

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-16223

In the Matter of

SANDS BROTHERS ASSET  
MANAGEMENT, LLC, STEVEN  
SANDS, MARTIN SANDS AND  
CHRISTOPHER KELLY,

Respondents.

DECLARATION OF JANNA I. BERKE  
IN SUPPORT OF THE DIVISION OF ENFORCEMENT'S  
REPLY MEMORANDUM OF LAW

I, Janna I. Berke, pursuant to 28 U.S.C. § 1746, declare as follows:

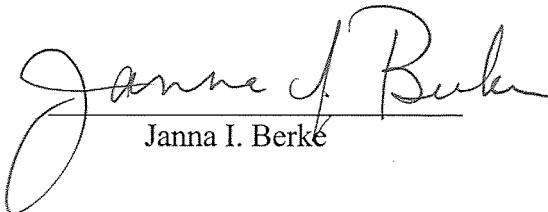
1. I am Counsel in the Division of Enforcement (the "Division"). I submit this declaration in support of the Division's Reply Memorandum of Law in Further Support of its Motion for Summary Disposition. I am fully familiar with the facts and circumstances herein.

2. Appended hereto as Exhibit 1 is a true and correct copy of a submission made by Gusrae, Kaplan, Bruno & Nusbaum PLLC on behalf Martin Sands and Steven Sands to the Division on May 15, 2009 and bearing the Bates numbers SEC-NY8127-000148865 - 75.

3. Appended hereto as Exhibit 2 is a true and correct copy of relevant excerpts from a Sands Brothers Asset Management, LLC ("SBAM") Compliance Manual, dated January 30,

2008, produced to the Division by SBAM and bearing bates numbers SEC-NY8127-000039557,  
SEC-NY8127-000039639 - 44.

Executed on February 23, 2015  
New York, NY

  
Janna I. Berke

**GUSRAE, KAPLAN, BRUNO & NUSBAUM PLLC**

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May 15, 2009

**VIA FAX: 212-336-1317  
and FEDERAL EXPRESS**

Karen M. Lee, Esq.  
Division of Enforcement  
New York Regional Office  
Securities and Exchange Commission  
3 World Financial Center, Suite 400  
New York, New York 10281

Re: In the Matter of Sands Brothers Asset Management (NY-07605)

Dear Ms. Lee:

This law firm represents Martin S. Sands and Steven B. Sands. We submit the following on behalf of our clients Martin and Steven Sands in response to your letter dated April 13, 2009 (the "Wells Notice") wherein you indicated that the staff of the Securities and Exchange Commission (the "Commission") is considering recommending that an administrative proceeding be commenced against Steven and Martin Sands as well as the firm, Sands Brothers Asset Management, LLC ("SBAM"), which is registered as an investment adviser.

SBAM is a provider of investment advisory services to private investment funds. SBAM has been registered as an investment adviser with the Commission since its founding in 1999.

SBAM currently provides investment advisory services to Genesis Merchant Partners and Genesis Merchant Partners II LP, both asset based lending funds; Vantage Point Partners, a distressed asset fund; the Select Access Funds, a group of fund of funds; and the Venture Funds, a group of venture capital funds (collectively "Venture Capital Funds").

SBAM is represented by its counsel and this Wells Submission deals only with Martin and Steven Sands, and the inappropriateness of the Commission bringing an administrative proceeding against either Martin or Steven Sands.

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### The Venture Capital Funds:

#### Genesis Merchant Partners

Genesis Merchant Partners, LP and Genesis Merchant Partners II, LP (the "Genesis Funds") are focused on making strategic and opportunistic asset based and secured loans in underserved markets. The Genesis Funds make loans to both US and non-US companies as well as both public and private companies. The Genesis Funds offer financing to companies in niche markets that are often overlooked by banks and other traditional providers of capital.

