July 27,2009

Securities and Exchange Commission
Washington, DC

Re: File Number S7-09-09

Dear Commissioners and SEC Division of Investment Management Director and Staff:

I write as the founder and president of a small investment advisory firm, Boston Investment Advisers, that is registered in Massachusetts but expects soon to apply for registration with the SEC under the Investment Advisers Act of 1940 (the "Act"). I am also a member of the bar of the State of New York and formerly practiced securities law in New York City). I wish to comment on SEC Release No. IA-2876 (the "Release") and its proposed changes to Rule 206(4)-2 (the "Rule") but only with respect to its prospective impact upon investment advisers that are deemed to have custody of client assets solely because they have a contractual right to withdraw their fees from client accounts at a bona fide third-party custodian (that is, as contained in Subsection (b)(2)(i) of the Rule as proposed to be amended. The Rule as thus amended would require such advisers to have a surprise annual audit of all such accounts by an independent public accountant, the scope of which is set forth in footnote 8 in the release.

I believe that even assuming, arguendo, that such advisers have "custody" under the Act, the proposed remedy is vastly disproportionate to any alleged harm and represents a material burden especially for small advisers that will in no demonstrable way compensate for any loss from misuse or misappropriation. The cost-benefit analysis set forth in the Release makes this clear simply because it makes no showing of any harm that in fact has ever occurred to any advisory client in this context. The Release claims that the proposed changes will "benefit" 8,214,962 advisory clients (many of whom, it must be admitted, will be affected by the other changes proposed in the Release than the one discussed here), but if none has ever been harmed, how will they all benefit? Obviously, misappropriation and misuse do occur, recent examples of which are listed in footnote 11, but in none of the enforcement actions cited is it alleged that fee withdrawal was the—or one of the—mechanisms by which misappropriation or misuse occurred. Madoff, the world knows, did not do so because he charged no fees at all. I personally have been in the investment advisory business for over 30 years, and I have never heard of such a case. Obviously, if one is going to steal from a client, fee overcharging is hardly the best way to do it.

The Release says, in Section VI.B, that "the surprise examination requirement of the rule may deter fraudulent activities by advisers " and that "an independent public accountant may identify misuse . . . " (emphasis added). Yes, that is an incontrovertibly true statement, but the Release makes absolutely no case for the proposition that such fraudulent activities or misuse has ever occurred by means deducted fee overcharge. If there is no harm, why must there be a remedy?[1]

The fact that the Commission cannot quantify the alleged harm is particularly curious. Who else is better positioned to do so? I do not know whether routine staff examinations of investment advisers do any forensic testing of fee withdrawals, but if not, why not? It would be a simple matter to do so. I also would think that if misappropriation or misuse has occurred on any widespread basis, clients or their accountants or lawyers would have, from time to time, brought it to the Commission's attention. In either case, there would be a documented record. Therefore, the silence of the Release on the subject is troubling. Furthermore, if there has been any harm in the form of chronic fraudulent fee withdrawals (which I strongly doubt), the easiest—and much more efficient remedy than that proposed—is for the Commission to instruct the staff to include testing of fee withdrawals in every examination and to so announce to all investment advisers. If deterrence is needed, that should accomplish it.

Another troubling aspect of the proposal is that it implies that investment advisers, which have, of course, a strict fiduciary duty to their clients (unlike, of course, broker-dealers), are chronically prone to breach it. Does the Commission believe that somehow investment advisers are different from attorneys and accountants, who obviously have a similar duty, and cannot be trusted not to steal from their clients by overcharging of fees? Does the Commission really believe that the law of the jungle prevails between investment advisers and their clients?

Finally, it must be said that the Release, as noted above, cites as the justification for what to me is a draconian proposal five recent enforcement actions against both investment advisers and broker-dealers. One of them, of course, is Madoff, an instance for which the Commission has been widely and, in my view, appropriately criticized, including in Congress. It is therefore difficult not to see this completely unmerited proposal as an attempt to deflect political heat back upon all investment advisers at your calculated cost of $8,100 a year. That would seem deeply cynical and unfair.

Very truly yours,

Jerome W. Anderson

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[1] The Commission betrays its own intellectual confusion or at least uncertainty both (i) in footnote 18 of the Release, where it says that investment advisers that deduct fees would still not have custody for purposes of Item 9 of Pat 1 of Form ADV and (ii) asks, in Section II.A.1 if such investment advisers should be excepted from the surprise annual examination requirement—why make the proposal and then ask if it should, in effect, be withdrawn?