differentiate them from traditional assets readily maintained with QCs. They rely on code, decentralized networks, cryptography, immutability, the fact that one does not need to place sole trust in any one party for a network to function, and incentivized consensus algorithms to ensure security and integrity, which leads to novel opportunities and advancements as well as challenges in how to best safeguard them. Safeguarding such assets requires specialized technical knowledge and capabilities. For example, generating, encrypting, and decrypting keys to protect and use new digital assets in cold storage, and then participating in novel Networks with those assets requires specialized technical expertise, including in cryptography, cybersecurity, computer science, distributed networking, varying coding and programing languages, developing bespoke software and infrastructure (as Networks often differ in novel and fundamental ways), and other Technology Functions. The younger and more novel the Network, the more difficult these challenges are.

Nimble RIAs with the necessary engineering resources and experience in such areas have proven able, unlike QCs, to securely support early-stage digital assets and participation in novel Networks at their outset. Over time, QC options generally become available, but usually only in phases of partial support. For instance, QCs may come to support cold storage for a particular digital asset, but not more advanced functionality, including participation necessary for securing the relevant Network with that asset. That level of support may be sufficient in some RIA situations, but not necessarily all. Indeed, securely supporting Network participation may be critical to RIAs' fulfillment of their fiduciary responsibilities, and it includes securely supporting—importantly to RIA clients and the health, security, and advancement of nascent Networks in which they may seek to participate—staking (including auto-restaking or future functions that best serve RIA clients' interests), validating, and voting. Until QCs can securely, timely, and fully support all forms of participation for a particular Network, RIAs will need secure and workable self-custodial options available.

A further consideration is having the technical knowledge and capabilities to securely support necessary accounting, audit, and administrative functions for novel, complex technology environments. Network participation (including staking) is necessary to secure Networks, and it is incentivized by digital asset rewards. Developing technology to interface with a novel, early-stage Network to track and account for rewards and to map complex data from the Network to make it intelligible/usable for accounting, tax, and other purposes is difficult. Doing this at a level that is secure, meets RIAs' fiduciary responsibilities, is independently verifiable/auditable, and complies with safeguards like the Proposal's[4] is possible today for novel Networks, *but* only with specialized technical expertise in areas listed above (see also Part 3.B below). Here too, until QCs can securely, timely, and fully support the bespoke technology for accounting, audit, and administration for novel Networks, RIAs will need secure and workable self-custodial options.

3. QUALIFIED SELF-CUSTODY

When QC options are not available to securely and reasonably support an asset with or needing Technology Functions, Qualified Self-Custody offers a solution. What is it? It has two main policy components: (A) the same or analogous safeguarding protections as those in the Proposal (or as may be revised in a final rule) for assets with or needing Technology Functions and (B) further requirements for

[3] *Cf., e.g., id.* at 14781 (Proposal § 275.223-1(b)(1) (RIAs "may use the mutual fund's transfer agent in lieu of a qualified custodian") and § 275.223-1(b)(2) ("Certain assets unable to be maintained with a qualified custodian")).

[4] *See, e.g., id.* at 14780 (§ 275.223-1(a)(1)(i)(B) (statements), 14781 (§§ 275.223-1(a)(1)(ii)(D) & (a)(3) (segregation), and 14781-82 (§§ 275.223-1(a)(4)) & 275.223-1(b)(2)(iii)-(v) (independent verifications/audits)).

RIAs to implement policies and documented procedures reasonably designed to evaluate and determine whether QC options are unavailable and it is in their clients' best interests for the RIA to self-custody consistent with the safeguarding under (A).

As the QC-unavailability-and-client-best-interests determination is inherently asset specific and temporal, it would be performed per asset (i.e., for each digital or other technological asset and Network participation opportunity with that asset) and regularly reassessed. If an RIA satisfies (A) and (B) for a particular asset opportunity, then the RIA would qualify as a QSC and may self-custody the asset at issue until secure and reasonable QC options become available. That is Qualified Self-Custody. Both components are discussed below.

