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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, AND EDEN ARC CAPITAL ADVISORS, LLC, Respondents.	Administrative Proceeding File No. 3-17387

EXPERT REPORT OF MARTIN E. LYBECKER

November 7, 2016

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I. Request for Service as an Expert Witness

Counsel for the Division of Enforcement of the U.S. Securities and Exchange Commission ("Division") has asked me to serve as an expert witness in the above-captioned administrative proceeding with respect to the applicability of Rule 206(4)-2 ("Custody Rule")[1] under the Investment Advisers Act of 1940 (the "Advisers Act") to the arrangements used by Eden Arc Capital Management, LLC ("EACM"), Eden Arc Capital Advisors, LLC ("EACA"), and Eden Arc Capital Partners, LP ("Fund"). Neither my law firm nor I have every represented any of the respondents in this administrative proceeding.

II. Qualifications

I am a Partner at Perkins Coie, LLP, resident in its Washington, D.C., office. I have served as an expert witness and provided oral and/or written expert testimony before a state court in the Commonwealth of Massachusetts, before Federal district courts, and before arbitration proceedings sponsored by FINRA.

I have received a Bachelor in Business Administration degree in Accounting (1967) from the University of Washington, a Juris Doctor degree (1970) from the University of Washington, an LL.M. (in Taxation) degree (1971) from New York University, and an LL.M. degree (1973) from the University of Pennsylvania, where from 1971-1972 I was a Fellow at the Center for the Study of Financial Institutions and the Securities Markets. Articles that I have written have been published in the Yale Law Journal, Columbia Law Review, Duke Law Journal, Brooklyn Law Review, and the Washington University Law Quarterly. I have also published articles in journals such as the Securities Regulation Law Journal, Banking Law Journal, Wall Street Lawyer, The Investment Lawyer, and the Journal of European Company Law. I have spoken at a number of forums during which attendees earn continuing legal education credits, and I have testified before the U.S. Senate and U.S. House of Representatives. I have taught law courses on a full-time basis at the State University of New York at Buffalo, Duke University, and the University of North Carolina, and as an adjunct law professor have taught at Duke University and the Georgetown University Law Center. With respect to the American Bar Association, I have been Chair of the Committee on Developments in Investment Services, Chair of the Committee on Banking Law, and Chair of the Business Law Section. My experience and education are more fully set out in my complete resume, attached hereto as Exhibit 1.

Perkins Coie LLP is compensated for my service as an expert witness at a rate of $1060 per hour. In addition to my own time, I have directed other Perkins Coie LLP professionals who performed supporting work in connection with my preparation of this report. My opinions in this matter are in no way dependent on my personal compensation or Perkins Coie LLP's receipt of compensation for my work.

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[1] 17 C.F.R. § 275.206(4)-2 (2016). The full text of the Custody Rule is attached hereto as Exhibit 2. *See generally* JAMES E. ANDERSON, ROBERT G. BAGNALL, AND MARIANNE K. SMYTHE, INVESTMENT ADVISERS: LAW & COMPLIANCE, ¶ 9.18 (LexisNexis 2016) (custody of client assets), attached hereto as Exhibit 3.

III. Relevant Facts[2]

EACM serves as the investment adviser to the Fund pursuant to an Investment Management Agreement. Beginning in 2012 and through February 2016, EACM was registered as an investment adviser with the SEC under the Advisers Act.[3] EACM received an investment advisory fee for the services that it performed for the Fund. The Investment Management Agreement between Mr. Lathen and the Fund, among other things, authorized and permitted and required Mr. Lathen to act as a "nominee" for the Fund in various respects. The Investment Management Agreement also stated that Mr. Lathen shall have "no legal or beneficial interest in the SO [Survivor Option] Investments;" instead, Mr. Lathen will hold "the SO [Survivor Option] Investment, and all right, title and interest therein and benefit to be derived therefrom, as nominee for and on behalf of the Partnership only." Finally, the Investment Management Agreement provided that "all other attributes of the beneficial ownership of the SO [Survivor Option] Investments shall be and remain in the Partnership."

EACA served as the general partner of the Fund, and a percentage of the profits earned by the Fund was allocated to its capital account. EACA was not registered as an investment adviser with the SEC under the Advisers Act.[4]

The Fund is styled as a "hedge fund" and, according to the various Form ADVs filed by EACM, has relied on Section 3(c)(1) of the Investment Company Act of 1940 for exclusion from the definition of "investment company" and thus was not registered with the SEC.[5]

The Private Placement Memorandum ("PPM") given by Mr. Lathen to investors in the Fund regularly describes the investment objective of the Fund as investing in survivor option corporate bonds or survivor option CDs ("Survivor Option Investments") in a brokerage account set up as a Joint Tenancy With Right of Survivorship ("JTWROS"), and states that the Fund will value the funds and securities in the JTWROS accounts as assets of the Fund.

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[2] The list of documents that were provided to me by the Division is attached hereto as Exhibit 4.

[3] After the Dodd-Frank Act, an investment adviser may register with the SEC only if it is eligible. Initially, EACM registered with the SEC by asserting that it expected to raise the $150 million necessary to register. *See* Rule 203A-2(c) under the Advisers Act. Subsequently, EACM unchecked that box but did not check any other box that explained why it was eligible to continue to be registered with the SEC. In January 2016, EACM filed Form ADV-W to withdraw its registration; however, it did not indicate on that Form ADV-W on what theory that it was allowed to deregister. In any event, EACM was registered under the Advisers Act, and continued to be registered until it filed Form ADV-W in January 2016, and thus was in fact registered under the Advisers Act during the times relevant to these proceedings.

[4] It is the position of the SEC's Division of Investment Management that, in addition to the entity that has an investment advisory contract with a private fund client, the general partner of a limited partnership (usually an affiliated person) is also an investment adviser. In most instances, such a general partner effects its registration by being listed as a "relying adviser" on the investment adviser's Form ADV if it meets certain criteria. *See* Rule 203A-2(b) under the Advisers Act.

[5] No person is identified as the person who or which sold interests in the Fund to the investors in the Fund. Mr. Lathen might have relied on Rule 3a4-1 under Securities Exchange Act of 1934, although there is no indication in the Form ADVs filed by EACM nor the testimony given by Mr. Lathen that he was also an employee of the Fund for purposes of broker-dealer registration, or that he qualified in all respects with the requirements of Rule 3a4-1.

It was Mr. Lathen's practice to establish multiple brokerage accounts with those broker-dealers that would permit him to open an account. Generally, one brokerage account was opened in the name of the Fund; each of the other brokerage accounts was opened as a JTWROS in the name of Mr. Lathen and one or more natural persons, one of whom was a terminally-ill person ("Participant"). Mr. Lathen executed a Participant's Agreement and Limited Powers of Attorney between himself and each Participant. Although Mr. Lathen revised the Participant Agreements over time, each Participant Agreement limited the rights that the Participants could exercise that would be normal for a natural person with any ownership or other rights over a brokerage account set up as a JTWROS.[6] In short, Mr. Lathen appears to have retained full contractual authority to move and transfer assets into and out of the JTWROS accounts at will, and without permission from (or notice to) the affected Participants.

As interests in the Fund were sold to its investors, money would become available to implement the Fund's investment strategy. Initially, the Fund's investment strategy involved making "advances" to Mr. Lathen; in a later iteration described more fully below, the Fund and Mr. Lathen executed "notes" to evidence the transfer of money to Mr. Lathen. The "advances" were promises to repay principal and did not carry an express interest rate; the "notes" were non-recourse and contained a nominal interest rate. However, the expectation of the investors was that, as "nominee" for the Funds, Mr. Lathen would open JTWROS accounts with a Participant and invest the "advance" or "loan" as well as cash derived from margin borrowing from the brokerage firm in Survivor Option Investments. Viewed in its entirety, the return earned by the investors in the Fund was dependent on a combination of (i) repayment of principal and interest on the "advance" or "loan," (ii) the anticipated profit from the purchase of Survivor Option Investments in the secondary market, or from issuers, at discount from par, (iii) the death of the Participant, triggering the right of the survivor (Mr. Lathen) to put the Survivor Option Investments or CDs back to the issuer at par, and (iv) liquidation and transfer of the net proceeds of the investments made in the JTWROS accounts to Mr. Lathen, as nominee for the Fund, and subsequently by Mr. Lathen to the Fund for distribution to its investors (and EACA for the benefit of Mr. Lathen).

In 2013, Mr. Lathen executed an agreement with the Fund ("Profit-Sharing Agreement") and a borrowing arrangement ("Discretionary Line") in which he agreed to give the Fund all of the compensation that he received from the JTWROS, less the amount that was to be allocated to EACA's capital account in the Fund in respect of the compensation due to Mr. Lathen. The Profit-Sharing Agreement stated that JTWROS accounts opened after January 2013 would be

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[6] For example, the Participant Agreement of James McCord, dated May 11, 2011, states that Mr. McCord is not permitted "to pledge, borrow against, withdraw or exercise any right of ownership with respect to the Investments or other assets in the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion." Similarly, Mr. McCord gave Mr. Lathen power of attorney which, among other things, gave Mr. Lathen the power: (i) to "open, manage, handle, and direct brokerage accounts titled in" Mr. McCord's name; (ii) to "buy, sell, exchange, convert, tender, trade, lend, and in any and every other way it sees fit to handle, dispose of, acquire, and deal in stocks [and] bonds...;" and (iii) to "transfer funds into and out of such accounts." It appears that later Participant Agreements contained somewhat different language, but they do not appear to derogate from Mr. Lathen's exclusive plenary powers over the investments or give a Participant any powers over the investments.

governed by it, whereas accounts opened before that time would be governed by the Investment Management Agreement. The Discretionary Line purported to set up a lender/borrower relationship between the Fund and Mr. Lathen, although the "loan" is non-recourse so that Mr. Lathen is never personally liable to the Fund for repayment. While the Fund purports to charge interest to Mr. Lathen during the term of the "loan," income recorded as earned by the Fund from the loan does not appear to be accompanied by any cash being paid by Mr. Lathen to the Fund; rather, the interest owed on the "loan" was accrued by the Fund as an accounting entry and was offset in its entirety when the net profits earned by a JTWROS was transferred by Mr. Lathen to the Fund in accordance with the Profit-Sharing Agreement.

The balance sheets approved by independent public accountants during the audit of the Fund reflected the assets held in the JTWROS accounts as assets of the Fund under the caption "Due from Joint Accounts at Fair Value," and the income statements for the Fund reflect all of the costs borne by the JTWROS accounts. The interest income earned on the "loans" under the Discretionary Line is accrued and treated as gross income of the Fund, and is offset by an identical amount accrued and reported as "interest expense;" in other words, the Fund appears to be both *charging* interest to Mr. Lathen under the Discretionary Line agreement and *paying* that same interest to Mr. Lathen pursuant to the Profit-Sharing Agreement. The financial statements were prepared, audited, and certified by independent public accounting firms. An independent public accounting firms prepared the income tax return for the Fund, and another public accounting firm prepared Mr. Lathen's personal tax returns. Because Mr. Lathen withdrew the net proceeds from each of the JTWROS in his own name before transferring that amount to the Fund, his personal tax return reflects that amount as his gross income; however, the net income that appears in Mr. Lathen's income tax returns reflects only the amounts that were allocated to EACA pursuant to the Profit-Sharing Agreement with the Fund, and the amounts kept by the Fund are treated as "nominee" transfers by Mr. Lathen to the Fund. The character of the income earned by each JTWROS is unchanged as it is reported on the tax return of the Fund, even though it has passed through Mr. Lathen's hands, in what might otherwise be viewed as an independent transaction in which the character of the income would change if Mr. Lathen were not treated as a mere "nominee" for the Fund.