#### Vantage Point Partners

Vantage Point Partners ("VPP") is focused on making opportunistic investments in distressed and high yield corporate and consumer debt. It is anticipated that VPP will initially concentrate on investments in distressed residential mortgage-backed securities.

#### Select Access Funds

Select Access is a family fund of funds. SBAM determined in early 2009 to wind down the funds, and the funds are currently closed to new investors.

#### Venture Funds

The Venture Funds make investments in a number of sectors, including technology, healthcare, business services, finance and transportation. The Venture Funds are currently closed to new investors.

### The Wells Notice

On or about April 13, 2009 the staff of the Commission's New York Regional office gave notice to Martin and Steven Sands of its consideration of recommending that the Commission authorize the institution of administrative proceedings against them for willfully aiding and abetting and causing SBAM to engage in conduct in violation of Sections 204 and 207 of the Investment Advisors Act of 1940 (the "Advisors Act") and Rules 204-1 and 204-2 thereunder.

The Wells Notice sets forth that the proposed administrative action would allege, *inter alia*, that from at least 2004 Martin and Steven Sands willfully aided and abetted and caused SBAM's failure to make and keep certain books and records and to annually update its Form ADV in a timely manner and late filings in 2006 and 2007.

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Thereafter in a teleconference with staff members on April 15, 2009, the staff elaborated on the written Wells Notice and provided some details of the perceived violations.

The staff's elaboration generally identified recordkeeping deficiencies and a failure to amend Form ADV in a timely manner.

The staff affirmatively stated that the proposed administrative action did not allege any fraud charges and that generally the books and records and form ADV allegations did not require scienter, and were premised on a negligence theory.

The staff identified the year for which a Form ADV was not filed as 2005 and conceded that Form ADV was filed in 2006 and thereafter.

SBAM is owned by two trust whose beneficiaries are descendants of Martin and Steven Sands. Both Martin and Steven Sands are principals of SBAM.

The staff Wells Notice identified that the proposed administrative proceeding could seek, among other relief, a cease and desist order, censure, and penalties and additional remedial sanctions pursuant to Sections 203(f) and 203(k) of the Advisors Act.

**BOTH MARTIN AND STEVEN SANDS  
REASONABLY BELIEVED THAT SBAM  
PERSONNEL WERE COMPLYING WITH  
THE ADVISORS ACT**

During the relevant time period from 2004, both Martin and Steven Sands reasonably believed that they had delegated responsibility for compliance with the recordkeeping and Form ADV filing requirement to competent individuals.

Since 2004 SBAM has had a number of Chief Compliance Officers whose securities understanding and/or educational experience reasonably made them competent with respect to assuring that SBAM complied with recordkeeping and Form ADV filing requirements under the Advisors Act.

Thus the Chief Compliance Officers in chronological order were:<sup>1</sup>

William A. Iommi	2002-2004
Christopher (Moshe) Silver	2004-2005/6
Marv S. Koplik	2005/6-2007

<sup>1</sup> Due to turnover of personnel, persons with de minimis involvement have been omitted.

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John Telfer	2007
Ron Wilhelm	2008
Doug Bisio (Acting)	2008 (March-April 22)
Christopher Kelly	April 22, 2008 – Present

### William A. Iommi

From June 1993 through May 2000 Mr. Iommi served as divisional compliance director (northeast) for Citigroup Salomon Smith Barney. From May 1989 through May 1993 he served as executive director of Trading Analysis and Inquiries at the American Stock Exchange. From May 1981 through April 1989 he served as manager of market surveillance services at the New York Stock Exchange.

### Christopher "Moshe" Silver

Mr. Silver commenced his employment in the securities business in 1984. Throughout his career, Mr. Silver was employed at various firms of various sizes. Mr. Silver passed multiple exams and obtained various licenses including his Series 4, 7, 8, 14, 24, 55, 63 and 65 licenses.