A. Analogous QSC Safeguarding Protections

Safeguarding client assets is paramount. That would remain true in the QSC setting via safeguarding protections like the Proposal's. While assets with or needing Technology Functions present unique challenges (see above), RIAs who want to be a QSC must appropriately manage those challenges with specialized technical expertise and engineering resources to perform the Technology Functions to support the relevant asset. More specifically, to qualify as a QSC, the RIA would implement safeguarding policies and procedures to document the Qualified Self-Custody and ensure the same or analogous safeguarding protections to those in Proposal § 275.223-1(a).[5]

- As in the QC setting,[6] the QSC-RIA would have a written agreement, a Qualified Self-Custody agreement, with its consenting clients. It would cover the same safeguarding provisions and reasonable assurances in § 275.223-1(a) (as may be revised in a final rule), including, but not limited to, maintaining/producing records, account statements, internal control reports, authority level specification, segregation, and measures to safeguard against theft, misuse, misappropriation, and other similar types of loss.[7]
- Equally important, the QSC-RIA would have independent verifications by actual examinations at least annually by a PCAOB-registered independent public accountant with the same certification, timing, notification, and other requirements in § 275.223-1(a)(4).[8]

Such policies and procedures would be noticed/disclosed to the RIA's clients in a manner consistent with the requirements in a final rule and would be reviewed and updated on a periodic basis to ensure compliance with the latest industry standards.

B. Additional QSC Requirements – Including For Evaluating QC Unavailability

Qualified Self-Custody would further require the QSC-RIA to implement policies and documented procedures reasonably designed to evaluate and determine whether QC options are unavailable for an asset with or needing Technology Functions and whether it is in the RIA client's best interests for the RIA to self-custody such asset consistent with the safeguarding protections as summarized in Part 3.A above. This would include three main prongs:

1. Is the asset an asset currently with or needing, or expected to have or need, Technology Functions?
2. Is the asset appropriate for the RIA client?
3. Are QC options for the asset unavailable? Would Qualified Self-Custody provide superior client protections due to the nature of the asset at issue and better serve the interests of the RIA client?

The first prong would determine whether specialized technical expertise of a nature summarized above is required. The second prong, in addition to a customary fiduciary analysis, would focus on whether there has been full and fair disclosure to the RIA client of the material risks of the asset as well as the RIA self-custodying it, the RIA client's ability to withstand a loss, and the sophistication level and risk tolerance of the RIA client.[9]

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[5] *Id.* at 14780-81.

[6] The QC setting includes RIAs who themselves are QCs. Not all RIAs can realistically become QCs. To become a QC under federal/state regulations, an RIA must meet a number of requirements which may be cost-prohibitive or operationally unrealistic for many RIAs, limiting the number of advisors who can realistically operate as QCs. Qualified Self-Custody is intended to fill that gap and be a limited, temporary option.

[7] *Id.* at 14780-81 (§§ 275.223-1(a)(1) & (3)). To the extent RIAs and others submit comments to make § 275.223-1(a) more workable for RIAs while still safeguarding RIA client assets, we are generally supportive of such comments. A key point of this letter is that no matter where a final rule lands on the safeguarding provisions and reasonable assurances, Qualified Self-Custody can track them, and it should be an available option to securely, prudently, and reasonably fill the QC-availability gap.

[8] *Id.* at 14781; *cf. also id.* at 14781-82 (§ 275.223-1(b)(2)(iii)-(v)).

[9] Indeed, to comply with a final rule here and their fiduciary responsibilities, QSC-RIAs may find it prudent and reasonable to limit Qualified Self-Custody to clients meeting a sophistication threshold (including understanding and being able to take the risks involved)—such as, for example, an accredited investor (as defined in Regulation D under the Securities Act of 1933, as amended), a qualified purchaser (as defined in Section 2(a)(51) of the Investment Company Act of 1940, as amended ("ICA"), and Rule 2(a)(51) thereunder), or a knowledgeable employee (as defined in Rule 3c-5