IV. Legal Analysis

A. The Requirements of the Custody Rule

The Custody Rule states that, "If you are an investment adviser registered or required to be registered under section 203 of the [Advisers Act], it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act for you to have ***custody*** of ***client funds or securities*** unless a qualified custodian maintains those funds and securities . . . in a separate account for each client under that client's name; or in accounts that contain only your client's funds and securities, under your name as agent or trustee for the clients." (Emphasis added.) The JTWROS account identified the owners of each account -- Mr. Lathen and a Participant -- as joint tenants, and did not identify the Fund as the person on whose behalf the brokerage firm was serving in its capacity as custodian of the funds and securities in the account. That was not in compliance with the requirements of the Custody Rule.

B. The Fund was EACM's "Client" For Purposes of the Advisers Act

Since *Goldstein v. SEC*, 451 F. 3d 873, (D.C. Cir. 2006) ("*Goldstein*") was decided, there has been no reasonable doubt that the "client" of EACM is the Fund. The precipitating issue that resulted in *Goldstein* was whether an investment adviser to a hedge fund was required to register as an investment adviser. In the early 2000s, Section 203(b)(3) of the Advisers Act excepted from registration any investment adviser which had fewer than fifteen clients and did not hold itself out to the public as an investment adviser. Hedge fund advisers, not unnaturally, took the position that they had only one "client," the hedge fund itself. For reasons that are not relevant for this purpose, the SEC decided to change that analysis and require that the hedge fund adviser count, instead, each of the investors in each of its hedge funds as its "clients," which would inevitably mean that it had many more than fourteen "clients." To effect that change, the SEC adopted two rules under the Advisers Act, Rule 203(b)(3)-1 and Rule 203(b)(3)-2.[7] Mr. Goldstein sued the SEC, and the U.S. Court of Appeals for the District of Columbia Circuit held that the SEC had exceeded its authority in adopting those rules, and vacated them, restoring the *status quo ante*.[8]

In the Form ADVs filed by EACM, Item 7 states that EACM is an investment adviser to just one private fund – Eden Arc Capital Partners, LP, *e.g.* the Fund. In all but one filing (February 2013), the current gross asset value of that private fund listed in each Form ADV is equal to the reported Regulatory Assets Under Management listed in Item 5 of the ADV. As of March 2014, EACM reported that it was providing portfolio management for the pooled investment vehicle in Item 5, and it reported providing investment advice to only one individual advisory account.[9] This is consistent with the EACM treating the Fund as its "client" and, with the exception of the one individual advisory account, it was treating the Fund as its only advisory client. In other words, EACM did not take the position in its Form ADV that (i) the investors in the Fund was a "client" or (ii) any Participant was a "client."

C. EACM had "Custody" of the Fund's Assets

An investment adviser has "custody" of client funds and securities where it, or a related person, holds, "directly or indirectly, client funds or securities, or [has] any authority to obtain possession of them." Here, Mr. Lathen had the authority to transfer the funds and securities of the Fund into the JTWROS account that was in the name of Mr. Lathen and of a Participant. Each act taken by Mr. Lathen was a step taken pursuant to his actual and apparent authority as the principal and managing member of EACM and/or as a "nominee" on behalf of the Fund pursuant to the Investment Management Agreement. It cannot reasonably be argued that Mr.

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[7] Investment Advisers Act Release No. 2333 (December 2, 2004).

[8] In the Dodd-Frank Act, Congress did repeal Section 203(b)(3), and did adopt amendments to the Advisers Act that had the effect of requiring hedge fund advisers to register with the SEC and/or the appropriate state securities administrator, but it did not change the conclusion in *Goldstein* that the hedge fund was the investment adviser's "client" wherever the term "client" appears in the Advisers Act.

[9] EACM never reported providing investment advice to more than two individual advisory accounts in any of the Form ADVs that it filed.

Lathen did not have the authority to obtain possession of the funds and securities held in the JTWROS account. Therefore, EACM had custody of the Fund's funds and securities. Item 9 in every Form ADV filed by EACM acknowledges that it has custody of the Fund's funds and securities. Item 7 further lists the prime brokers, banks, and clearing firms that were acting as custodians for the Fund's assets at the direction of EACM. Finally, EACM's compliance manual states that EACM has custody of the funds and securities of the Fund.[10]

D. The Assets in the JTWROS Accounts Represented "Funds and Securities" of the Client

a. The Period of Time under the Investment Management Agreement

As noted above, the Investment Management Agreement causes Mr. Lathen to be a "nominee" of the Fund, and all attributes of ownership of the assets of the Fund are deemed to be possessed exclusively by the Fund and not by Mr. Lathen, as expressly set forth in that Agreement. Therefore, Mr. Lathen cannot have any beneficial interest in the assets in the JTWROS accounts.

Similarly, the restrictions imposed on Participants in the Participant Agreements and the Limited Powers of Attorney -- which, in some cases explicitly restricted the exercise of any ownership rights, and in all cases constrained the Participant from preventing Mr. Lathen from transferring or dissipating any or all of the assets held in the brokerage accounts -- are inconsistent with any notion that a Participant is a true or beneficial owner of the assets in the affected JTWROS account. Indeed, Mr. Lathen transferred assets between various JTWROS accounts that were nominally identified as belonging to different individual Participants without the knowledge or consent of any of the Participants. Accordingly, the assets in the JTWROS accounts could not reasonably be characterized as the funds and securities of the Participants.[11]

As described more fully above, the manner in which amounts received by Mr. Lathen from the JTWROS brokerage accounts were reported on Mr. Lathen's personal income tax returns is also inconsistent with the notion that Mr. Lathen himself has any true economic interest personally in the assets in the JTWROS accounts. Rather, Mr. Lathen reported as his personal income only those amounts received from the JTWROS accounts that were allocated by the Fund to the capital account of EACA. The offsetting entry or deduction in his personal tax

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[10] Even if one were to assume *arguendo* that the Discretionary Line and Profit Sharing Agreements were assets of the Fund, Mr. Lathen had the actual authority to obtain possession of those and, thus, EACM had custody of those assets for purposes of the Custody Rule.

[11] Even if one were to ignore *arguendo* the restrictions imposed on the Participants in the Participation Agreements and the Limited Powers of Attorney and nonetheless treat the Participants as owning some portion of the funds and securities held by the JTWROS accounts, the Custody Rule requires that the custody account contain only the client's funds and securities under the name of the investment adviser for the benefit of the client. If certain funds and securities in the JWROS accounts were assumed *arguendo* to be held for the Participants, then EACM would still not have satisfied the requirements of the Custody Rule in that the funds and securities of the Fund would have been improperly commingled with the funds and securities of the Participants who were not "clients."

returns as "nominee" for the amounts due to the Fund under the Profit-Sharing Agreement meant that (a) those amounts were deemed to be income earned by the Fund, to be allocated to its investors pursuant to the terms of their individual investments in the Fund, and (b) for purposes of the tax character of the income the amounts received by the Fund from the JTWROS account were treated as if they had been earned directly by the Fund. The various Federal and state tax returns for all relevant parties were prepared by an independent public accounting firm. So the assets held in the brokerage accounts could not reasonably be characterized as the funds and securities of Mr. Lathen.

Moreover, the treatment of assets in the JTWROS accounts on the Fund's financial statements is wholly consistent with the notion that the Fund is the sole beneficial owner of the assets held in those brokerage accounts. As more fully described above, the financial statements for the Fund were audited and certified by an independent public accounting firm and treat the assets held in the JTWROS accounts as if the Fund owned all of the assets in the JTWROS accounts. For purposes of Form ADV, EACM calculated its regulatory assets under management (Item 5F of Form ADV) as if the Fund owned all of the assets held in the JTWROS accounts. In short, the assets in the JTWROS accounts were treated in the Fund's financial statements, and in Form ADV, as funds and securities of the Fund.

The facts and the actions of Mr. Lathen, the Participants, and the independent public accountants for the Fund in preparing Form ADV and the financial statements and the tax returns for Mr. Lathen and the Fund are entirely consistent with the conclusion that the assets held in the JTWROS accounts were the funds and securities of the Fund (not Mr. Lathen and not the Participants) and pursuant to the Custody Rule should have been held in a proper custody account in the name of the Fund.

b. The Period of Time after the Execution of the Profit-Sharing Agreement and of the Discretionary Line Agreement

As described above, Mr. Lathen executed a new set of agreements, the Profit-Sharing Agreement and the Discretionary Line agreement, in 2013. Notwithstanding the execution of these two agreements, the behavior described immediately above regarding the activities of Mr. Lathen with respect to the operation of the JTWROS accounts -- and how those activities were treated by the Fund, EACM, EACA, and Mr. Lathen with respect to the disclosure in the Form ADV, the financial statements prepared for the Fund, and the tax returns prepared for the Fund and for Mr. Lathen -- did not change in any material respect. In fact, Mr. Lathen continued as if nothing substantive had changed as a result of executing those agreements, and as such the JTWROS accounts should have been custodied in the name of the Fund.

Further, the agreements purport to describe a lender/borrower relationship, but as described above the "loan" was non-recourse in that Mr. Lathen was not personally liable for repayment. Moreover, the totality of these arrangements belie any kind of secured lending between the Fund and Mr. Lathen where the assets in the JTWROS accounts should be viewed as serving as collateral in support of the "advances" or the "notes." Rather, the combination of

promises and understandings entered into by EACM, Mr. Lathen, the Participants, and the Fund should be viewed in the aggregate because that is the economic reality of the situation.[12] It is true that an investor in the Fund would own indirectly an interest in the "advances" or the "notes," but the non-recourse "loan" has little if any economic value and was not the true source of economic return without the services that Mr. Lathen would perform as "nominee" on behalf of the Fund in making investments for the JTWROS accounts that were expected to provide the actual economic return for the venture through the death of the Participant. Indeed, the interest "paid" on the "notes" was merely an accrual entry in the Fund's accounting records, and was offset in its entirety when Mr. Lathen distributed the net proceeds of the JTWROS account to the Fund. In other words, from an investment perspective the Fund's ownership of the "advances" or "notes" becomes an economically valuable asset only when tied to the investment advisory services that EACM/Lathen would exercise on behalf of the Fund's investors in selecting Survivor Option Investments that would generate the interest income and capital gains. Viewed in that manner, the Fund has a direct economic interest that consists of the "advances" or "notes" plus the assets in the JTWROS accounts, all of which taken together form an integrated investment program for the Fund. Indeed, the Fund possessed the only beneficial interest in whatever return could be earned from the JTWROS accounts, less the amount that was allocated by the Fund to EACA's capital account. Therefore, the "advances" or "loans" and the related agreements, and all of the assets in the JTWROS accounts, were subject to the Custody Rule and should have been held in a property custody account in the name of the Fund.

E. Characterizing the Money Received by Mr. Lathen as an "Advance" or Pursuant to a "Note" Has No Legal Consequences Because Both Are Evidences of Indebtedness and Thus Are "Securities" for Purposes of the Advisers Act and the "Note" Should Have Been Held in a Proper Custody Account

Even if one were to take the "advances" under the Investment Management Agreement, and "notes" under the Discretionary Line Agreement and related agreements at face value, and to argue that those were the only "assets" of the Fund for purposes of the Custody Rule, those "assets" were "securities" that were subject to the Custody Rule and should have been held in a proper custody account. The definition of "security" in Section 202(a)(18) of the Advisers Act includes any "note," "evidence of indebtedness," or "certificate of interest or participation in any profit-sharing scheme," and thus would include both the "advances" and the "notes." Unlike the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("Exchange Act"), the Advisers Act and the Investment Company Act of 1940 do not have any exclusions for those kinds of instruments from the definition of "security" and the operation of those statutes. On their face, both the "advances" and the "notes" are evidences of indebtedness and thus both are "securities" subject to the Custody Rule.

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[12] The U.S. Supreme Court enunciated the "economic realities" test in *United Housing Foundation, Inc., v. Forman*, 421 U.S. 837 (1975) (*"Forman"*). In *Forman*, the plaintiff alleged that shares of stock in a state subsidized and supervised nonprofit housing cooperative were "securities." The Court cited one of its own previous decisions in stating that, "[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality." *See generally*, RICHARD W. JENNINGS, HAROLD MARSH, JR., JOHN C. COFFEE, JR., & JOEL SELIGMAN, SECURITIES REGULATION, at 319-324 (8th ed. 1998).