During his many years in the securities industry Mr. Silver functioned in various capacities including compliance and operations. Mr. Silver upon information and belief was also well educated.<sup>2</sup>

### Marc S. Koplik

Marc S. Koplik attended Brown University graduating cum laude. Thereafter, Mr. Koplik attended Yale Law School. Upon graduating from Yale Law School, Mr. Koplik was employed at Debevoise & Plimpton where he worked on financial and general corporate matters.

Thereafter, Mr. Koplik served as a Director and General Counsel for investment bankers Kuhns Brothers and Laidlaw Inc.

### John Telfer

Mr. Telfer has been employed in the securities industry since 1997. Mr. Telfer took various exams and holds Series 4, 7, 24 and 63 licenses.

<sup>2</sup> Particularly noteworthy is a memo drafted by Mr. Silver in May 2004 which causes the reasonable reader to conclude that certain "curcs" and additional information to be provided the examination staff satisfied the staff's requests and concerns.

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Ron Wilhelm and Doug Bisio

Ron Wilhelm was SBAM's Chief Compliance Officer for less than one month. Mr. Bisio was the acting Chief Compliance Officer for less than 2 months.

SBAM then hired its current Chief Compliance Officer, Christopher Kelly.

Christopher Kelly

Christopher Kelly joined SBAM after employment at Pirate Capital LLC, a \$1.8 billion hedge fund at its peak, where he served as General Counsel and Chief Compliance Officer. Prior thereto he served as Managing Director, General Counsel and Chief Compliance Officer of Cypress Associates LLC ("Cypress"), a New York based investment banking boutique. Mr. Kelly joined Cypress from Proskauer Rose LLP, an international law firm based in New York, where he served as a (non-equity) Partner. Mr. Kelly began his career in New York with the law firm Skadden, Arps, Slate, Meagher & Flom. Mr. Kelly earned a B.A. with Honors from the University of Virginia and a J.D. from the University of Virginia School of Law.

During the relevant period SBAM had various other personnel serving in operational and administrative positions. All of these personnel were reasonably considered by Martin and Steven Sands to be doing their jobs in a competent way under the oversight of SBAM's Chief Compliance Officer.

Noteworthy is that the current Chief Compliance Officer who joined SBAM in 2008, Christopher Kelly, has been actively pursuing the reorganization of SBAM in compliance with the Advisors Act. Such effort is ongoing and has included amongst other things the rewriting of SBAM's compliance manual and the use by SBAM of a new Code of Ethics.

Delegation

SBAM through Martin and Steven Sands reasonably and in good faith delegated responsibilities for compliance with the Advisors Act to SBAM's various Chief Compliance Officers. The Chief Compliance Officers were reasonably believed by Martin and Steven Sands to be knowledgeable, competent and empowered to establish policies and procedures to govern the business activities of SBAM, including maintaining books and records and filing amendments to Form ADV. The delegation and allocation of obligations set forth in the Advisors Act and related Rules to SBAM's Chief Compliance Officer was consistent with industry and good practices.

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The "delegation" concept has its roots in broker dealer regulation. The delegation concept under the Advisors Act follows the same standards enunciated for broker dealers.

A president of a broker dealer is ultimately responsible for compliance with the rules until he delegates those duties to another person in the firm. (See Sheldon v. SEC, 45 F.3d 1515).

This principle is set forth in many cases. See:

In the Matter of Universal Heritage Investments Corp., 47 S.E.C. 839, 845 (1982) "The president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient."; and In the Matter of Thomas White, 51 SEC 1194 – restating the law in Universal Heritage and finding that the principal of the firm reasonably delegates supervisory authority to another supervisor and the compliance officer.

The Adopting Release, and other authority relating to Rule 206(4)-7, places an emphasis on appointing a Chief Compliance Officer and the need for an investment adviser firm to maintain written policies and procedures.