The third prong, which is at the core of the QSC concept, would evaluate standardized factors to assess and determine QC unavailability and QSC appropriateness for such an asset given the Technology Functions involved (and they may, by the synergistic nature of the inquiries, also inform aspects of the first two prongs). For example, for digital assets and Network participation with such digital assets, such standardized factors and best practices should include:

1. The best interests of the RIA client.
2. Consistency with the purposes of the Proposed Safeguarding Rule and the RIA's fiduciary responsibilities.
3. Use of industry-leading administrative, technical, and physical safeguards for novel Networks to protect the security and integrity of the electronic systems used and to protect against anticipated threats/hazards to such systems.
4. Industry-leading competence and knowledge regarding security practices for digital assets and Networks.
5. Ability to generate cryptographic keys that allow use of the digital asset at issue.
6. Ability to securely and durably encrypt and maintain sensitive information (e.g., login passwords, RSA tokens, and private keys) using industry standard encryption keys generated with leading cryptographic methods.
7. Ability to decrypt keys in order to securely use the digital asset.
8. Ability to support participation in the Network at issue fully, including staking (including auto-restaking and future Network functions to best serve RIA clients' interests), validating, collating, delegating (including the ability to delegate to someone other than the QC/QSC if it is in RIA client's best interests to do so), voting, and/or other forms of current and expected participation on the Network.
9. Ability to support accounting, audit, and administrative solutions to appropriately and securely interface with the Network to produce institutional-grade accounting data to support at least quarterly account statements to RIA clients and at least annual audits by an independent public accounting firm.
10. Ability to support large nodes on a novel Network, consistent with the best interests of RIA clients.
11. Ability to receive airdrops or other yet-to-be-conceived Network opportunities.
12. Ability to provide 24/7 monitoring for chain stoppages, forks, missed blocks, and other novel challenges to minimize risks of loss, including slashing and opportunity costs.
13. Ability to identify and segregate digital assets for the Network consistent with the Proposal.
14. Ability to ensure the security, authenticity, and accuracy of cryptographic operations, factoring in the risks/complexities of a Network and to ensure no single party or device has the ability to initiate/finalize a cryptographic operation.
15. Ability to identify and mitigate/stop new security threats.
16. Ability to securely split access to keys and physically distribute them at-rest for enhanced security purposes.
17. Whether there is a concentration of QC options that could unreasonably increase security risks.
18. Whether the foregoing abilities can be appropriately provided with industry-leading security, infrastructure, software, speed, reliability, responsiveness, and reasonableness.
19. Whether there are secure and reasonable options to outsource certain noncustodial support functions (e.g., engineering, software design, infrastructure design) and whether any such QSC-RIA outsourcing is in RIA clients' best interests.[10]
20. If QC options have some, but not all, of the foregoing abilities, then the RIA should consider whether it is in the best interests of its clients for the RIA to act as a QSC until secure, timely, and fulsome QC options are available or if a hybrid approach is in the best interests of its clients.

under the ICA), or, with respect to pooled investment vehicles, vehicles with investors that are accredited investors, qualified purchasers, or knowledgeable employees, or other reasonable standard. Alternatively, a final rule could require such a sophistication threshold here if the SEC feels it is necessary to adopt the Qualified Self-Custody concept. Letting such sophisticated clients knowingly take risks is important to free and fair markets and the efficient allocation of capital and aligns with policies for reduced restrictions based on sophistication.

[10] Any such outsourcing would not only need to be limited (noncustodial only), used, and monitored by the QSC-RIA in manner consistent with the Qualified Self-Custody protections under a final rule here, but also in compliance with the SEC's Outsourcing by Investment Advisers rule, which recognizes and permits (with requirements) RIA outsourcing of certain functions. Release No. IA-6176; File No. S7-25-22, 87 FR 68816 (Nov. 16, 2022).

This list is not exhaustive, but illustrative of the types of factors that RIAs typically consider today when deciding to self-custody a digital asset consistent with their clients' best interests and would be essential for Qualified Self-Custody going forward.