The decision in *Reves v. Ernst & Young*, 494 U.S. 110 (1990) ("*Reves*"), sets forth an analytical framework for determining whether an obligation is a "note" for purposes of the definition of "security" in the Exchange Act. Under *Reves*, every "note" is a "security" unless the "family resemblance" test suggests otherwise because of (i) the motives of the buyer and seller in entering into it and the buyer is primarily interested in the profit that the note is expected to generate, (ii) the plan of distribution, (iii) the reasonable expectation of the investing public, and (iv) the existence of another regulatory scheme that significantly reduces the risk of the instrument. That analytical framework is generally regarded as applicable only to the narrow question of whether a "note" is a "security" for purposes of the Exchange Act, not the Advisers Act. However, even if *Reves* case applied in these circumstances, these "notes" would surely be considered "securities" because the motive of the buyer is the profit to be earned from holding the "note" (unlike a commercial loan from a bank), the "note" is intended for speculation or investment, the expectations of the holder are receipt of an investment return, and there is no other regulatory scheme that would reduce the risk of the "note." Even if a court were to disagree with this application of the *Reves* test in this context, there can be no serious doubt that the "advances" and the "notes" were "securities" subject to the Custody Rule because of the more inclusive definition of "security" in the Advisers Act.

Because the "advances" or "notes" are clearly "securities" under the Advisers Act and thus were subject the requirements of the Custody Rule, they also should have been held in a custody account by an appropriate custodian in the manner required by the Custody Rule.[13] None of the evidence that has been made available to me suggests that the "advances" or "notes" were held by a proper custodian in an account that identified the Fund as the beneficial owner. There are certain exceptions in the Custody Rule that do not require compliance with the Custody Rule in situations where the security is not issued in a certificated form, *i.e.*, a private placement effected for a private fund. That exception would not apply in these circumstances because each "note" was physically issued in the form of a certificate and was thus fully capable of being possessed by a proper custodian.

[13] To the extent that it is being argued that the "advances" and/or "notes" are not a "security" for purposes of the Advisers Act and that those are the only assets owned by the Fund, then it is unclear how EACM was ever eligible to register with the SEC under the Advisers Act since its sole client would not have had any Regulatory Assets Under Management.

V. Conclusion

For purposes of the Advisers Act, the Fund was EACM's "client" and was its only client, and all of the assets held in the JTWROS accounts (i) were funds or securities of the Fund, (ii) were subject to the Custody Rule, and (iii) should have been held in a proper custody account. For all of the reasons set forth above, the Fund should have been listed as the client on the JTWROS accounts.

VI. Caveat

In this report, I have set forth my legal analysis of the law and applied the law to the facts. I reserve the right to expand, amend, and/or change this report based upon additional information that may be subsequently provided to or obtained by me.

Martin E. Lybecker — November 7, 2016

Exhibit 1. Resume

RESUME

MARTIN E. LYBECKER

DATE OF BIRTH: February 11, 1945

MARITAL STATUS: Married; Two Children

EMPLOYMENT:

Partner
Perkins Coie LLP
Suite 600
700 Thirteenth Street, N.W.
Washington, D.C. 20005
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(202) 654-9696
MLybecker@perkinscoie.com

LEGAL EDUCATION:

University of Pennsylvania School of Law
LL.M. degree, May 1973

Graduate Fellow, Center for the Study of Financial Institutions and the Securities Markets, University of Pennsylvania, 1971-1972

New York University School of Law
LL. M. degree (in Taxation), June 1971

University of Washington School of Law
J.D. degree, June 1970

Member, Washington State, District of Columbia, and Pennsylvania Bars; American Bar Association; U.S. Court of Appeals for the District of Columbia Circuit, and U.S. District Court for the District of Columbia

PRE-LEGAL EDUCATION:

University of Washington School of Business Administration
B.B.A. degree, June 1967
Major: Accounting; Minor: History
Beta Alpha Psi (Accounting Honorary) Fraternity

LEGAL AND ACADEMIC EXPERIENCES:

Adjunct Professor of Law
Georgetown University Law Center
Washington, D.C.
2015-

Senior Lecturing Fellow in Law
Duke University
Durham, North Carolina
2000-2015

Partner
Wilmer Cutler Pickering Hale and Dorr LLP
Washington, D.C.
2002-2010

Partner, Co-Chair, Financial Services Group
Ropes & Gray LLP
Washington, D.C.
1987-2002

Partner
Drinker Biddle & Reath LLP
Washington, D.C.
1981-1987

Associate Director
Division of Investment Management
Securities and Exchange Commission
Washington, D.C.
1978-1981

Visiting Associate Professor of Law
Duke University
Durham, North Carolina
1977-1978

Visiting Professor of Law
University of North Carolina
Chapel Hill, North Carolina
Fall 1977

Associate Professor of Law
State University of New York at Buffalo
Buffalo, New York
1975-1978 (on leave, 1977-1978)

Adjunct Professor of Law
Georgetown University Law Center
Washington, D.C.
1974-1975, 1980-1981

Attorney, Office of Chief Counsel
Division of Investment Management Regulation
Securities and Exchange Commission
Washington, D.C.
1972-1975

Lecturer, Department of Accounting
School of Business Administration
University of Washington
Seattle, Washington
1967-1970

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Panel Member, The Investment Company Act of 1940 and Investment Company Compliance, ALI-ABA Course of Study, Emory University School of Law, Atlanta, Georgia, March 20-22, 1975

Panel Member, Federal Securities Market Regulation: The Banks, the SEC and the Bank Regulators, ALI-ABA Course of Study, Washington, D.C., October 22- 23, 1976

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Panel Member, The SEC Speaks in 1979, PLI, Washington, D.C., March 2-3, 1979

Panel Member, FBA-CCH Mutual Funds and Investment Management Conference, San Diego, California, March 20-23, 1979

Informal Remarks Before the Section of Banking, Corporation, and Business Law of the Philadelphia Bar Association, Philadelphia, Pennsylvania, June 20, 1979

Co-Chairman, Insurance and the Federal Securities Laws, PLI, New York City and San Francisco, California, June 28-29, 1979 and July 12-13, 1979, with James F. Jorden and Paul J. Mason

Panel Member, SEC Faces the Eighties, OTC Congress '79, Washington, D.C., September 20, 1979

Discussant, Regulatory Aspects of New or Expanding Bank Securities Activities, Conference on Regulating the Securities Activities of Commercial Banks, NYU Graduate School of Business Administration, New York City, October 11, 1979

Informal Remarks Before the Closed-End Bond Fund Conference, New Orleans, Louisiana, October 29, 1979

Panel Member, Regulatory Restrictions on Institutional Access to the Futures Market, FBA-CCH Financial Futures Conference, Washington, D.C., November 1, 1979

Testimony Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce on H.R. 3991: The Small Business Investment Incentive Act of 1979, Washington, D.C., November 9, 1979, with SEC Commissioner Philip Loomis, Jr., and Sydney H. Mendelsohn, Director, SEC Division of Investment Management

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Discussant, Pooled Investments and the Securities Laws, National Trust Conference, American Bankers Association, Washington, D.C., January 29, 1980

Panel Member, Investment Management Regulation, The SEC Speaks in 1980, PLI, Washington, D.C., March 7-8, 1980

Panel Member, FBA-CCH Mutual Funds and Investment Management Conference, Phoenix, Arizona, March 24-27, 1980

Participant, Roundtable on Money Management and Investment Advisory Activities: Recent Developments, University of Pennsylvania Law School Center for the Study of Financial Institutions, Philadelphia, Pennsylvania, April 10, 1980

Informal Remarks Before the Association of Publicly Traded Investment Funds, New York City, May 2, 1980

Informal Remarks Before the Executive Committee, Trust Division, American Bankers Association, Washington, D.C., May 20, 1980

Testimony Before the NASAA/NAIC Joint Regulatory Insurance Products Study, Madison, Wisconsin, August 13, 1980

Discussant, "Small Business Investment Incentive Act of 1980," and Panel Member, Workshop on the New Federal Securities Law, 22d Annual Meeting of the National Association of Small Business Investment Companies, Boca Raton, Florida, October 18, 1980

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Panel Member, Bank Regulation vs. SEC Regulation of Functionally Equivalent Activities, FBA Third Annual Conference on Current Issues in the Financial Markets, Washington, D.C., May 13-14, 1982

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Panel Member, An Analysis of the SEC Regulation of Thrift Institution Trust and Investment Services, Securities Activities of Savings and Loan Associations, Fifth Annual National Savings and Loan League Lawyers Seminar, Washington, D.C., December 5-8, 1982

Panel Member, Legal Aspects of Portfolio Management, Investment Company Institute 1983 Money Market Compliance Conference, Washington, D.C., February 9-10, 1983

Panel Member, Glass-Steagall, Savings Banks, and the Securities Business, National Association of Mutual Savings Banks Law Seminar, New York City, April 5, 1983

Panel Member, Legal Aspects of Bank Account-Related Money Market Funds, Closed-End Real Estate Funds, and Collective Investment Funds for IRAs, ABA National Institute on Financial Institutions, Boston, Massachusetts, April 27-28, 1983

Legislative Prospects for Deregulation of the Banking Industry, Address Before the Arizona State University Law School Foundation Education Seminar, Phoenix, Arizona, November 3, 1983

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Panel Member, Compliance Matters, 1983 SEC/ICI Procedures Conference, Washington, D.C., November 18, 1983

Panel Member, Financial Services Update: Where Are We Going . . . and How Are We Going to Get There?, Joint Program of the Committees on Developments in Investment Services and Federal Regulation of Securities, ABA Section of Corporation, Banking and Business Law, Washington, D.C., November 18, 1983

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Panel Member, The Case For and Against Financial Services Deregulation, National Association of Independent Insurers 30th Annual Workshop, Salt Lake City, Utah, March 26, 1984

Chairman, The Real Revolution - The Effect of Changing State Laws on the Financial Services Industry, Program of the Committee on Developments in Investment Services, ABA Section of Corporation, Banking & Business Law, Washington, D.C., November 15, 1984

Financial Institutions and the Federal Securities Laws -- When Do CDs and Other Instruments Become Securities?, Address before the National Council of Savings Institutions 1985 Lawyers Seminar, Washington, D.C., February 6, 1985

Panel Member, Financial Services Legislation: Outlook and Update; Bush Task Group Report: Prospects, Joint Program of the Committees on Developments in Investment Services and Federal Regulation of Securities, ABA Section of Corporation, Banking and Business Law, Los Angeles, California, March 29, 1985

Discussant, Insurance and Banking: The "Bank" Loophole in the Bank Holding Company Act, State Banking Regulation and Deregulation, Law & Business, Inc., Washington, D.C., June 20-21, 1985

Discussant, SEC Rules 3b-9 and 12b-1, Policy Conference on Distribution, Research and Management Fee Issues, National Center on Financial Services, School of Law, University of California, Berkeley, California, November 14-15, 1985

Speaker, SEC Rule 3b-9, SEC Developments, National Council of Savings Institutions 1986 Lawyers Seminar, Washington, D.C., January 21, 1986

Panel Member, Mutual Funds: Strategic and Profit Considerations, 1986 American Bankers Association National Trust and Financial Services Conference, Orlando, Florida, February 4, 1986

Panel Member, Rule 3b-9 Seminar, American Institute of Banking, New York City, March 26, 1986

Panel Member, Legislative and Regulatory Issues and Limitations in the Mutual Fund Industry, Conference on Mutual Funds, Institute for International Research, New York City, May 6, 1986

Panel Member, Profitable Utilization of Mutual Funds in a Bank, Ohio Bankers Trust Convention, Dublin, Ohio, May 14, 1986

Discussant, Insurance Companies and Savings Institutions, The New Broker-Dealers, Program of the Committee on the Federal Regulation of Securities, ABA Section of Corporation, Banking and Business Law, New York City, August 12, 1986

Co-Chair, Bank Securities Activities, Program of the Committee on Developments in Investment Services, ABA Section of Corporation, Banking and Business Law, St. Louis, Missouri, April 10, 1987

Co-Chair, Latest Developments in Securitizing Financial Assets, Executive Enterprises, Inc., New York City, October 5-6, 1987, with Tamar Frankel and Peter J. Wallison

Panel Member, Investment Advice and Mutual Funds, Banks and Securities - The Dismantling of Glass-Steagall, Inter-Financial Association, Washington, D.C., October 6-7, 1987

Speaker, Federal Banking and Securities Law Aspects of Securitizing Assets, 23rd Annual Banking Law Institute, Arlington, Virginia, May 5, 1988

Panel Member, US-Canadian Accord: Effects on Financial Institutions, ABA Business Law Section Annual Meeting, Toronto, Canada, August 10, 1988

Speaker, How to Establish a Private Label Mutual Fund, Bank Marketing Association's Trust and Personal Financial Services Marketing Conference, Washington, D.C., September 27, 1988

Speaker, The AMBAC Case, Banking Law Committee of the Federal Bar Association, Washington, D.C., December 12, 1988

Speaker, Bank Holding Company Act Issues, National Council of Savings Institutions 1989 Lawyers Conference, Washington, D.C., January 30, 1989

Speaker, Bank Investment Company Activities, SEC New York Regional Office Training Program, New York City, February 21, 1989.