The role of the CCO in an investment adviser firm was emphasized in a speech given by Gene Gohlke, Associate Director Office of Compliance Inspection and Examinations, of the Commission entitled "Managed Funds Association Educations Seminar Series 2005: Practical Guidance for Hedge Fund CCO Under the SEC's New Regulatory Framework." In discussing the Commission's view of the role of the CCO and the delegation of activities and responsibility to such person, Gohlke states, "By requiring designations of CCOs, the SEC recognized a principal taught in Management 101 courses, The principal is that: for a program or function to be successful and achieve its objectives, responsibility for that program or function must be clearly assigned to a single person."

Gohlke states, "[I]n its Adopting Release, [the Commission] identified three attributes that a CCO should have: knowledge, competence and empowerment." An analysis of these three attributes will go to establishing the "reasonableness" of the appointment of the specific CCO.

- Knowledge relates to having a good understanding of the requirements imposed by the IAA and related rules.



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- Competence relates to qualifications of the individual, familiarity with the firm's business and the ability to create policies and procedures to govern the firm's business.
- Empowerment relates to providing the Chief Compliance Officer with responsibility and authority to develop and enforce policies and procedures.

In addition to identifying characteristics for a Chief Compliance Officer, the SEC has provided guidance in connection with the delegation of responsibility in the actual procedures. "[I]t may be enough for the compliance policies and procedures to allocate responsibility within the organization for the timely performance of many obligations, such as filing or updating the required forms." *Compliance Programs of Investment Companies and Investment Advisers*, 2003 WL 22971048, 81 S.E.C. Docket 2775, Release No. IA-2204.

Martin and Steven Sands believed that their delegation to the various Chief Compliance Officers was reasonable and appropriate. At no time during their respective tenures were either Martin or Steven Sands notified nor did they have reason to believe that each of the various Chief Compliance Officers were not doing their jobs in a competent way.<sup>3</sup>

**Martin S. Sands***Founder, Partner and Senior Portfolio Manager*

Martin S. Sands has over 25 years of investment experience in areas that include investment banking, venture capital, private equity, real estate, money management, sales/brokerage, and merchant banking. Martin is the co-founder of Sands Brothers.

Martin began his career in 1983 at Shearson American Express, Inc. and moved on to Oppenheimer & Co. where he serviced high net worth clientele nationally. He later joined Laidlaw, Adams and Peck where he worked closely with investors as he focused on small capitalization and emerging companies. In 1988, Martin played a key role in opening and developing the NYC office for Rodman & Renshaw. In 1990, Martin, along with his brother Steven, founded and launched Sands Brothers and Co., Ltd., which focused on providing high net worth investors an alternative to the large brokerage firms. The firm grew dramatically and by the year 2000, Sands Brothers and Co. Ltd. and its related entities had approximately 400 employees.

<sup>3</sup> Where instances existed that either Martin or Steven Sands were doubtful of the ability/competence of personnel, they removed those employees.

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Martin has spent the last eight years pursuing various business ventures that spanned different industries and allowed him to act as both a principal and an investor in numerous ventures. Specifically, Martin directed his strategic focus toward both the asset management business and the real estate business. In the first half of 2001, he created the Select Access funds, a fund of funds family. While developing and managing the fund of funds business, he acquired, renovated and/or sold approximately 500,000 square feet of class A commercial office space. Beyond these endeavors, Martin and his brother Steven pursued various growth opportunities and acted as portfolio managers for the Venture Capital Funds.

Martin graduated from Union College where he received a bachelor's degree in Political Science. He continues to be very active in youth lacrosse as well as in various local, regional, and international charitable endeavors. Martin lives in Greenwich, CT with his wife and four children.

**Steven B. Sands***Founder, Partner and Senior Portfolio Manager*

Steven B. Sands has more than 25 years of investment experience in areas that include investment banking, venture capital, real estate, money management, sales/brokerage and merchant banking. Steven is a co-founder of Sands Brothers. He is also a founder and portfolio manager of the Select Asset funds, Chairman of Critical Capital Growth Fund, which is licensed with the Small Business Administration, a portfolio manager of the Venture Capital Funds, a manager of special purpose partnerships, and he is the former Chairman of Olympic Cascade Financial Corporation.

