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July 28, 2009

VIA ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-09-09
Custody of Funds or Securities of Clients by Investment Advisers

Dear Ms. Murphy:

We are submitting this letter on behalf of our clients, Curian Capital LLC,[1] Genworth Financial Wealth Management, Inc.,[2] LPL Financial Corporation,[3] and SEI Investments Company[4] (together, the "Companies"), in response to the publication of *Custody of Funds or Securities of Clients by Investment Advisers* (the "Proposal Notice"), issued by the U.S. Securities and Exchange Commission (the "SEC").[5] The Proposal Notice requests comment on proposed amendments to Rule 206(4)-2 (the "Custody Rule") and related forms and rules (together, the "Proposed Amendments") under the Investment Advisers Act of 1940 (the "Advisers Act").

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[1] Curian Capital works with over 22,400 outside financial professionals and provides advisory services to over 30,600 advisory clients. Total assets under management are in excess of $2.7 billion.

[2] Genworth Financial Wealth Management has over $14 billion in assets under management or administration and works with over 12,000 individual financial advisers.

[3] LPL Financial Corporation has 10,000 financial advisors nationwide and provides advisory services to over 280,000 advisory clients and has over $40 billion in assets under management.

[4] SEI Investments Company, in the United States, works with over 6,500 advisors with over $26.5 billion in advisor assets under management.

[5] The Proposal Notice was published in SEC Release No. IA-2876, 74 Fed. Reg. 25354 (May 27, 2009).

Among other things, the Proposed Amendments would amend the Custody Rule to require:

- All advisers with custody of client funds or securities to undergo an annual surprise examination by an independent public accountant to verify client funds and securities (together, "client assets");

- Advisers, who self-custody or who maintain client assets with an affiliated custodian, to have an independent public accountant registered with, and subject to oversight by, the Public Company Accounting Oversight Board ("PCAOB") (i) conduct its annual surprise examination and (ii) prepare a written internal control report including an opinion regarding the custodian's controls relating to custody of client assets; and

- Qualified custodians to send account statements to customers directly rather than continuing to allow advisers who undergo a surprise examination to send statements personally (together, the "Proposals").

The comments herein focus primarily on the Proposed Amendments' impact with respect to the Companies' operation of separately managed advisory account programs. We note that some or all of the Companies will be commenting separately and through various trade groups and other associations on the Proposed Amendments.

While the programs offered by each of the Companies vary to some degree, each are designed to provide advisory services targeted to retail "Main Street" investors. In this regard, we note that many of the advisory programs offered by the Companies involve either a self-custody arrangement or use of an affiliated custodian. As we discuss further below, these existing custody arrangements are critical to allowing the Companies to provide advisory services without imposing the inefficiencies, costs, and/or decreased services that would be incurred through an independent custodian requirement. For this reason, the Companies strongly support the SEC's decision not to propose amending Rule 206(4)-2 to require that an independent qualified custodian hold client assets.

The Companies appreciate this opportunity to comment on the Proposed Amendments. As set forth in more detail below, the Companies have comments on the following aspects of the Proposed Amendments:

- **Self-Custody/Use of an Affiliated Custodian**. The Companies strongly support the SEC's decision not to prohibit self-custody or use of an affiliated custodian.

- **The Proposed Requirement That Advisers Who Self-Custody or Use an Affiliated Custodian Undergo Both a Surprise Audit and Obtain a Control**

Report. The Companies believe that there is no need to subject firms to both the written control report and surprise audit. As discussed below, the Companies believe that the rule should allow each firm to determine which control to employ.

- **Form of the Internal Control Report.** The Companies believe that the adviser should be provided with flexibility to choose the form of internal control report. The SEC acknowledges that such report can take the form of a SAS 70. We believe that the SEC should specifically acknowledge other acceptable forms of reports (*e.g.*, a "17a-5(g)" report required of broker dealers).