Commentator, New Products and Services: Europe 1992, Committee on Developments in Investment Services, ABA Section of Corporation, Banking, and Business Law, Washington, D.C., November 16, 1989

Speaker, Savings Institution Trust and Investment Services: New Opportunities for Fee Income, National Council of Savings Institutions 1990 Lawyers Conference, Washington, D.C., January 30, 1990

Speaker, Bank Securities Activities, Banking Law Committee of the Boston Bar Association, Boston, Massachusetts, February 6, 1990

Speaker, The TIAA-CREF Settlement, Seminar on "Retirement Issues: The Future" by Tax-Exempt Services Division of Fidelity Investments, Baltimore, Maryland, March 8, 1990; Phoenix, Arizona, April 27, 1990

Speaker, Bank Mutual Fund Services, Committee on Banking Law, ABA Section of Business Law; Speaker, Bank Insurance Activities, Committee on Developments in Investment Services, Subcommittee on Insurance Securities, Federal Regulation of Securities, ABA Section of Business Law, Boston, Massachusetts, April 6-7, 1990

Speaker, Converting Common and Collective Funds into Mutual Funds: A Legal Perspective, American Bankers Association 1990 Mutual Funds Workshop, Washington, D.C., June 25-26, 1990

Moderator, Bank Insurance, Committee on Developments in Investment Services, ABA Section of Business Law, Colonial Williamsburg, Virginia, April 13, 1991

Speaker, Derivative Securities, Committee on Developments in Investment Services, ABA Section of Business Law, Atlanta, Georgia, August 12, 1991

Speaker, Surviving an SEC Investment Adviser Inspection, Security Analysts of San Francisco, San Francisco, California, June 2, 1992

Speaker, 1940 Act Study, Seminar sponsored by Ropes & Gray, Boston, Massachusetts, June 16, 1992

Speaker, 1940 Act Issues for Investment Advisers, ICI/SEC Procedures Conference, Washington, D.C., December 3, 1992

Speaker, Institutional Investors, Program sponsored by the Copenhagen Stock Exchange, Copenhagen, Denmark, March 18, 1993

Speaker, New Directions in Bank Regulatory Enforcement; Speaker, An Update on EC Financial Services Regulatory Initiatives Affecting Banks, Broker-Dealers, Investment Company, and Insurance Products, ABA Section of Business Law, New Orleans, Louisiana, April 15, 1993

Speaker, Recent Bank Mutual Fund Developments, American Bankers Association 1993 Mutual Funds Conference, Washington, D.C., June 14, 1993

Moderator, Evolving Regulation of International Investment Services, Committee on Developments in Investment Services, ABA Section of Business Law, New York City, August 9, 1993

Moderator, Banks Selling Mutual Funds and Annuities, Joint Program of the Committees on Developments in Investment Services, Banking Law, and Federal Regulation of Securities, ABA Section of Business Law, Washington, D.C., November 13, 1993

Moderator and Speaker, Current Legal Developments for Bank Mutual Funds and Bank Insurance, FBA-CCH Mutual Funds and Investment Management Conference, Phoenix, Arizona, March 22, 1994

Panel Member, Bank Insurance Activities, Subcommittee on Bank Holding Company Activities of the Committee on Banking Law, ABA Section of Business Law, Washington, D.C., April 7, 1994

Speaker and Moderator, Current Legal Developments, General Session on Regulatory Perspectives on Responsibility, American Bankers Association 1994 Mutual Funds Workshop, Washington, D.C., May 23, 1994

Speaker, Current Legal Developments Effecting Bank Distribution of Mutual Funds, Developments in Mutual Fund Regulation, Executive Enterprises, Inc., New York City, September 22, 1994

Speaker, Some Reflections on the Implications of the Mellon-Dreyfus Transaction, Trust Research Seminar, The Secura Group, Washington, D.C., September 29, 1994

Moderator, Regulatory Developments Regarding Derivatives: An Odyssey Through Recent Mutual Fund and Other, Related Experiences, Committee on Developments in Investment Services, ABA Section of Business Law, Washington, D.C, November 11, 1994

Speaker, New Mutual Fund and Insurance Opportunities for Banks, American Bankers Association 1995 National Trust and Financial Services Conference, Orlando, Florida, February 7, 1995

Speaker, Foreign Investment Advisers and the Extraterritoriality of the Investment Advisers Act of 1940, ALI-ABA Investment Advisers Regulation Course of Study, Washington, D.C., February 10, 1995

Moderator, New Challenges in Bank Distribution of Retail Non-Deposit Products, Committee on Developments in Investment Services, Panelist, Bank Retail Distribution Activities, Committee on Banking Law, ABA Section of Business Law, San Antonio, Texas, March 23-24, 1995

Speaker, Current Issues in Fiduciary Asset Management, Speaker, Mutual Fund Compliance Concerns, Fiduciary Risk Management Conference, Bank Administration Institute, San Antonio, Texas, April 10-11, 1995

Speaker, Bank Distribution, Developments in Mutual Fund Regulation, Executive Enterprises, Inc., New York City, April 24, 1995

Speaker, Bank-Advised Mutual Funds, Trust Conference, Federal Financial Institutions Examination Council, Atlanta, Georgia, August 7, 1995

Speaker, Bank Insurance Developments and Litigation, 1995 Treasury and Capital Markets Legal Issues Conference, Financial Markets Association, Washington, D.C., September 21, 1995

Speaker, Bank Involvement in Mini-Accounts, Mini-Trusts, and Asset Allocation Services, Trust Research Seminar, The Secura Group, Washington, D.C., September 28, 1995

Speaker, Demystifying Derivatives, Investment Management Regulation, ALI-ABA Advanced Course of Study, Washington, D.C., October 12, 1995

Speaker, Demystifying Derivatives, 1995 Bank Mutual Fund Compliance Conference, Bank Administration Institute Foundation, Washington, D.C., October 26, 1995

Moderator, A Proliferation of Investment Management Media: Are They All Here to Stay?, Committee on Developments in Investment Services and Subcommittee on Investment Companies and Investment Advisers of the Committee on Federal Regulation of Securities, ABA Section of Business Law Fall Meeting, Washington, D.C., November 10, 1995

Speaker, New Bank Securities Activities, Investment Adviser Regulation, ALI-ABA Course of Study, Washington, D.C, February 1-2, 1996

Moderator, Regulatory Update on Recent SEC, NASD, and OCC Regulatory Actions, Ensuring Mutual Fund Sales Compliance Conference, Global Business Research, Ltd., New York City, February 28-29, 1996

Speaker, Demystifying Derivatives, Bank Mutual Fund Compliance Conference, Bank Administration Institute, Orlando, Florida, March 18-20, 1996

Speaker, Current Issues in Fiduciary Asset Management, Fiduciary Risk Management Conference, Bank Administration Institute, New Orleans, Louisiana, April 15-16, 1996

Speaker, Bank Insurance Litigation and Developments, Transforming Bank Annuity and Insurance Distribution, International Quality & Productivity Center, Washington, D.C., June 24-25, 1996

Speaker, Current Issues in Fiduciary Asset Management, Trust Conference, Federal Financial Institutions Examination Council, Minneapolis, Minnesota, July 29-30, 1996

Moderator, After *VALIC* and *Barnett Banks*: What's Next In Bank Insurance Activities?, Committee on Developments in Investment Services, ABA Section of Business Law Annual Meeting, Orlando, Florida, August 3, 1996

Speaker, Fund of Funds Developments, Investment Management Regulation, ALI-ABA Advanced Course of Study, Washington, D.C, October 17-18, 1996

Speaker, Current Issues in Fiduciary Asset Management, National Association of Trust Audit and Compliance Professionals, Cleveland, Ohio, October 22, 1996

Speaker, Variable Rate Notes, Structured Notes, And Cash Infusions: Strategies for Dealing with Troubled Securities after Orange County, Tax-Exempt Money Market Funds, IBC Conference, New York City, October 30, 1996

Moderator, Cyberspace: The New Frontier for Investment Companies and Investment Advisers, Committee on Developments in Investment Services, ABA Section of Business Law Fall Meeting, Washington, D.C., November 8, 1996

Speaker, Bank Insurance Litigation and Related Administrative Law Developments, 1997 American Bankers Association National Trust and Private Banking Conference, Washington, D.C., January 27, 1997

Speaker, New Developments with Private Investment Companies and Fund of Funds, Investment Adviser Regulation, ALI-ABA Advanced Course of Study, Washington, D.C., January 30-31, 1997

Speaker, Current Issues in Fiduciary Asset Management, Trust Audit and Compliance Seminar, National Association of Trust Audit and Compliance Professionals, Inc., Scottsdale, Arizona, April 21, 1997

Panelist, How to Prepare for an SEC Inspection, Preparing for and Surviving the New SEC Inspection Program, PLI, Washington, D.C., June 9, 1997

Speaker, Investment Management Update, Committee on Banking Law, ABA Section of Business Law Annual Meeting, San Francisco, California, August 3, 1997

Speaker, Fund of Funds and Private Investment Companies: The Two "Hot" New Products in Investment Management, The Trust Research Seminar, The Secura Group, Washington, D.C., September 24, 1997

Speaker, Fund of Funds and Mini-Accounts, Investment Management Regulation, ALI-ABA Advanced Course of Study, Washington, D.C., October 16, 1997

Speaker, Current Issues in Fiduciary Asset Management, Trust Audit and Compliance Seminar, National Association of Trust Audit and Compliance Professionals, Inc., Newark, New Jersey, October 28, 1997

Chair, Acquiring Nonbanking Activities: Opportunities for the Wary, Committee on Developments in Investment Services and Committee on Federal Regulation of Securities, ABA Section of Business Law, Washington, D.C., November 7, 1997

Speaker, Retail Securities Sales, Committee on Banking Law, ABA Section of Business Law, Baltimore, Maryland, November 14, 1997

Speaker, Variable Rate Notes, "Structured" Notes, And Cash Infusions: Strategies for Dealing with Troubled Securities after Orange County, 1997 ICI Securities Law Procedures Conference, Washington, D.C., December 4, 1997

Speaker, Bank Advisory Activities, Investment Adviser Regulation, ALI-ABA Advanced Course of Study, Washington, D.C., February 5, 1998

Speaker, Current Issues in Fiduciary Asset Management, Trust Audit and Compliance Seminar, National Association of Trust Audit and Compliance Professionals, Inc., Richmond, Virginia, March 12, 1998

Co-Chair, The Proper Role of the Federal Reserve Board, Committee on Banking Law, ABA Section of Business Law, Spring Meeting, St. Louis, Missouri, April 4, 1998