Steven's financial experience began as a member of the Fixed Income Team with L.F. Rothschild. Thereafter, Steven leveraged his experience into servicing both high net worth and institutional accounts by joining Oppenheimer and Co. He continued to broaden his experience and eventually joined Laidlaw Adams & Peck, where he focused on private equity and corporate finance. Eventually Steven joined his brother Martin in the opening of the New York operations for Rodman & Renshaw, where his experience and role earned him a seat on the firm's board. In 1990, he joined his brother in founding Sands Brothers & Co., Ltd., an investment bank, brokerage firm and NYSE member.

Steven has focused the past five years on both the real estate business and corporate deal business. On the corporate side, he worked closely on numerous venture capital and private equity transactions. He continues to act as a portfolio manager of the Venture Capital Funds he co-founded. In addition, he has worked closely with his brother Martin in assembling, acquiring and/or selling over 500,000 square feet of commercial office space.

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Steven earned a bachelor's degree from Hamilton College. Steven has served as a trustee of the Friends School in Locust Valley, NY and is active in other charitable and scholastic institutions. Steven lives in Locust Valley, NY with his wife and three children.

Naming Martin Sands and Steven Sands in an administrative proceeding is not remedial nor is it warranted under these circumstances.

The clear and ongoing reasonable delegation of responsibilities to previous Chief Compliance Officers renders naming either Martin or Steven Sands inappropriate. Further, Martin and Steven Sands continue to act in conformity with their earlier intent and actions directed at promoting compliance by having a Chief Compliance Officer who meets all of the standards that have been enumerated in the adopting release relating to Rule 206(4)-7. Specifically:

Knowledge and having a good understanding of the requirements of the Advisors Act and related rules;

Competence and qualification as Chief Compliance Officer which provides familiarity with SBAM's business and the ability to create policies and procedures to govern SBAM's business; and

Providing the Chief Compliance Officer with empowerment which allows for responsibility and authority to develop and enforce SBAM's policies and procedures.

**Conclusion**

For all of the foregoing reasons it is respectfully submitted that the staff should not recommend an administrative action against either Martin or Steven Sands. Both Martin and Steven Sands have continually delegated responsibility for compliance functions to Chief Compliance Officers who had the requisite knowledge and experience and authority to perform their functions as Chief Compliance Officer completely.

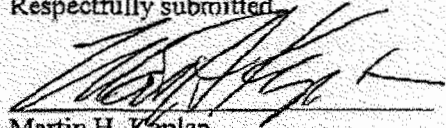
The reliance by Martin and Steven Sands under the circumstances was reasonable and at no time during their respective tenures were either Martin or Steven Sands aware of the failure of any of the Chief Compliance Officers to perform their delegated functions completely.

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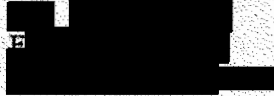
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Finally, the remedial purposes of enforcement action will not be furthered by the commencement of an administrative proceeding against either Martin or Steven Sands.

Respectfully submitted



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Attorney for Martin S. Sands and  
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# 281

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FROM: Martin H. Kaplan, Esq. PAGES: 11  
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**Sands Brothers Asset Management, LLC**

**Sands Brothers Asset Management**

January 30, 2008

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## 8 CUSTODY PROCEDURES

### 8.1 Introduction

An adviser that has custody of client assets must implement a set of controls designed to protect those assets from being lost or misappropriated. The SEC deems an investment adviser to have "custody" when it (1) directly or indirectly holds client funds or securities, (2) has any authority to possess them, or (3) has access to client funds or assets.

Because of this broad definition, most investment advisers are deemed to have custody of client assets. Advisers generally can meet the requirements of Rule 206(4)-2 under the Investment Advisers Act of 1940, the SEC's custody rule, by maintaining client assets with "qualified custodians" (i.e., banks and broker-dealers).