- **Scope/Methodology of the Surprise Audit.** The Companies believe that clearer guidance regarding scope of the surprise audit is needed. Specifically, we believe that generally accepted auditing standards should dictate the scope and methodology of the audit. Further, the Companies request that the SEC confirm the permissibility of the surprise audit leveraging safeguards/controls already in place (for example, broker-dealer's audits of procedures for the safekeeping of assets). Finally, we note our support of the requirement that the auditor be registered with PCAOB, in cases where an adviser self-custodies or uses an affiliated custodian.

- **Imposition of Surprise Audit-- Withdrawal of Advisory Fees.** The SEC has previously provided guidance that if a qualified custodian is acting on the end client's instruction to deduct advisory fees based on the fee schedule of the advisory agreement, such arrangement would not result in the adviser having custody under the custody rule. We understand that there is no suggestion by the SEC that this previous guidance would be changed under the proposal. We note that we strongly support the SEC's position in this regard.

  Further, we believe that in situations where the the custodian deducts fees upon an adviser's instructions following adviser's invoice to client, a requirement of a surprise audit should not be imposed, even if such situations are viewed as custody. In such cases, the advisory fee is paid only after invoice and the client has an opportunity to contest the payment in whole or part. The surprise exam requirement as proposed is not the appropriate control to adopt in the context of advisory fee withdrawals.

- **Delivery of Account Statements by the Custodian.** Under the proposal, qualified custodians would be required to send account statements. The SEC should confirm that an adviser can provide some direction to the custodian regarding account statement delivery (*e.g.*, householding instructions), without constituting the adviser being deemed to have sent out the statement. Further we

seek clarification that performance reports, newsletters or other mailings from the adviser may be added to the custodial accounts statements without constituting the adviser being deemed to have sent out the statements and that, in the instance of electronic delivery, links between adviser's and custodian's websites would be permissible.

- **Implementation Date.** Advisers with custody should be provided with 18 months within the Rule's effective date in which to have their first surprise audit and/or internal control report completed.

Self-Custody and Affiliated Custody Arrangements

Proposal. In the Proposal Notice the SEC requests comment on whether, as an alternative to its proposal to impose additional conditions on advisers that serve as, or have related persons that serve as, qualified custodians for client assets, it should simply amend rule 206(4)-2 to require that an independent qualified custodian hold client assets.

Comment. The Companies strongly support the SEC's decision not to propose amending rule 206(4)-2 to require that an independent qualified custodian hold client assets. As discussed above, many of the advisory program offered by the Companies involve either a self-custody arrangement or use of an affiliated custodian. These arrangements are critical to allowing the Companies to provide advisory services without imposing the inefficiencies and costs that would be incurred through an independent custodian requirement.

In support of the SEC's decision, we note the self-custody/affiliated custody arrangements are subject to extensive oversight and robust regulation, such as banking and/or broker-dealer regulation. We note that the custodial protections provided by these alternative regulations are significant and subject to extensive inspections by regulators.

Further, we note that self-custody/affiliated custody is integral to many separately managed account programs. Self-custody/affiliated custody arrangements are often a foundation to the design and operation of such programs. In such cases, custodial, trading, and related services are tailored to the specific advisory services offered. In contrast, unaffiliated custodians are not likely to incur the costs necessary to tailor such services. Moreover, when custodians and advisers are unaffiliated, duplication of certain processes may occur at an increased cost to clients.

It is not apparent, practically speaking, what additional custodial protections would be afforded by an independent qualified custodian, particularly in light of the other requirements that are proposed. In any event, any such protections need to be considered in the context of the significant costs that would be imposed by requiring an independent custodian.

We request that if the SEC determines to prohibit self-custody/affiliated custody, it re-propose that aspect of the proposal to provide an opportunity for further comment.

Necessity of Requiring Both Surprise Examinations and Internal Control Reports

Proposal. The Proposed Amendments would require that advisers who self-custody or who maintain client assets with an affiliated custodian, have an independent public accountant registered with, and subject to oversight by, the PCAOB (i) conduct its annual surprise examination *and* (ii) prepare a written internal control report including an opinion regarding the custodian's controls relating to custody of client assets.