Co-Chair and Speaker, Thrift Trust and Investment Advisory Activities: New Developments, Committees on Developments in Investment Services and Banking Law, ABA Section of Business Law, Spring Meeting, St. Louis, Missouri, April 4, 1998

Speaker, Section 28(e): "Soft Dollars" Revisited, Current Issues in Fiduciary Asset Management, Annual Meeting of the National Association of Trust Audit and Compliance Professionals, Inc., New Orleans, Louisiana, April 22, 1998

Speaker, Recent Developments in Banking Law, Committee on Banking Law, ABA Section of Business Law Annual Meeting, Toronto, Canada, August 3, 1998

Speaker, Current Issues in Fiduciary Asset Management, Trust Audit and Compliance Seminar, Regional Meeting of the National Association of Trust Audit and Compliance Professionals, Inc., Chicago, Illinois, September 16, 1998

Speaker, Bank Advisory Activities, Investment Management Regulation, ALI-ABA Advanced Course of Study, Washington, D.C., October 15, 1998

Speaker, Section 28(e): "Soft Dollars" Revisited, Personal Securities Transactions, Trust Audit and Compliance Seminar, Regional Meeting of the National Association of Trust Audit and Compliance Professionals, Inc., Cleveland, Ohio, October 23, 1998

Speaker, Retail Sales of Nondeposit Products, Committee on Banking Law, ABA Section of Business Law Fall Meeting, Richmond, Virginia, October 30, 1998

Speaker, Pricing an Investment Company's Assets, 5th Annual Mutual Fund Compliance Forum, Institute for International Research, New York City, November 9, 1998

Moderator, Prior Performance of Investment Advisers, Committee on Developments in Investment Services, ABA Section of Business Law Fall Meeting, November 13, 1998

Speaker, Current Issues in Bank and Thrift Investment Advisory Activities, Investment Advisers Regulation, ALI-ABA Course of Study, Washington, D.C., January 28, 1999

Lecture, Current Issues in Retail Sales of Nondeposit Investment Products by Banks, Morin Center for Banking Law, Boston University School of Law, Boston, Massachusetts, February 4, 1999

Co-Moderator, Mutual Fund Marketplaces, Committees on Developments in Investment Services and Federal Regulation of Securities, ABA Section of Business Law, Spring Meeting, San Francisco, California, April 16, 1999

Speaker, Thrift Trust and Investment Management Activities, Chief Counsel's Law Conference, Office of Thrift Supervision, Arlington, Virginia, April 27, 1999

Speaker, Current Developments in Personal Securities Transactions, Soft Dollars, Fiduciary Asset Management, and Pricing Investment Company Securities, Annual Meeting of the National Association of Trust Audit and Compliance Professionals, Inc., San Diego, California, May 5, 1999

Speaker, Investment Company Issues in Corporate and Capital Market Transactions: Exclusions under the '40 Act, Committee on Developments in Investment Services, ABA Annual Meeting, Atlanta, Georgia, August 7, 1999

Speaker, Soft Dollars, Regional Meeting of the National Association of Trust Audit and Compliance Professionals, Inc., Dallas, Texas, September 16, 1999

Moderator, Regulatory Update: Understanding Current SEC and NASD Regulatory Initiatives Impacting Mutual Fund Groups, Mutual Fund Compliance, Institute for International Research, Washington, D.C., October 18, 1999

Speaker, Mutual Fund Marketplaces, Investment Management Regulation, ALI-ABA Advanced Course of Study, Washington, D.C., October 22, 1999

Moderator, Financial Services Modernization Legislation, Committee on Developments in Investment Services, ABA Section of Business Law Fall Meeting, Washington, D.C., November 12, 1999

Co-Chair, Your Client and Financial Services Modernization, ABA Business Law Section Satellite Seminar, Washington, D.C., January 18, 2000, with Karol K. Sparks

Speaker, New Securities, Mutual Fund, and Trust Activities after Gramm-Leach-Bliley Act of 1999, Investment Advisers Regulation, ALI-ABA Course of Study, Washington, D.C., January 28, 2000

Co-Chair, Financial Services Modernization: The Gramm-Leach-Bliley Act of 1999, ALI-ABA Course of Study, Washington, D.C., February 3-4, 2000, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Speaker, New Securities, Mutual Fund, and Trust Activities after the Gramm-Leach-Bliley Act of 1999, 2000 Annual Convention, Independent Community Bankers Association, San Antonio, Texas, March 7, 2000

Moderator, E-Commerce and Financial Services, Committees on Banking Law, Consumer Financial Services, and Developments in Investment Services, ABA Section of Business Law, Spring Meeting, Columbus, Ohio, March 24, 2000

Speaker, New Securities, Mutual Fund, and Trust Activities after the Gramm-Leach-Bliley Act of 1999, Banking and Commercial Lending Conference, ALI-ABA Course of Study, San Francisco, California, August 19, 2000

Speaker, Mutual Fund Advertising, "Soft Dollars," and Personal Securities Transactions, Regional Meetings, National Association of Trust, Audit, and Compliance Professionals, Chicago, Illinois, September 18, 2000, and Cleveland, Ohio, October 23, 2000

Speaker, New Securities, Mutual Fund, and Trust Activities after the Gramm-Leach-Bliley Act of 1999, IIR Mutual Fund Sales and Operational Compliance Conference, Washington, D.C., September 26, 2000

Speaker, Inadvertent Investment Companies, Investment Management Regulation, ALI-ABA Course of Study, Washington, D.C., October 27, 2000

Moderator, The Gramm-Leach-Bliley Act: One Year Later, Committee on Developments in Investment Services, ABA Section of Business Law Fall Meeting, Washington, D.C., November 10, 2000

Speaker, "Status" Questions under the Investment Company Act of 1940 In Light of E-Commerce Technology and Internet Developments, Committees on Developments in Investment Services and Federal Regulation of Securities, ABA Section of Business Law Fall Meeting, Washington, D.C., November 10, 2000

Speaker, New Financial, Securities, Mutual Fund, and Trust Activities after the Gramm-Leach-Bliley Act of 1999, Mid-South Commercial Law Institute, Nashville, Tennessee, November 17, 2000

Speaker, New Securities, Mutual Fund, and Trust Activities after Gramm-Leach-Bliley Act of 1999, Investment Advisers Regulation, ALI-ABA Course of Study, Washington, D.C., January 26, 2001

Co-Chair, Financial Services Modernization: The Gramm-Leach-Bliley Act of 1999, One Year Later, ALI-ABA Course of Study, Washington, D.C., February 15-16, 2001, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Co-Moderator, ETFs, Folio[fn], and Incubators: New Competition for Traditional Investment Products, Committee on Developments in Investment Services, ABA Section of Business Law Spring Meeting, Philadelphia, Pennsylvania, March 23, 2001

Speaker, Bank Securities Activities, Gramm-Leach-Bliley Act, ABA Business Law Today National Teleconference Briefing, October 2, 2001

Speaker, New Securities, Mutual Fund, and Trust Activities after the Gramm-Leach-Bliley Act of 1999, Investment Management Regulation, ALI-ABA Course of Study, Washington, D.C., October 12, 2001

Speaker, Legal and Regulatory Update, PriceWaterhouseCoopers 2001 International Banking and Capital Markets Conference, New York City, October 23, 2001

Moderator and Speaker, Investment Adviser Regulation, Gramm-Leach-Bliley Act, "Back to the Fundamentals: Insurance Regulation, Broker-Dealer Regulation, Investment Adviser Regulation," ABA National Institute, Washington, D.C., November 9-10, 2001

Co-Moderator, Best Execution, Fall Meeting of the ABA Committee on Developments in Investment Services, Washington, D.C., November 16, 2001

Speaker, New Securities, Mutual Fund, and Trust Activities after Gramm-Leach-Bliley Act of 1999, Investment Advisers Regulation, ALI-ABA Course of Study, Washington, D.C., February 1, 2002

Co-Chair, Financial Services Modernization: The Gramm-Leach-Bliley Act of 1999, ALI-ABA Course of Study, Washington, D.C., February 7-8, 2002, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Lecturer, Conflict of Interest Provisions in the Federal Securities Laws and Federal Banking Laws, Morin Center for Banking Law, Boston University School of Law, Boston, Massachusetts, February 12, 2002

Co-Chair, The "Gatekeeper Initiative:" The Government's Effort to Impose AML Responsibilities on Lawyers, Committees on Developments in Investment Services, Banking Law, Consumer Financial Services, and Federal Regulation of Securities, Spring Meeting of the ABA Business Law Section, Boston, Massachusetts, April 4, 2002

Speaker, Implementing Investment Policies, Annual Meeting, FIRMA, Scottsdale, Arizona, April 24, 2002

Co-Chair, The Democratization of Hedge Funds and Other Private Equity Investment Vehicles, Committees on Developments in Investment Services and Venture Capital and Private Equity, ABA Annual Meeting, Washington, D.C., August 11, 2002

Speaker, Inadvertent Investment Companies, Investment Management Regulation, ALI-ABA Course of Study, Washington, D.C., October 18, 2002

Speaker, When to Register as an Investment Adviser, Family Office Exchange Fall Forum, Chicago, Illinois, October 22, 2002

Participant, Roundtable on Investment Company Regulation, Oral Histories Program, Securities and Exchange Commission Historical Society, Washington, D.C., December 4, 2002

Speaker, New Securities, Mutual Fund, and Trust Activities after Gramm-Leach-Bliley Act of 1999, Investment Advisers Regulation, ALI-ABA Course of Study, Washington, D.C., January 31, 2003

Co-Chair, Financial Services Modernization 2003: Implementation of The Gramm-Leach-Bliley Act, ALI-ABA Course of Study, Washington, D.C., February 6-7, 2003, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Speaker, Regulatory Overload?, US Institute Washington Forum, Institutional Investor, Washington, D.C., March 3, 2003

Co-Chair, Corporate Governance after Sarbanes-Oxley, Committee on Banking Law, ABA Spring Meeting, Los Angeles, California, April 7, 2003

Speaker, Informal Remarks on Implementation of the Gramm-Leach-Bliley Act, 2003 American Bankers Association Trust Management Association, Inc., Seminar, White Sulphur Springs, West Virginia, May 2, 2003

Discussion Leader, Regional Seminar, Mutual Fund Directors Forum, Washington, D.C., May 21, 2003

Co-Panelist, Regulation and Compliance, U.S. Institute COO/CFO "Best Practices" Workshop, New York City, October 3, 2003

Speaker, Transparency of Broker-Dealer Compensation, Investment Management Regulation, ALI-ABA Course of Study, Washington, D.C., October 17, 2003

Moderator, The Mutual Fund Mess, ABA Banking Law Committee Fall Meeting, Washington, D.C., November 7, 2003

Moderator, Being a PATRIOT: Anti-Money Laundering in a Post 9/11 World, an Audiocast sponsored by the Section of Business Law, Criminal Justice Section, Section of International Law and Practice, Section of Taxation, and the ABA Center for Continuing Legal Education, November 20, 2003

Speaker, New Bank Investment Advisory Activities, Investment Adviser Regulation, ALI-ABA Course of Study, Washington, D.C., January 30, 2004

Keynote Speaker, The Mutual Fund Scandals: the Long and Balanced View, American Bankers Association Trust, Wealth Management & Marketing Conference, Scottsdale, Arizona, March 1, 2004

Moderator, Current Developments, ICAA-IA Week 12th Annual Compliance Summit, Washington, D.C., March 15, 2004

Moderator, Banking Law 101, Institute for the New Business Lawyer; Speaker, The Attorney Conduct Rules and Attorney-Client Privilege in the Complex Organization: the Mutual Fund Example, Committee on Developments in Investment Services; Co-Moderator, The Functionality of Credit, Debit, and Stored Value Cards for Financial Services Lawyers: Cards 101, Co-Sponsored by the Committees on Banking Law and Consumer Financial Services, Spring Meeting, ABA Business Law Section, Seattle, Washington, April 1-3, 2004

