



DIVISION OF
INVESTMENT MANAGEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 21, 2011

Robert Van Grover, Esq.
Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004 US

Re: Request for no-action relief under the Investment Advisers Act of 1940
Section 206(4) and Rule 206(4)-2

In a letter to you dated October 12, 2010 (the "letter"), the staff of the Division of Investment Management (the "staff" or "we") responded to your request for guidance regarding compliance by certain investment advisers with rule 206(4)-2 (the "Custody Rule") under the Investment Advisers Act of 1940, as amended (the "Advisers Act")¹. We indicated that we would not recommend enforcement action to the Commission under Section 206(4) of the Advisers Act and rule 206(4)-2 thereunder against an investment adviser that engages an auditor, which is not subject to regular inspection by the Public Company Accounting Oversight Board (the "PCAOB") but which audits the financial statements of a broker or a dealer, to audit the financial statements of a pooled investment vehicle for purposes of complying with rule 206(4)-2(b)(4) (the "Annual Audit Provision"), subject to the conditions outlined in the letter. The letter states that it applies only to financial statements issued prior to the date the PCAOB adopts rules concerning the inspection of auditors of brokers and dealers or July 21, 2011, whichever date is earlier.

In a telephone conversation between you and the staff on July 18, 2011, you asked the staff to provide guidance regarding the temporary rule adopted by the PCAOB on June 14, 2011, which, if approved by the Securities and Exchange Commission ("SEC"), would establish an interim program of inspection related to audits of brokers and dealers (the "Temporary Rule").²

All registered public accounting firms that audit brokers and dealers are covered by the Temporary Rule. The PCAOB has indicated that it anticipates being in a position to propose rules for a permanent program by 2013.³

¹ See incoming letter and staff response at <http://sec.gov/divisions/investment/noaction/2010/sewardkissel101210.pdf>.

² See PCAOB Release No. 2010-008, *Proposed Temporary Rule for an Interim Program of Inspection Related to Audits of Brokers and Dealers*.

³ *Id.*

You noted that the Custody Rule requires auditors performing certain engagements (each, an “Engagement”), for purposes of an investment adviser’s compliance thereunder, to be registered with, and subject to regular inspection by, the PCAOB as of the commencement of the professional engagement period and as of each calendar year-end.⁴ Given the nature of the Temporary Rule, you asked whether the staff would recommend enforcement action against an investment adviser which engages a registered public accounting firm to perform an Engagement if such firm audits the financial statements of a broker or dealer as of the commencement of the professional engagement period of such Engagement and as of each calendar year-end.

In light of the Temporary Rule, we would not recommend enforcement action to the Commission under Section 206(4) of the Advisers Act and rule 206(4)-2 thereunder against an investment adviser who, for purposes of compliance with the Custody Rule, engages an auditor to (1) perform a surprise examination of an investment adviser who maintains, or who has custody because a related person maintains, client funds or securities as qualified custodian in connection with advisory services provided to clients, (2) prepare an internal control report, or (3) audit the financial statements of a pooled investment vehicle in connection with the Annual Audit Provision, as long as such auditor was registered with the PCAOB and was engaged to audit the financial statements of a broker or a dealer as of the commencement of the professional engagement period of the respective Engagement and as of each calendar-year end.

This response applies until the earlier of the date the SEC approves a PCAOB-adopted permanent program for the inspection of broker and dealer auditors or December 31, 2013.⁵



Daniel S. Kahl
Assistant Director

⁴ See rule 206(4)-2(a)(6)(i) (surprise examination of an adviser who maintains, or who has custody because a related person maintains, client funds or securities as qualified custodian in connection with advisory services provided to clients); rule 206(4)-2(a)(6)(ii)(C) (internal control report); and rule 206(4)-2(b)(4)(ii) (pooled investment vehicle audit to comply with the Annual Audit Provision). Auditors performing surprise examinations of advisers who solely use independent qualified custodians are not required to be registered with, and subject to regular inspection by, the PCAOB.

⁵ This response will also cease to apply if the Temporary Rule is withdrawn or disapproved.