Comment. The Companies support the SEC's initiative to enhance controls with respect to advisers who self-custody or who maintain client assets with an affiliated custodian. However, the Companies would urge the SEC to reconsider requiring advisers who maintain (or use a related person to maintain) custody of client assets to (i) undergo an enhanced surprise examination, *and* (ii) obtain a written internal control report.

This requirement would subject the Companies to significant additional financial and administrative burdens. At the same time, the Companies believe that effective oversight can be achieved with either control, but that both controls are overlapping and unnecessary.

In lieu of requiring both a surprise examination *and* an internal control report, the Companies suggest allowing advisers to choose between one requirement or the other depending on the size and scale of the adviser's activities. The Companies also suggest allowing affected advisers to modify their selection as necessary to reflect changes in the size and scale of their activities.

Form of Internal Control Report

Proposal. The Proposed Amendments would require that where an adviser self-custodies or uses an affiliated custodian, the adviser or such affiliate obtain a written report from an independent public accountant registered with PCAOB that includes an opinion regarding the adviser's (or affiliate's) controls over custody. Such reports could take the form of a "SAS 70 Type II Report" conducted in accordance with PCAOB standards. The internal control report would have to contain, among other things, a description of the relevant controls, the control objectives and related controls, and the independent public accountant's tests of operating effectiveness that were performed and the results of those tests.

Comments. While the Companies commend the staff of the SEC ("SEC staff") for allowing flexibility with respect to which type of internal control report is utilized by the

adviser,[6] they request clarification of other report types that would be sufficient. The Companies are concerned that the SAS-70 will emerge as the only form of acceptable report given the staff statement at the open meeting on the Proposed Amendments indicating that it expects most advisers to use a Type II SAS 70 to comply with the control report requirement. In order to avoid any doubt, the Companies request that the SEC staff recognize as sufficient reports prepared in compliance with Rule 17a-5(g) under the Securities Exchange Act of 1934, to the extent that such reports cover client assets.

Scope and Methodology of Surprise Audit

Proposal. The Proposed Amendments would require all registered investment advisers with custody of client funds or securities to engage an independent public accountant[7] to conduct an annual surprise examination of client assets.

Comment. The Companies request clearer guidance from the SEC staff regarding the scope of the surprise audit contemplated by the Proposed Amendments. The Proposal Notice states that an accountant must "verify" or "substantiate" all of the client assets of which an adviser has custody.[8] The Companies believe that Generally Accepted Auditing Standards ("GAAS") should dictate the scope and methodology of the audit and further, that where appropriate, the auditing of a reasonable sample of the advisers accounts would be sufficient to meet this new requirement. The application of GAAS is appropriate and would offer a number of benefits. First, it would better balance the administrative and financial burdens to be imposed on advisers by the new inspection requirement, particularly in light of its mandatory nature. Second, it would allow advisers to leverage safeguards and controls already in place with respect to client assets (*e.g.*, a broker-dealer's audits of procedures for the safekeeping of assets as acknowledged in the Proposal Notice).[9]

Imposition of Surprise Audit Requirement-- Withdrawal of Advisory Fees

Proposal. Since the Custody Rule defines "custody" to include any registered adviser with authority or permission to withdraw client funds or securities maintained with a custodian upon instruction to the custodian, all registered advisers with the ability to obtain their advisory

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[6] *See* Proposal Notice n. 42 (acknowledging that a Type II SAS 70 Report conducted in accordance with PCAOB standards would be sufficient to satisfy the internal control report requirements, but not stating that other types of reports would be insufficient).

[7] The Proposed Amendments would define "independent public accountant" as a public accountant that meets the standards for independence described in Rule 2-01(b) and (c) of Regulation S-X.

[8] *See* Proposal Notice at n. 8.

[9] *See* Proposal Notice at n. 23; Exchange Act Rule 17a-5(g).

fees upon instruction to the custodian would be subject to the annual surprise examination requirement.