Speaker, Transparency of Broker-Dealer Compensation and Securities Laws 101, Fiduciary and Investment Risk Management Association 18th Annual National Training Conference, Las Vegas, Nevada, April 21, 2004

Speaker, Preparation for Regulatory Inquiries, Mutual Funds: The Impact of the Scandals, Gail Weiss & Associates, Washington, D.C., May 4, 2004

Co-Chair, Financial Services Institute 2004, ALI-ABA Advanced Course of Study, Washington, D.C., May 6-7, 2004, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Speaker, Is Your Bank Ready for the SEC Bank Broker Rules (aka the "Push-Out Rules")?, American Bankers Association Telephone Briefing, Washington, D.C., July 20, 2004

Panelist, The View From "Inside the Beltway" -- Regulation, Oversight and the Evolution in Mutual Fund, ETF, and Index Derivative Use, 2nd Annual The Art of Indexing, Washington, D.C., October 1, 2004

Keynote Speaker, The Mutual Fund Scandals, 2004 Central Atlantic Trust, Private Banking and Asset Management Conference and Exhibition, Hershey, Pennsylvania, November 5, 2004

Speaker, Regulatory Update, Platform Investment Sales, Consumer Bankers Association, Litchfield Park, Arizona, November 16, 2004

Discussion Leader, Excessive Regulation: How Much is Enough?, Lawyers Council/CFO Council Strategy Session, Financial Services Roundtable, Washington, D.C., December 14, 2004

Speaker, Mutual Fund Scandals, 2004 Annual Meeting, Florida Office of Financial Regulation, Division of Financial Institutions, Tallahassee, Florida, January 12, 2005

Speaker, SEC Rule 38a-1, Fiduciary and Investment Risk Management Association Seminar, Richmond, Virginia, March 4, 2005

Speaker, Bank Entry Into the Mutual Fund Business, Online Program of the SEC Historical Society, Herndon, Virginia, March 8, 2005

Speaker, Money Market Funds, Online Program of the SEC Historical Society, Herndon, Virginia, March 29, 2005

Moderator, Banking Law 101, Institute for the New Business Lawyer; Speaker, The New Era of Enforcement & Compliance -- Bank Secrecy Act, Anti-Money Laundering and More, Committee on Banking Law; Regulation B: SEC's Broker-Dealer Rules for Banks, Committee on Banking Law, Spring Meeting, ABA Business Law Section, April 1-2, 2005, Nashville, Tennessee

Speaker, Mutual Fund Procedures: Views of Practitioners, American Bankers Association Operations Conference, April 3, 2005, Memphis, Tennessee

Presenter, Enhanced Corporate Governance for Mutual Funds: A Concept that Needs Serious Reconsideration, A Symposium on Mutual Funds, Hedge Funds & Pension Funds, Washington University School of Law and The Institute for Law and Economic Policy, Lake Las Vegas, Nevada, April 9, 2005

Speaker, Mutual Fund Scandals, 19th Annual National Training Conference, Fiduciary and Investment Risk Management Association, San Diego, California, April 12, 2005

Moderator, Enforcement, 2005 Lawyers Council Spring Meeting, Financial Services Roundtable, Washington, D.C., May 12, 2005

Luncheon Speaker, Banking Law II, ABA National Institute, Chicago, Illinois, September 30, 2005

Presenter, Comparative Regulation of Common Trust Funds versus Mutual Funds, Is There a Better Way to Regulate Mutual Funds?, American Enterprise Institute for Public Policy Research, Washington, D.C., October 24, 2005

Speaker, SEC Rule 38a-1, Fiduciary and Investment Risk Management Association Seminar, Cleveland, Ohio, October 28, 2005

Moderator and Speaker, Securities Developments, Committee on Banking Law, Business Law Section, ABA, Fall Meeting, Richmond, Virginia, November 11, 2005

Co-Chair, Financial Services Institute 2006, ALI-ABA Advanced Course of Study, Washington, D.C., February 2-3, 2006, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Speaker, The Changing Role and Responsibilities of Fiduciaries, Corporate Funds Roundtable, Institutional Investor Institute, Washington, D.C., March 7, 2006

Speaker, Does Your Family Office Need to Register as an Investment Advisor?, Institute for Private Investors, Boston, Massachusetts, April 5, 2006; Annual Meeting, New York, New York, May 24, 2006

Speaker, Investment Management Developments, 2006 Lawyers Council Meeting, Financial Services Roundtable, Washington, D.C., May 11, 2006

Speaker, The Intersection of Federal Securities Regulation and Banking, Banking Law II, ABA Second Annual National Institute, Chicago, Illinois, September 21-22, 2006

Member, Advisory Board, ABA/ABA Money Laundering Enforcement Conference, Washington, D.C., October 8-10, 2006

Speaker, Bank Developments, ALI-ABA Investment Management Regulation, New York, New York, December 1, 2006

Speaker, Collective Investment Funds, Subcommittee on Trust and Fiduciary Activities, Banking Law Committee, Section of Business Law, ABA Spring Meeting, Washington, D.C., March 16, 2007

Moderator, Hedge Funds: Proposed SEC Regulations and Your Advice to Managers and Investors, ALI-ABA Teleseminar & Audio Webcast, May 24, 2007

Speaker, Equity Index Annuities: Insurance versus Securities, "Senior Investors, Annuities, and Suitability Rules," FRC's 8th Annual Investment Adviser Compliance Forum, New York, New York, May 31, 2007

Speaker, Family Offices, Post-Forum Workshop for the Fifth Annual Integrated Wealth Management Forum, New York, New York, September 12, 2007

Speaker, Family Offices and the Investment Advisers Act, Current Risk Issues, Fiduciary and Investment Risk Management Association, Inc., Chicago, Illinois, September 14, 2007

Speaker, The Intersection of Federal Securities Regulation and Banking, Banking Law II, ABA Third Annual National Institute, Chicago, Illinois, September 28, 2007

Speaker, Overview of the Final Regulation R and Putting an Implementation Team/Plan in Place, ABA/ABASA Telephone Briefing, Washington, D.C., October 16, 2007

Co-Chair, Financial Services Institute 2007, ALI-ABA Advanced Course of Study, Washington, D.C., October 18-19, 2007, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Speaker, Selling Investment Company Shares, Bank Securities Activities, Investment Company Governance Issues, Investment Management Basics, ABA First Annual National Institute, Boston, Massachusetts, October 29-31, 2007

Facilitator, Money Market Funds, "Colloquium on Markets and Systemic Risk," Duke Global Capital Markets Center, Duke University, Durham, North Carolina, November 16, 2007

Speaker, Evolving Regulatory Oversight: The SEC, GLBA, Mutual Funds and More, 2008 Wealth Management and Trust Conference, Texas Bankers Association, Fort Worth, Texas, March 28, 2008

Speaker, The Intersection of Federal Securities Regulation and Banking, Banking Law II, ABA Fourth Annual National Institute, Chicago, Illinois, May 8, 2008

Panelist, Election 2008: What It Will Mean for the Life Insurance Industry, Its Products, and Its Contract Owners, 2008 Compliance and Regulatory Affairs Conference, Association for Insured Retirement Solutions, Washington, D.C., June 2, 2008

Moderator and Speaker, Exemptive Authority: The Mandate of the Division of Investment Management, SEC Historical Society Ninth Annual Meeting, Washington, D.C., June 5, 2008

Moderator and Speaker, Representing the Financial Services Client: Current Ethical Issues, ALI-ABA Teleseminar, June 6, 2008

Speaker, Regulation R, KnowledgeCongress Teleseminar, June 12, 2008

Discussant, How Do Mutual Funds Vote Their Proxies?, American Enterprise Institute for Public Policy Research, Washington, D.C., July 10, 2008

Speaker, Moving Securities Regulation Boxes in the 21st Century: The Department of Treasury Blueprint for a Modernized Financial Regulatory Structure, Section of Administrative Law, ABA Annual Meeting, New York, New York, August 8, 2008

Speaker, Definition of Investment Company, Bank Securities Activities, Investment Management Basics, ABA Second Annual National Institute, Boston, Massachusetts, October 27-28, 2008

Moderator, Forecasts: Predictions & Proposals for the Industry's Future, The Evolution of Mutual Funds: Markets & Law, Sponsored by Boston University and the Chicago-Kent College of Law, Chicago, Illinois, November 7, 2008

Co-Chair and Moderator, Financial Services Industry Today, ALI-ABA Teleseminar, December 15, 2008, with William J. Sweet, Jr., Ronald R. Glancz, and A. Patrick Doyle

Chair, Hedge Fund Developments, ALI-ABA Teleseminar, December 17, 2008

Speaker, The Intersection of Federal Securities Regulation and Banking, Banking Law II, ABA Fifth Annual National Institute, Chicago, Illinois, May 14, 2009

Speaker, The Supreme Court Addresses Fund Advisory Contracts, The Corporation Finance and Securities Law Section / Investment Management Committee, District of Columbia Bar, Washington, D.C., July 1, 2009

Speaker, The Financial Regulatory Reform Plan: Overview and Analysis, a Thomson Reuters Webinar, Washington, D.C., July 7, 2009

Speaker, Financial Reform Legislation, Current Issues Risk Seminar, Fiduciary and Investment Risk Management Association, Cleveland, Ohio, September 23, 2009, and New York City, November 13, 2009

Discussant, Emerging Issues in Investment Management, Investment Management Law Conference, School of Law, Hofstra University, Hempstead, Long Island, New York, October 9, 2009

Speaker, Recent SEC Proposals, Asset Management Expert Meeting, Office of the Comptroller of the Currency, Washington, D.C., November 3, 2009

Moderator, The Administration's Regulatory Reform: How Will It Impact Your Company, 14th Annual Georgetown Law Corporate Counsel Institute, Washington, D.C., March 11, 2010

Speaker, Regulatory Reform: Navigating the Industry's New Landscape, Texas Bankers Association's 2010 Wealth Management and Trust Conference, Grapevine, Texas, March 25, 2010

Co-Chair and Speaker, Representing Troubled Banks in 2010: Failures, Acquisitions, and Resolutions, ALI-ABA Topical Courses, Video Webcast, Washington, D.C., April 13, 2010

Speaker, The Impact of *Jones v. Harris Associates* on Mutual Fund Fees, Thomsonreuters Webinar, April 22, 2010

Moderator, SEC Enforcement and Regulation, Financial Services Roundtable Lawyers Council, Washington, D.C., May 13, 2010

Speaker, The Supreme Court Addresses Fund Advisory Contracts, The Corporation Finance and Securities Law Section / Investment Management Committee, District of Columbia Bar, Washington, D.C., May 27, 2010

Presenter and Commentator, Cross-Border Crisis Management in the Banking Sector, Joint Conference of INSOL Europe Academic Forum & Centre for European Company Law, University of Leiden, The Netherlands, July 1 and 2, 2010

Speaker, New Financial Reform Package: An Analysis of Dodd-Frank for Lawyers and Related Professionals, ALI-ABA Audio Webcast/Telephone Seminar, July 26, 2010

Interviewee regarding the Dodd-Frank Act on "Legally Minded," Legal Talk Network, July 29, 2010

Speaker, The Impact on Wealth Management and Institutional Trust, How Financial Regulatory Legislation Will Impact Banks, American Bankers Association Telephone Briefing/Webcast Series, August 11, 2010

Speaker, Dodd-Frank Financial Reform and Its Impact on the Banking Industry, ALI-ABA Course of Study, Washington, D.C., October 7, 2010

Speaker, Family Office Exemption, FOX Fall Forum, Chicago, Illinois, October 18, 2010

Speaker, Investment Advisers Act, FOX Private Wealth Conference, Chicago, Illinois, November 10, 2010

Speaker, Family Office Exemption, Fall Meeting of the Subcommittee on Hedge Funds, Committee on Federal Regulation of Securities, American Bar Association, Washington, D.C., November 19, 2010