After initially qualifying to be a QSC for a particular asset, the QSC-RIA would perform periodic re-evaluations, at least annually or quarterly. A regular review cadence is also at the core of the QSC concept because, if used at all, Qualified Self-Custody is intended to be temporary. When, after evaluation, it is in the RIA client's best interests to transition support from the QSC-RIA to a QC, the QSC-RIA would do so. This is generally when the necessary technology reaches a steady state. The expectation would be that the QSC period would last no more than 18 months. Using a hard, one-size-fits-all deadline is unlikely to be workable given the fluidity and nuances of novel, emerging asset settings (e.g., Network staking periods) and could be potentially harmful to RIA clients' interests. Rather, RIA's policies and procedures would include an expectation of an 18-month QSC period, which could only be extended if the RIA determines it is in its client's best interests to do so and the client consents. Determinations would be documented and reevaluated at least quarterly or monthly.

The policies and procedures would be required by the written Qualified Self-Custody agreement, which is consistent with and furthers an SEC goal of an RIA "hav[ing] the flexibility to determine the specific safeguarding measures it puts in place, which may differ from asset to asset."[11]

4. SUGGESTED AMENDMENTS TO THE PROPOSAL

Consistent with, and to implement, the points and concepts above, we suggest the following amendments to the Proposal.[12]

A. Add Qualified Self-Custodian To The Proposal

There may be multiple avenues to amend Qualified Self-Custody into the Proposal. The most consistent, most targeted, and least-disruptive-to-the-Proposal path to do so is by adding an unable-to-be-maintained-with-a-QC exception to Proposal § 275.223-1(b)(2),[13] and then to define QSC with a cross reference to § 275.223-1(a)(1) (as may be revised in a final rule) to require compliance with its safeguarding protections during the QSC period. This treats Qualified Self-Custody like the limited, temporary exception to the QC default that it is, and then still requires safeguarding at the Proposal's level as discussed above.

Citation	Suggested Change
§ 275.223-1(b)(2)	(2) *Certain assets unable to be maintained with a qualified custodian.* You are not required to comply with paragraph (a)(1) of this section with respect to client assets that are privately offered securities, ~~or~~ physical assets, or assets with technology functions not securely and reasonably supported by qualified custodians, provided:
§ 275.223-1(b)(2)(i)	(i) You reasonably determine, and document in writing, that (A) ownership cannot be recorded and maintained (book-entry, digital, or otherwise) in a manner in which a qualified custodian can maintain possession or control of such assets and/or (B) the asset is an asset with technology functions that are not securely and reasonably supported by qualified custodians;
§ 275.223-1(b)(2)(ii)	(ii)(A) You reasonably safeguard the assets from loss, theft, misuse, misappropriation, or your financial reverses, including your insolvency, and (B) for assets with technology functions not securely and reasonably supported by qualified custodians, you reasonably safeguard the assets as a qualified self-custodian;
§ 275.223-1(b)(2)(v)	(v) The existence and ownership of each of the client's ~~privately offered securities or physical~~ assets subject to this paragraph (b)(2) that are not maintained with a qualified custodian are verified during the annual independent verification conducted pursuant to paragraph (a)(4) of this section or as part of a financial statement audit performed pursuant to paragraph (b)(4) of this section.

[11] 88 FR at 14751.

[12] To the extent the SEC believes these amendments necessitate updates to Proposal § 275.204-2 (Books and records to be maintained by investment advisers) or Amended Form ADV (referenced in Proposal § 279.1), we encourage the SEC to include such updates. *See id.* at 14779 & 84.

[13] *Id.* at 14781-82.