Comment. The Companies note that the SEC staff has previously stated that if a qualified custodian is acting on the end client's instruction to deduct advisory fees based on the fee schedule of the advisory agreement, such agreement would not result in the adviser having custody under the Custody Rule.[10] The Proposed Amendments do not suggest that this guidance would be changed by the proposal. We note that we strongly support the SEC's position to maintain this position.

Further, we believe that automatic billing situations are less likely to result in the sort of abuses that the surprise audit requirement is intended to address. Under such circumstances, the client's interests are already protected by the invoice's disclosure of the adviser's fees and the client's ability to object to the fee payment prior to withdrawal. Requiring a surprise examination of the adviser in addition to these existing safeguards would not significantly increase protections accorded to such clients, but would significantly increase the administrative and financial burdens placed on advisers.

While we do not believe that automatic billing situations call for enhanced controls, if the SEC determines otherwise, we would urge that such controls be focused solely upon the mechanics of automatic billing. This could be accomplished in a number of ways. For example, we believe that it would be appropriate for an adviser to rely on a third-party report or assessment obtained by a custodian regarding its general controls over automatic billing. For instance, a qualified custodian that receives an internal control report covering its advisory fee billing and payment controls could provide a copy of this report to an adviser in lieu of the adviser's need to undergo a surprise audit solely because it instructs the qualified custodian to deduct advisory fees from client accounts, and/or the adviser could rely on this report to satisfy the surprise auditor's examination requirements in this area. Alternatively, if the SEC determines that each adviser should instead go through a separate surprise audit, the SEC should confirm that such audit may be limited to automatic billing, as opposed to something more comprehensive. Further, the SEC should confirm that it is not necessary for an auditor to conduct such audit at the premises of the qualified custodian, and that such audit requests to the custodian may be limited to copies of standard account records retained by the custodian and need not be expanded to include the adviser's auditor requesting information and/or conducting a review of the custodian's systems and controls. Further, we seek confirmation that such audit could be conducted via copies of account information provided by the custodian via PDF or other means.

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[10] Staff Response to Questions About Amended Custody Rule, Question III. 3 (January 10, 2005).

Custodian Sending Account Statements to Clients

Proposal. The Proposed Amendments would require a registered adviser with custody of client assets to have a reasonable basis for believing that the adviser's qualified custodian sends a quarterly (or more frequent) account statement to the adviser's clients. Currently, an adviser has the option of directly sending account statements to clients, provided the adviser undergoes a surprise yearly examination by an independent public accountant. Thus, this practice would no longer be permitted.

Comment. While the Companies generally do not object to the Proposed Amendments' requirement that a client's qualified custodian provide account statements directly to the client, the Companies seek clarification that certain actions by an adviser would not cause a determination that a statement was not sent directly by the custodian. In particular, the Companies request clarification that advisers could provide some directions to the custodian (*e.g.*, householding instructions), without the adviser being deemed to have sent out the statement. Second, the Companies request clarification that performance reports, newsletters or other mailings from the adviser may be added to the account statements without the adviser being deemed to have sent the statements and, in the instance of electronic delivery of statements through website access, that the custodian's and adviser's websites may be linked to each other. None of these activities implicate concerns expressed by the SEC staff in the Proposal Notice.

We also seek confirmation that an adviser may use various means to establish its reasonable basis for believing that the custodian is sending account statements to clients. For instance, such determination may be based upon an adviser's access to copies online.

Implementation Date

Proposal. The Proposal Notice does not provide an implementation date for comment.

Comment. The Companies request at least 18 months from the effective date of the Proposed Amendments to complete their first surprise audit and/or written internal control report. This time will be necessary for the Companies to make any necessary adjustments to their policies and procedures, update their compliance and accounting systems, and will lessen the administrative and financial burdens created by the new requirements.

We appreciate the opportunity to comment. Please do not hesitate to contact me at 212.389.5052 with any questions.

Sincerely,

Clifford E. Kirsch

Clifford E. Kirsch

cc: Stephanie L. Brown, LPL Financial Corporation
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