Speaker, Family Office Exemption, Florida Family Office Exchange, November 29, 2010

Moderator, Developments in Hedge Funds, Investment Funds, a Roundtable Discussion sponsored by the Boston University School of Law, December 10, 2010

Speaker, Changes to the Federal Securities Laws, The Dodd-Frank Act: A New Framework for the Regulation of Financial Services in the U.S., ABA CLE Webinar Program, February 1, 2011

Speaker, Navigating the Latest Federal Regulatory and Legislative Developments, 2011 Wealth Management Trust Conference, Texas Bankers Association, San Antonio, Texas, March 17, 2011

Speaker, Managing the Portfolio: Topical Legal Issues Confronting Lawyers Today, 2011 Institutional Investor Forum, PLI, New York, New York, March 22, 2011

Speaker, Financial Reform Update: Dodd Frank Wall Street Reform and Consumer Protection Act, 2011 Trust Management Association Inc. Seminar, American Bankers Association, Palm Springs, California, April 28, 2011

Speaker, The Gatekeeper Initiative and the Voluntary Good Practices Guidance: Risky Business for Transactional Lawyers, 2011 Spring Legal Opinion Seminar, Working Group on Legal Opinions, New York, New York, May 3, 2011

Speaker, The Final Family Office Rule, Family Office Exchange, Webinar Program, June 27, 2011

Speaker, The Final Family Office Rule, CCC Alliance Network, Webinar Program, June 27, 2011

Speaker, Preparing for the New Era of Family Office Regulation, Family Office Exchange, New York, New York, September 7, 2011

Speaker, Update on Family Office SEC Regulations, CCC Alliance Network, Boston, Massachusetts, September 13, 2011

Panelist, Brave New World; Dealing with Increased Scrutiny from the IRS, the SEC, Dodd-Frank, and the New Regulations affecting the Ultra High Net Worth and Family Office Industry, Southeastern Family Office Forum, sponsored by Kennesaw State University and the Southeastern Council of Foundations, Kennesaw State University, Kennesaw, Georgia, September 23, 2011

Panelist, Thirteen Ideas Shaping Asset Management, US Institute Advisory Council Briefing, New York, New York, September 27, 2011

Speaker, Doing Nothing is Not an Option: Coping and Complying with the Regulatory Changes, Family Office Exchange Fall Forum, Chicago, Illinois, October 18, 2011

Speaker, Family Office Rule, Deloitte Family Office Forum, Chicago, Illinois, November 9, 2011, and San Francisco, California, November 10, 2011

Speaker, Fiduciaries in a Post-Dodd-Frank World, American Bankers Association's Wealth Management and Trust Conference, Scottsdale, Arizona, March 15, 2012

Panelist, Thirteen Ideas Shaping Asset Management, Webinar sponsored by US Institute Advisory Council Briefing, New York, New York, April 24, 2012

Moderator, Future Issues for Investment Funds, Fourth Annual Investment Fund Roundtable, Boston University School of Law, Boston, Massachusetts, May 11, 2012

Speaker, Private Investment Companies, The JOBS Act in Ninety Minutes: What Business Lawyers Need to Know, ABA Section of Business Law Webinar, July 12, 2012

Speaker, Fiduciaries in a Post-Dodd-Frank World, Current Risk Issues Seminar, FIRMA, New York, New York, October 12, 2012

Speaker, Fund Marketing and Sale of Fund Shares, PLI Basics of Mutual Funds and Other Registered Investment Companies 2013, New York, New York, April 24, 2013

Speaker, My Community -- My Customer -- Municipal Advisor Registration: The Impact on Banks and their Municipal Customers, American Bankers Association Telephone Briefing, December 17, 2013

Speaker, Fund Marketing and Sale of Fund Shares, PLI Basics of Mutual Funds and Other Registered Investment Companies 2014, New York, New York, April 22, 2014

Speaker, Building a Board for your Private Family Trust Company, Family Office Exchange Webinar, August 20, 2014

Speaker, Family Office Rule, Southeastern Family Office Forum, Atlanta, September 19, 2014

Participant, Global Capital Markets Roundtable, Public and Private Enforcement after *Halliburton, ATP and Boilermakers*, Duke Law School, Durham, North Carolina, September 26, 2014

Participant, Seventh Annual Investment Funds Roundtable, Harvard Law School, Cambridge, Massachusetts, December 8, 2014

Speaker, Family Offices, 16th Annual IBA/ABA International Conference on Private Investment Funds, London, England, March 10, 2015

Speaker, Fund Marketing and Sale of Fund Shares, PLI Basics of Mutual Funds and Other Registered Investment Companies 2015, New York, New York, April 29, 2015

Speaker, Banks, Family Offices, and the Volcker Rule, Meeting of the National Conference of Lawyers and Corporate Fiduciaries, sponsored by the Trust Counsel Committee of the American Bankers Association Securities Association and the Section of Real Property, Probate, Trust, and Estates Section of the American Bar Association, Washington, D.C., June 4, 2015

Speaker, Update on Family Office Rule, Annual Meeting, Private Investor Coalition, Washington, D.C., June 10, 2015

Speaker, Banks, Family Offices, and the Volcker Rule, Webinar sponsored by the American Bankers Association Securities Association, June 30, 2015

Speaker, Keynote Address, ALI Mutual Funds Today, Washington, D.C., October 6, 2015

Speaker, Federal Regulatory Update, Advanced Trust Forum, Wealth Management & Trust Division, Texas Bankers Association, Dallas, Texas, October 16, 2015

Speaker, Fund Facts for Corporate Lawyers - What You Need to Know About the '40 Act, PLI 47th Annual Institute on Securities Regulation, New York, New York, October 29, 2015

Speaker, The Volcker Rule and Family Offices, Fiduciary Investment Risk Management Association's 30th Annual Risk Management Training Conference, Las Vegas, Nevada, March 23, 2016

Speaker, Interview, Oral History Project, SEC Historical Society, May 2016

PROFESSIONAL ACTIVITIES:

Member; Chair, Subcommittee on Legislative Matters (1983-1986); Liaison Officer (1986-1990); Vice-Chair (1990-1994); Chair (1994-2002), Committee on Developments in Investment Services, Section of Business Law, American Bar Association

Member, Vice Chair (1992-1994), Chair (1994-1998), Subcommittee on Bank Holding Company Activities; Co-Chair, Subcommittee on Long Range Planning (1998-2002); Chair (2002-2005), Committee on Banking Law, Section of Business Law, American Bar Association

Member, Subcommittee on Investment Companies and Investment Advisers, Subcommittee on Securities Activities of Banks, Subcommittee on Hedge Funds, Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association

Member, Council of the Section, 2005-2009; Chair, Finance Committee, 2006-2009; Secretary, 2009-2010, Vice-Chair, 2010-2011, Chair-Elect, 2011-2012, Chair, 2012-2013, of the Section of Business Law, American Bar Association

Member, Presidential Task Force on the Gatekeeper Regulation and the Profession, American Bar Association, 2001-2012

Member, Standing Committee on Government Affairs, American Bar Association, 2007-2010

Member, Presidential Task Force on Financial Markets Regulatory Reform, American Bar Association, 2008-2012

Recipient, Grassroots Advocacy Award, American Bar Association, U.S. Supreme Court, Washington, D.C. April 13, 2011

Member, Editorial Advisory Board for Volumes 58, 59, 61, 62, 63, 64, 65, and 66 of The Business Lawyer, Section of Business Law, American Bar Association

Life Fellow, American Bar Foundation

Co-Chair, Investment Management Committee, Securities and Exchange Commission Historical Society, 2004-

Member, Committee on Securities Laws, Member, Financial Institutions Subcommittee, Division of Corporations, Finance and Securities Laws, District of Columbia Bar Association

Member, American Law Institute

Member, Editorial Advisory Board, The Investment Lawyer, published by Aspen Law & Business

Profiled in Who's Who in American Law since 1987 and Who's Who in America since 1994

Profiled in Chambers USA: America's Leading Lawyers for Business, Investment Management, 2005, 2006, 2007, 2008 editions

Selected by peers for inclusion in Best Lawyers in America, 2005-2006 (Corporate, M&A, and Securities Law), 2007, 2008, 2009, 2010, 2011 (Mutual Funds Law, Banking Law), 2012, 2013, 2014, 2015 (Financial Services Regulatory Law, Mutual Funds Law, Securities/Capital Markets Law), 2016, 2017 (Financial Services Regulation Law, Mutual Funds Law, Securities/Capital Markets Law, Securities Regulation)

Alumnus of the Month, May 2012, University of Washington School of Law, http://www.law.washington.edu/Alumni/alumni_of_the_month/default.aspx

Exhibit 2. Custody Rule

§275.206(4)-2 Custody of funds or securities of clients by investment advisers.

(a) Safekeeping required. If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3), it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for you to have custody of client funds or securities unless:

(1) Qualified custodian. A qualified custodian maintains those funds and securities:

(i) In a separate account for each client under that client's name; or

(ii) In accounts that contain only your clients' funds and securities, under your name as agent or trustee for the clients.

(2) Notice to clients. If you open an account with a qualified custodian on your client's behalf, either under the client's name or under your name as agent, you notify the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information. If you send account statements to a client to which you are required to provide this notice, include in the notification provided to that client and in any subsequent account statement you send that client a statement urging the client to compare the account statements from the custodian with those from the adviser.

(3) Account statements to clients. You have a reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each of your clients for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period.

(4) Independent verification. The client funds and securities of which you have custody are verified by actual examination at least once during each calendar year, except as provided below, by an independent public accountant, pursuant to a written agreement between you and the accountant, at a time that is chosen by the accountant without prior notice or announcement to you and that is irregular from year to year. The written agreement must provide for the first examination to occur within six months of becoming subject to this paragraph, except that, if you maintain client funds or securities pursuant to this section as a qualified custodian, the agreement must provide for the first examination to occur no later than six months after obtaining the internal control report. The written agreement must require the accountant to:

(i) File a certificate on Form ADV-E (17 CFR 279.8) with the Commission within 120 days of the time chosen by the accountant in paragraph (a)(4) of this section, stating that it has examined the funds and securities and describing the nature and extent of the examination;

(ii) Upon finding any material discrepancies during the course of the examination, notify the Commission 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 Office of Compliance Inspections and Examinations; and

(iii) Upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, file within four business days Form ADV-E accompanied by a statement that includes:

(A) The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the accountant; and

(B) An explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

(5) Special rule for limited partnerships and limited liability companies. If you or a related person is a general partner of a limited partnership (or managing member of a limited liability company, or hold a comparable position for another type of pooled investment vehicle), the account statements required under paragraph (a)(3) of this section must be sent to each limited partner (or member or other beneficial owner).

(6) Investment advisers acting as qualified custodians. If you maintain, or if you have custody because a related person maintains, client funds or securities pursuant to this section as a qualified custodian in connection with advisory services you provide to clients:

(i) The independent public accountant you retain to perform the independent verification required by paragraph (a)(4) of this section must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules; and

(ii) You must obtain, or receive from your related person, within six months of becoming subject to this paragraph and thereafter no less frequently than once each calendar year a written internal control report prepared by an independent public accountant:

(A) The internal control report must include an opinion of an independent public accountant as to whether controls have been placed in operation as of a specific date, and are suitably designed and are operating effectively to meet control objectives relating to custodial services, including the safeguarding of funds and securities held by either you or a related person on behalf of your advisory clients, during the year;

(B) The independent public accountant must verify that the funds and securities are reconciled to a custodian other than you or your related person; and

(C) The independent public accountant must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules.

(7) Independent representatives. A client may designate an independent representative to receive, on his behalf, notices and account statements as required under paragraphs (a)(2) and (a)(3) of this section.

(b) Exceptions.

(1) Shares of mutual funds. With respect to shares of an open-end company as defined in section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-5(a)(1)) ("mutual fund"), you may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with paragraph (a) of this section.

(2) Certain privately offered securities.

