MACKENSEN & COMPANY, INC.
Fee-Only Financial Planners

May 26, 2009

Ms. Elizabeth M. Murphy
Secretary
U. S. Securities and Exchange Commission
100 F Street NE,
Washington, DC 20546-1090

RE: File Number S7-09-09, Custody of Funds or Securities by Investment Advisers

Dear Ms. Murphy:

Commenter Background

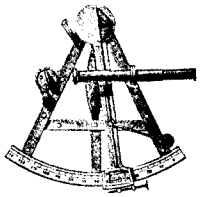
I am the founder and President of Mackensen & Company, Inc., (SEC 801-55188) (www.mackensen.com) a fee-only RIA firm with less than $100 million in assets under management. The firm has been in business for almost 18 years. We have always used qualified custodians to custody our assets, such as Charles Schwab & Company, Fidelity Institutional Wealth Services, and National Advisers Trust Company. We deduct our quarterly fees directly from most client accounts. A few clients prefer to write us a check.

In addition, I am the founder of ProTracker Software, Inc., (www.protracker.com). My software company sells an industry-specific client relationship management system for investment advisers. The firm also sells a compliance manual that facilitates regulatory compliance by investment advisers. As a result, regulatory compliance is a very serious topic because many advisers in the industry look to us to informally answer their compliance questions. Queries that are beyond a simple reading of the rules are referred to compliance attorneys.

With that background established, let me speak as a long-time registered investment adviser who is very sensitive to the custody rules, and still perplexed by them in some respects.

Custody Definition and Fee Deductions

Although custody has been defined and reviewed and redefined by the SEC over the years, I have long felt that the SEC has not done an adequate job of separating the custody definitions from the fee deductions exemption.



The rule that we have custody if we debit our client fees, but we can answer "No" to Item 9A.(1) and 9A.(2) on Form ADV, Part I, has always baffled me. Clearly, there has to be a better way of resolving the "Yes, you have custody, but you can answer "No" to the custody question" imbroglio. Every adviser that I have ever spoken to about this topic finds this a paradox.

Invoice for Client Fees

I still do not understand why the SEC abandoned the requirement a few years ago that an adviser must send a client an invoice showing the calculation of the fee if the client receives a statement directly from the custodian. The custodian statement may show the dollar amount of the fee, but it does not provide the supporting calculation.

Mackensen & Company has continued the practice of sending the client an invoice showing the fee calculation even though this is no longer required. It comes down to putting yourself in the client's shoes. Would you want a deduction from your investment account when you did not know how the fee was calculated? Of course not. To ensure full transparency with our clients, we always invoice the client based on month-end values because we know the client receives monthly statements showing month-end values to corroborate our fee computation. The invoice provides the fee calculation details.

Delivery of Account Statements and Notice to Clients

Delivery of Account Statements: All three of our qualified custodians send monthly statements to our clients. Further, the custodians send us copies of the monthly statements, either through Internet download or on a CD mailed to us. We save these electronic statements on our file server for future reference. Receipt of such electronic media in our office by mid-month should serve as reasonable belief that the qualified custodian sent at least quarterly statements to our clients in a timely fashion.

Notice to Clients: The *new* content of the notice that advisers are currently required to send to clients upon opening a custodial account on their behalf should be specified by the SEC. By providing explicit language "urging clients to compare the account statements they receive from the custodian with those they receive from the adviser," the industry will avoid incredible discussion and word smithing by private lawyers that would otherwise occur.

Advisers who have custody and elect to send their internally-generated account statements should be required to include a legend urging clients to compare the information the adviser sends to clients with the information reflected in the qualified custodian's account statements.

Burden of Engaging an Independent Public Accountant

For a small adviser, such as Mackensen & Company, the burden of engaging an independent public accountant to conduct a surprise examination solely because we debit fees directly from client accounts would be costly, with no gain in investor protection. Our fees are always less than 2%, and usually closer to or below 1%.

The following client protection controls should be implemented to protect clients with respect to direct debiting of fees:

1. Require custodians to limit fee deductions to, say, 2%, which would provide sufficient investor protection that the adviser is not absconding with client assets;

2. Require at least quarterly statements directly from the qualified custodian (our clients receive monthly statements);

3. Require the custodians to send statements in any month in which a client fee was deducted (more immediate notice to the clients if statements are otherwise quarterly); and

4. Require the investment adviser to send an invoice showing the fee calculation directly to the client so that the client may compare the fee computation with his/her monthly statement showing the debited fee.

Accordingly, we strongly object to the accounting fees that would be imposed on small RIA firms if surprise examinations are required merely because these firms debit fees directly. The four controls above provide excellent investor protection.

In summary, the work that the SEC needs to do with regard to fee deductions is as follows:

1. Clarify and separate the custody definition from the fee debit definition. The current rule has the SEC talking out of both sides of its mouth, i.e., "you have custody, but you do not." Instead, stipulate that directly debiting fees does not constitute custody if the four client protection controls above are followed.

2. Establish client protection controls for advisers who debit fees from client accounts. Ensure the controls are simple, easily examined during an SEC inspection, and avoid unnecessary (and costly) annual surprise examinations by a CPA firm.

Assuming the SEC adopts the comments itemized above, the effect on a small RIA firm like Mackensen & Company will be inconsequential. We will incur a few hours to put in the required language in the client agreements and other documents. Other than that, we are doing everything right now that we have suggested above (invoices to clients for transparency, etc.).

Sincerely yours,

Warren J. Mackensen, CFP
Chief Compliance Officer