N/A **(New Definition in § 275.223-1(d))**	*Qualified self-custodian* means an adviser under this section that maintains possession or control of client assets with technology functions not securely and reasonably supported by qualified custodians, provided the adviser only does so (i) for a limited period until such support by qualified custodians becomes reasonably available and (ii) pursuant to a written agreement between the adviser and the client that includes: (A) safeguarding provisions and reasonable assurances analogous to those in paragraph (a)(1) of this section and requirements for the advisor to support the asset and its technology functions securely and reasonably; (B) the client's written consent to the adviser acting as a qualified self-custodian for such assets; (C) requirements for the adviser to implement written policies and procedures reasonably designed to determine, periodically reassess, and document whether an asset is an asset with technology functions, whether the asset is appropriate for the client, and whether the asset's technology functions are not securely and reasonably supported by qualified custodians; and (D) requirements that the limited period last no more than 18 months and can only be extended if the adviser reasonably determines a limited extension is in its client's best interests and the client consents in writing.
N/A **(New Definition in § 275.223-1(d))**	*Technology functions* means (i) functions or activities necessary to interact with, use, or support an asset with novel, advanced, or complex technological features and requiring specialized technical expertise and/or (ii) functions, attributes, or uses of such an asset that require specialized technical expertise; such specialized technical expertise may include, but is not limited to, computer coding and programing, cybersecurity, developing customized software or infrastructure, or developing customized technology solutions to map and use complex computer data.

B. Expand RIA Clients' Opt Out Rights

Not all RIA clients are the same in terms of sophistication, risk tolerance, goals, and the like. We understand that RIA clients have been participating with digital assets and in Networks for years via self-custodying RIAs. Limiting their RIAs to only QCs for such assets in *all* circumstances is not prudent, realistic, or sustainable for many (see also Part 2 above). The SEC's inclusion of an RIA client opt out in Proposal §§ 275.223-1(a)(1)(ii)(E) and 275.223-1(a)(3)(iii)[14] is a common-sense solution to give RIA clients the right to opt out of two provisions of the Proposal. Specifically, the SEC's opt out language is: *"except to the extent agreed to or authorized in writing by the client."*[15] As an additional or alternative option to the QSC option above, the SEC should consider incorporating that same practical language and approach into the QC requirement in § 275.223-1(a)(1) so a final rule would afford RIA clients an explicit right, with proper disclosure, to choose to have their RIA self-custody.

C. Expand Exceptions for Entities Subject to Annual Audit

A further consideration is that not all RIA clients are structured the same, given differing purposes, forms, objectives, existences, resources, and the like. The SEC recognized such distinctions by including an entity-focus exception in the Proposal. Under Proposal § 275.223-1(b)(4), RIAs do not have to comply (or will be deemed to have complied) with certain provisions of § 275.223-1(a) for "*the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle or any other entity) if it undergoes a financial statement audit"* and subject to certain conditions.[16] This is a practical exception acknowledging that the safeguarding needs of such entities is different. For many of the same reasons above, the SEC should expand this exception's scope to cover all of § 275.223-1(a), similar to the fulsome exceptions in § 275.223-1(b)(1)-(2) for shares of mutual funds, private securities, and physical assets.[17] This would accomplish many of the objectives above without singling out any particular type of asset.

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[14] *Id.* at 14781 (both provisions prohibit subjecting client assets to certain security interests, liens, etc., unless the opt out exception is met).

[15] *Id.* (emphasis added).

[16] *Id.* at 14782 (emphasis added).

[17] *Id.* at 14781-82.

5. TIMING

If adopted close to as is, the Proposal may trigger large liquidations of RIA clients' digital asset positions because QC options to support them are unavailable—which is likely to be further complicated by asset timing issues, such as bonding and unbonding periods for staked digital assets, and which may have residual impacts on markets and retail investors. Given such considerations plus the fact that the Proposal may materially change the way RIAs operate today, such a final rule's transition period before a compliance date should be longer, such as 24-27 months. If the Proposal is amended to include Qualified Self-Custody and/or the other proposed amendments in this letter, then the transition period before a compliance date could be substantially shorter, such as 12-15 months.

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We appreciate the opportunity to engage with the SEC on the Proposal. We welcome the opportunity to discuss this with you further. Please do not hesitate to reach out to us or our counsel, Jay G. Baris (jbaris@sidley.com) and Lilya Tessler (ltessler@sidley.com) of Sidley Austin LLP, with questions or to schedule a meeting.

Sincerely,

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