SEC's Office of Compliance Inspections and Examinations (OCIE) routinely places custody on its informal list of top ten problems at advisers. OCIE scrutinizes custody procedures when it examines an adviser, focusing on whether the investment adviser has custody and, if so, the controls and procedures the adviser has in place to minimize the risk of misappropriation of client assets.

### 8.2 Compliance Reference Chart

<b>Responsibility</b>	<ul style="list-style-type: none"><li>• Chief Compliance Officer</li></ul>
<b>Operational Areas</b>	<ul style="list-style-type: none"><li>• Investments</li><li>• Accounting</li></ul>
<b>Frequency</b>	<ul style="list-style-type: none"><li>• Each business day when client securities transactions take place</li><li>• At least quarterly to verify clients' assets are held by the bank or broker-dealer custodian and client account statements are accurate</li></ul>
<b>Statute/Rule</b>	<ul style="list-style-type: none"><li>• Rule 206(4)-2 under the Investment Advisers Act of 1940</li></ul>
<b>Records</b>	<ul style="list-style-type: none"><li>• Quarterly client account statements sent by banks or broker-dealer custodian</li><li>• Work papers demonstrating reconciliation of accounts</li></ul>
<b>Audit</b>	<ul style="list-style-type: none"><li>• SBAM audits its Custody Procedures annually.</li></ul>

### 8.3 Policy

It is SBAM's policy to arrange for the safekeeping of client assets with a broker-dealer or bank.

## 8.4 Procedures

SBAM will take steps to ensure that all assets of clients are maintained in a manner designed to safeguard them from theft, misappropriation or other loss.

### 8.4.1 Eligible Custodians

Only one or more of the following types of entities may have custody of client funds and securities:

- Banks (as defined in Section 202(a)(2) of the Investment Advisers Act of 1940);
- Broker-Dealers that are registered with the SEC;
- Savings Associations (as defined in Section 3(b)(1) of the Federal Deposit Insurance Act);
- Futures Commissions Merchants; and
- Foreign Financial Institutions (that customarily hold assets for their customers).

If SBAM inadvertently receives securities from a client, SBAM, within three days of such receipt, will forward the securities to the broker-dealer or bank where the client's account is maintained.

SBAM shall take the following steps to avoid having inadvertent custody of client assets:

- Periodically review advisory contracts and other client agreements to make sure there are no provisions that provide SBAM the authority to access client assets (e.g., a power of attorney that gives SBAM check-writing abilities) or to deduct advisory fees;
- Determine whether any affiliate of SBAM may have custody of client assets;
- Verify that client assets are transferred immediately to an eligible custodian;
- Avoid taking possession of client stock certificates or cash, even briefly; and
- Avoid forwarding client stock certificates or funds to third-party custodians.

### 8.4.2 Custody of Client Assets at Bank or Broker-Dealer

The Chief Compliance Officer will:

- Arrange for the funds and securities of clients to be maintained at a broker-dealer or bank;
- Require the broker-dealer or bank custodian to maintain client funds and securities:
  - In a separate account for each client under that client's name; or
  - In accounts that contain only SBAM's client funds and securities and under the name of SBAM as agent or trustee for the clients; and
- Notify each client in writing of the name and address of the broker-dealer or bank custodian, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information.

#### 8.4.2.1 Mutual Funds

SBAM may permit mutual fund shares owned by clients to be maintained at the respective mutual funds' transfer agent instead of a broker-dealer or bank.

#### 8.4.2.2 Privately Placed Securities

SBAM may permit privately placed securities of issuers such as closely-held companies to be maintained in the following manner in lieu of maintaining such securities at a bank or broker-dealer:

- The ownership of the securities is recorded only on the books of the issuer or its transfer agent;
- The ownership is recorded in the name of the client; and
- Transfer of ownership is subject to the prior consent of the issuer or holders of the issuer's



outstanding securities.

