July 15, 2009

Regarding: ***File Number S7-09-09***

To whom it may concern:

I am emailing regarding the SEC's proposed changes to the custody rule, *Release No. IA-2876*.

My firm is an SEC Registered Investment Advisor and a member of the Financial Planning Association *(FPA)*, and I am a Certified Financial Planner™ registrant and a taxpayer.

I want to formally object to part of the proposed amendments to the custody rule. Specifically, requiring advisory firms that technically have custody of client assets -- solely because they are authorized by their clients to automatically deduct client fees from investment accounts -- to subject themselves to surprise audits is an attempt to fix a non-existent problem. *To my knowledge, there haven't been any RIA citations around the subject of inappropriate fee withdrawal from client accounts.* If passed, this regulation would require surprise audits by independent accounting firms at approximately 11,000 SEC registered firms. The amount of extra expense that these audits would cause would inevitably force smaller firms that serve lower net worth clients out of business. During these especially turbulent financial times, the loss of professional advice that would be suffered by these clients would be tragic.

The surprise audit proposal appears to be a political reaction to the very public criticism of the SEC in the wake of the Madoff scandal. While I can certainly understand and support the need for more effective regulation, imposing a surprise audit requirement on advisors with no custody other than fee deduction rights, especially when non-affiliated 3rd-party custodians are being used, does not appear to be an effective and legitimate regulatory response.

With proper enforcement of *current* rules by the SEC and FINRA, the Madoff scandal and other Ponzi schemes that have happened could have been prevented. Because of this simple fact, new proposed regulations need to be carefully scrutinized to prevent an overreaction to problems that should have been corrected by more effective enforcement of current rules. FINRA (and its predecessor NASD) was the regulatory body in charge of reviewing Madoff's decades-old broker-dealer business, and rightly should be held most responsible for not catching Madoff's long-running fraud. Certainly the SEC should have initiated more stringent action, but Madoff was only registered with the SEC as an investment adviser for the past few years. This is another reason to carefully scrutinize new proposed SEC

regulations. And in fact, the SEC has already resolved one of the major problems with the custody rule by eliminating a loophole from registration for certain accounting firms with the PCAOB that Madoff's accountant used to avoid detection of its phony auditing practices.

Most importantly, the Madoff scandal and other Ponzi schemes uncovered by the SEC had nothing to do with fees deducted by investment advisers. As far as I am aware, there have been no systemic problems in this area, and the additional costs that will be borne by investment advisors and our clients is both unnecessary and burdensome. There have been no news reports of investment advisory firms stealing billions of dollars from clients via management fee deductions. Our clients' assets are held at a third-party custodian, and the amount of the fees debited for our services are always clearly itemized on the clients' statements from the custodian, and on statements we deliver to our clients.

Madoff and others stole from clients by generating fictitious statements, not by debiting their investment advisory fees from client accounts. I think the most appropriate regulatory response to the Madoff scandal would be for Congress to appropriate additional resources to the SEC to hire additional examination staff. This staff should then focus more of its resources on firms that have actual custody of their client assets, without using non-affiliated 3rd-party providers, which is where the biggest client protection issues can arise. Advisors whose sole "custodial" position is client authorization to automatically deduct fees should be exempted from the surprise audit proposal, much in the same way that they were previously exempted from the former balance sheet requirement. So long as advisors use 3rd-party custodians who provide clients with periodic statements, there would be no decrease in consumer protection from this exemption. And advisors, which are mostly small businesses, would not be burdened with the tremendous additional cost of this proposed surprise audit requirement. This should help keep smaller advisors in business serving their clients, and allow all advisors to be able to afford to continue hiring new employees and growing their businesses, instead of having to cut back to afford this proposed new regulatory burden.

Thank you for your consideration – and for your support going forward. If you would like more input, please feel free to contact me.

Tony J. Proctor, CFP®
Proctor Financial, Inc.