### 8.4.3 Custody of Client Assets at SBAM

SBAM may have custody of client funds or securities only if it is an Eligible Custodian. If SBAM is a registered broker-dealer, it will maintain client funds and securities in accordance with SEC and NASD rules applicable to broker-dealers. If SBAM is a bank, it will maintain client funds and securities in accordance with applicable banking regulations.

### 8.4.4 Account Statements

SBAM contractually requires the broker-dealer or bank custodian to send an account statement, at least quarterly, directly (and not via the adviser) to each client and duplicates of such account statements to SBAM. The account statement, at a minimum, will:

1. identify the amount of funds and each security in the account at the end of the period; and
2. set forth all transactions in the account during that period.

If the account statement is delivered electronically, SBAM will, or cause the broker-dealer or bank custodian, to make sure:

1. the client has given informed consent to receiving the information electronically;
2. the client can effectively access the electronically delivered information; and
3. there is evidence that the delivery was received, such as an email return receipt.

If SBAM does not wish to have the broker-dealer or bank custodian send an account statement to one or more clients, SBAM shall:

1. Require the broker-dealer or bank custodian to maintain client funds and securities in a separate account for each client under that client's name;
2. Send a quarterly account statement to each client identifying the amount of funds of each security of which SBAM has custody at the end of the period and setting forth all transactions during that period;
3. Arrange for an independent public accountant to verify the existence and proper maintenance of all client funds and securities, by actual examination at least once during each calendar year at a time that is chosen by the accountant without prior notice or announcement to SBAM and that is irregular from year to year;
4. Arrange for the independent public accountant to file a certificate on Form ADV-E with the SEC within 30 days after the completion of the examination, stating that it has examined the funds and securities and describing the nature and extent of the examination; and
5. Make sure that the independent public accountant is informed that, upon finding any material discrepancies during the course of the examination, it must notify the SEC within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the Director of the SEC's Office of Compliance Inspections and Examinations.

### 8.4.5 Client Representatives

A client may not wish to receive statements from a custodian. Clients can choose to have an independent representative receive account statements on their behalf.

SBAM permits a client to designate a representative to receive the client's statements from a broker-dealer or bank only if such representative:

1. Acts as agent for the advisory client and by law or contract is obliged to act in the best interests of the client;
2. Does not control, is not controlled by, and is not under common control with SBAM;
3. Does not have, and has not had within the past two years, a material business relationship with SBAM; and

4. Is appointed by the client or, if appointed by SBAM, the client consents to such appointment.

#### **8.4.6 Reconciliation**

From time to time, there may be discrepancies between client accounting records maintained by SBAM and similar records maintained by the bank or broker-dealer custodian. Discrepancies may be caused merely by timing differences between when the data is entered by SBAM and the broker-dealer or bank custodian. Discrepancies may also occur because of data entry errors. The goal of reconciliation should be to find discrepancies due to errors, so that they may be corrected.

Quarterly, the Chief Compliance Officer shall:

- reconcile client accounting records maintained by SBAM with those maintained by the bank or broker-dealer custodian;
- report any discrepancy to the bank or broker-dealer custodian and proceed to correct the discrepancy;
- report any material discrepancy to senior management of SBAM; and
- prepare a memorandum or some other document stating how the discrepancy was resolved.

#### **8.4.7 Overdrafts**

Overdrafts may occur for a variety of reasons, including when a client does not have sufficient cash in his or her account to cover securities purchases on the settlement date. Frequent overdraft positions in client accounts may invite unwanted regulatory scrutiny.

SBAM will manage client positions and accounts in a manner that minimizes the possibility of overdrafts in client accounts. The Chief Compliance Officer will report any pattern of overdrafts to the senior management of SBAM.

#### **8.4.8 Unusual Account Activity**

The Chief Compliance Officer and each Adviser Representative shall report any unusual activity in a client's account to senior management of SBAM, who shall assign someone to investigate such activity.

#### **8.4.9 Authorization**

SBAM will obtain from clients a list of persons who are authorized to withdraw or otherwise take actions with respect to such client's account. SBAM shall consider the use of passwords or other security devices to ensure that a person has proper authority to take actions with respect to a client's account. SBAM shall not permit the withdrawal of funds from a client account or any other activity from a person other than a client, unless such person demonstrates that he or she has proper authority to take such action.

#### **8.4.10 Custodian Selection and Retention**

When evaluating (initially and on an ongoing basis) a custodian for client assets, SBAM will:

1. Verify that the client's securities and other assets will be physically segregated from those of other customers of the custodian;
2. Request and review the internal audit procedures used by the custodian to count and otherwise keep track of client assets;
3. Request and review the custodian's controls over receipts of dividends, interest and other cash;
4. Request and review the custodian's procedures governing the receipt of, and payment for,

- securities, and the delivery of securities; and
5. Request and review the custodian's procedures for securities held in central depositories.

#### **8.4.11 Foreign Custodians**

SBAM will not permit client assets to be held with a foreign custodian, unless the foreign custodian is a financial institution that customarily holds financial assets for its customers and it keeps the clients assets in customer accounts segregated from its proprietary assets.

#### **8.4.12 Trustee Capacity**

If SBAM serves as a trustee to a client, SBAM will be deemed to have custody of the trust assets unless SBAM or one of its employees has been appointed as the trustee as a result of a family or personal relationship with the grantor or beneficiary and not as a result of employment with SBAM.

#### **8.4.13 Determination of Affiliation with the Broker-Dealer or Bank Custodian**

In some cases, the SEC takes the position that an investment adviser that is affiliated with the custodian of the assets of the adviser's clients will be deemed to have custody of the client's assets. For example, client assets might be maintained with an affiliated bank or broker-dealer. If SBAM is deemed to have custody of client assets because of such an arrangement, it will comply with the provisions of Rule 206(4)-2 that apply to advisers that have custody of client assets.

Whether or not SBAM will be deemed to have custody of client assets maintained at an affiliate depends on the following five factors:

1. whether client assets in the custody of the affiliated company might be subject, under any reasonable foreseeable circumstances, to the claim of the creditors of the adviser;
2. whether advisory personnel have the opportunity to misappropriate the client assets;
3. whether advisory personnel ever have possession of, or direct or indirect access to, client assets, or the power to control the disposition of client assets to third parties for the benefit of the adviser or an affiliate;
4. whether advisory personnel and personnel of the affiliated custodian who have possession of, control over, or access to, client assets are under common supervision; and
5. whether advisory personnel hold any position with the custodian or share premises with the custodian, and if so, whether they have direct or indirect access to or control over client assets.

If any of these factors are true, SBAM will likely be deemed to have custody of client assets, even though the assets are physically held by the affiliated custodian. The key issue when applying these factors is whether the adviser and affiliated custodian operate as separate entities and in a manner that prevents the adviser from reaching client assets. See *Crocker Management Corp.* (pub. avail. Apr. 11, 1978).

#### **8.4.14 Audited Balance Sheet**

If SBAM requires clients to prepay its advisory fee six months or more in advance and the fee exceeds \$500, SBAM will provide an audited balance sheet to clients.

### **8.5 Form ADV Disclosure**

SBAM will indicate on Item 9 to Part I of Form ADV whether or not SBAM has custody of client

assets.

## **8.6 Books and Records**

SBAM will maintain in the "Custody" section of its books and records:

1. Copies of all written materials received or sent concerning the receipt or delivery of clients' securities and funds;
2. Copies of all written materials related to the purchase and sale of securities on behalf of clients; and
3. Worksheets demonstrating the reconciliation and documents related to discrepancies and their resolutions.