(i) You are not required to comply with paragraph (a)(1) of this section with respect to securities that are:

(A) Acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(B) Uncertificated, and ownership thereof is recorded only on the books of the issuer or its transfer agent in the name of the client; and

(C) Transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(ii) Notwithstanding paragraph (b)(2)(i) of this section, the provisions of this paragraph (b)(2) are available with respect to securities held for the account of a limited partnership (or a limited liability company, or other type of pooled investment vehicle) only if the limited partnership is audited, and the audited financial statements are distributed, as described in paragraph (b)(4) of this section.

(3) Fee deduction. Notwithstanding paragraph (a)(4) of this section, you are not required to obtain an independent verification of client funds and securities maintained by a qualified custodian if:

(i) you have custody of the funds and securities solely as a consequence of your authority to make withdrawals from client accounts to pay your advisory fee; and

(ii) if the qualified custodian is a related person, you can rely on paragraph (b)(6) of this section.

(4) Limited partnerships subject to annual audit. You are not required to comply with paragraphs (a)(2) and (a)(3) of this section and you shall be deemed to have complied with paragraph (a)(4) of this section with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle) that is subject to audit (as defined in rule 1-02(d) of Regulation S-X (17 CFR 210.1-02(d))):

(i) At least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year;

(ii) By an independent public accountant that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules; and

(iii) Upon liquidation and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) promptly after the completion of such audit.

(5) Registered investment companies. You are not required to comply with this section (17 CFR 275.206(4)-2) with respect to the account of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 to 80a-64).

(6) Certain Related Persons. Notwithstanding paragraph (a)(4) of this section, you are not required to obtain an independent verification of client funds and securities if:

(i) you have custody under this rule solely because a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services you provide to clients; and

(ii) your related person is operationally independent of you.

(c) Delivery to Related Person. Sending an account statement under paragraph (a)(5) of this section or distributing audited financial statements under paragraph (b)(4) of this section shall not satisfy the requirements of this section if such account statements or financial statements are sent solely to limited partners (or members or other beneficial owners) that themselves are

limited partnerships (or limited liability companies, or another type of pooled investment vehicle) and are your related persons.

(d) Definitions. For the purposes of this section:

(1) Control means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. Control includes:

(i) Each of your firm's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control your firm;

(ii) A person is presumed to control a corporation if the person:

(A) Directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or

(B) Has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities;

(iii) A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership;

(iv) A person is presumed to control a limited liability company if the person:

(A) Directly or indirectly has the right to vote 25 percent or more of a class of the interests of the limited liability company;

(B) Has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the limited liability company; or

(C) Is an elected manager of the limited liability company; or

(v) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

(2) Custody means holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them. You have custody if a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services you provide to clients. Custody includes:

(i) Possession of client funds or securities (but not of checks drawn by clients and made payable to third parties) unless you receive them inadvertently and you

return them to the sender promptly but in any case within three business days of receiving them;

(ii) Any arrangement (including a general power of attorney) under which you are authorized or permitted to withdraw client funds or securities maintained with a custodian upon your instruction to the custodian; and

(iii) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives you or your supervised person legal ownership of or access to client funds or securities.

(3) Independent public accountant means a public accountant that meets the standards of independence described in rule 2-01(b) and (c) of Regulation S-X (17 CFR 210.2-01(b) and (c)).

(4) Independent representative means a person that:

(i) Acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership (or members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle) and by law or contract is obliged to act in the best interest of the advisory client or the limited partners (or members, or other beneficial owners);

(ii) Does not control, is not controlled by, and is not under common control with you; and

(iii) Does not have, and has not had within the past two years, a material business relationship with you.

(5) Operationally independent: for purposes of paragraph (b)(6) of this section, a related person is presumed not to be operationally independent unless each of the following conditions is met and no other circumstances can reasonably be expected to compromise the operational independence of the related person: (i) Client assets in the custody of the related person are not subject to claims of the adviser's creditors; (ii) advisory personnel do not have custody or possession of, or direct or indirect access to client assets of which the related person has custody, or the power to control the disposition of such client assets to third parties for the benefit of the adviser or its related persons, or otherwise have the opportunity to misappropriate such client assets; (iii) advisory personnel and personnel of the related person who have access to advisory client assets are not under common supervision; and (iv) advisory personnel do not hold any position with the related person or share premises with the related person.

(6) Qualified custodian means:

(i) A bank as defined in section 202(a)(2) of the Advisers Act (15 U.S.C. 80b-2(a)(2)) or a savings association as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811);

(ii) A broker-dealer registered under section 15(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(1)), holding the client assets in customer accounts;

(iii) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(iv) A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

(7) Related person means any person, directly or indirectly, controlling or controlled by you, and any person that is under common control with you.

[75 FR 1484, Jan. 11, 2010]

Exhibit 3. Article on Custody Rule

Investment Advisers: Law & Compliance

CHAPTER 9 FIDUCIARY DUTY

1-9 Investment Advisers: Law & Compliance § 9.18

§ 9.18 "Custody" of Client Assets

[1] **What Is Custody?**

NOTE

The collapse of the Bernard Madoff Ponzi scheme, in which the assets of advisory clients had purportedly been held in accounts at the firm, a dually-registered adviser and broker-dealer, raised concerns about the risks posed by the use of affiliated custodians and about custodial arrangements generally.

The SEC inspection staff undertook to verify the existence of advisory client assets by checking independently with various persons, including clients and shareholders. See, e.g., Requests for Independent Confirmation of Assets, available at http://www.sec.gov/about/offices/ocie/routine_account_information_confirmation.pdf.

Also in response to the Madoff scandal, in 2009, the SEC amended the Advisers Act custody rule to strengthen the protections over client assets of which advisers are deemed to have custody. n309 The amendments did not prohibit advisers or their affiliates from holding custody of client assets but instead imposed significant external controls over such arrangements.

Rule 206(4)-2 details strict requirements governing investment advisers that have "custody" of client securities or funds. These requirements are intended to insulate clients' assets from misappropriation or other unlawful activities by an adviser or its personnel or from financial reverses, including insolvency of an adviser.

The SEC revised the rule substantially in 2003 and 2009 (effective in 2004 and 2010), and the SEC Staff distributed an "Investor Alert" in 2010 to educate investors about the principal custody rule requirements. n310 Before the 2003 amendments, the rule did not define the terms "custody or possession" and imposed a requirement of surprise verifications by independent accountants on all advisers with custody or possession. A substantial body of interpretations of the custody rule had developed under Commission releases and dozens of staff no-action letters, which defined circumstances in which advisers would be deemed not to have custody if they followed various alternative procedures. The 2003 revisions superseded the conceptual structure and requirements of the old rule and the conditions of those no-action letters, virtually all of which were withdrawn.

The 2009 revisions strengthened several provisions of the rule in response to the Madoff Ponzi scheme and other in-stances of misappropriation or other misuse of client assets. In particular, the Commission reinstated the annual surprise examination requirement in cases where the adviser or a related person maintains actual custody or has certain forms of deemed custody, not including the ability to debit fees from client accounts. The 2009 revisions also require that any affiliated custodian obtain an internal control report by an accountant that is registered with and subject to inspection by the Public Company Accounting Oversight Board ("PCAOB").

In July 2010, the Dodd-Frank Act created a new section in the Advisers Act specific to custody of client accounts. The section provides that registered investment advisers must take steps to safeguard client assets within the adviser's custody and authorizes SEC rulemaking regarding such steps, including, without limitation, verification of custodied assets by an independent public accountant. However, see § 9.18[2][d] below for a description of the current rule requirements regarding annual surprise examinations by an independent accountant. In addition, the Dodd-Frank Act amends Section 204 to state that custody reports are subject to SEC examination. Also, the Dodd-Frank Act directs the General Accounting Office to conduct a study of the compliance costs associated with the current custody rule and the additional costs if the provisions relating to operational independence were eliminated. The report was submitted to Congress in July 2013, providing an overview of the costs arising from compliance with the custody rule and describing the SEC's reasoning for providing certain exemptions from the surprise examination requirement. n310.1

Custody remains an area of particular concern. In 2013 and again in 2014, the National Examination Program of the SEC Office of Compliance inspections and Examinations identified custody as a top priority for the program. In March 2013, the National Examination Program issued a Risk Alert, available at http://www.sec.gov/about/offices/ocie/custody-risk-alert.pdf, stating that its examiners had "observed widespread and varied non-compliance with elements of the custody rule." The Alert identifies four categories of deficiencies: (1) failure by advisers to recognize they have custody; (2) surprise exam requirements; (3) failure to satisfy "qualified custodian" requirements; and (4) in the case of private funds seeking to rely on the "audit approach" discussed below, failure to comply with the requirements of such reliance. These areas had also been identified as examination priorities in the National Examination Program's Priorities for 2013, available at http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2013.pdf. Custody was once again included as an examination priority in the National Examination Program's Examination Priorities for 2014, available at http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2014.pdf, with the staff re-emphasizing the topics raised in the 2013 Risk Alert and noting that "few things are more important than the safekeeping of clients' assets." The requirements applicable to each of these topics are discussed below.

The custody rule provides that an adviser has custody of client assets when it holds "directly or indirectly, client funds or securities or [has] any authority to obtain possession of them." n311 The rule also provides three examples that illustrate the circumstances under which an adviser has custody of client assets. However, as the SEC cautioned in the pro-posing release

for the 2003 revisions, the examples represent common custody scenarios, and there may be other circumstances in which an adviser may be deemed to have custody of client assets. n312

The rule's definition of custody, and hence its substantive scope, applies only to "clients' funds or securities." Thus, they do not apply to assets other than securities or cash. Other assets (e.g., futures,) are outside the scope of the rule, and the rule does not require them to be maintained with a qualified custodian. n313

The definition of the term "custody" in Rule 206(4)-2 applies only for purposes of that rule and does not necessarily apply in other contexts such as the scope of an adviser's liability coverage. n314

[a] Actual Possession or Control

The first example clarifies that an adviser has custody when it has actual possession or control of client funds or securities, even if only temporarily, unless the adviser received the funds or securities inadvertently and returns them to the sender within three business days of receipt. n315 If an adviser receives securities from a client and does not return them within three days, the adviser has custody and is violating the rule's requirement that client securities be maintained with a qualified custodian. n316 However, an adviser will not be deemed to have custody if the adviser "possesses or controls" checks drawn by a client and made payable to a third party. The staff stated that it would not recommend enforcement action if an adviser that received money or securities from third parties promptly forwarded those assets to the client or a qualified custodian; those assets and third parties could include refunds from tax authorities, settlement proceeds in class action lawsuits or other proceedings, or stock certificates or dividends. n317

[b] Payment of Advisory Fees

The second example of custody includes circumstances in which an adviser has authority (including a general power of attorney) to withdraw funds or securities from the client's account. n318 This includes any authority to: (i) withdraw advisory fees or expenses; (ii) dispose of client assets for any purpose other than authorized trading; or (iii) sign checks on a client's behalf.

If, however, a client (and not the adviser) instructs the custodian to debit the client's account for fees and the custodian computes the fee based on the advisory contract, the adviser is not exercising authority to withdraw assets from the client's account. In this circumstance, the adviser does not have custody for purposes of Rule 206(4)-2. n319

[c] Legal Ownership

The third example of custody clarifies that an adviser has custody when it acts in any capacity that gives the adviser legal ownership of, or access to, the client's assets. n320 Specifically, an adviser that acts as a general partner to a limited partnership, managing member of a limited liability company or other investment vehicle, or acts as both investment adviser and trustee of a trust would be construed as having custody of client assets. If, however, an employee

or other supervised person of the adviser is appointed to a trusteeship or other position because of a personal relationship, rather than employment with the advisory firm, the adviser would not be viewed as having custody. n321

[d] Custody by Related Persons

An adviser is deemed to have custody if a related person holds client funds or securities, or has any authority to obtain them, in connection with advisory services provided by the adviser to clients. n322 A related person is any person that controls, is controlled by, or is under common control with, the adviser. n323

The SEC imputed custody by related persons to the adviser in the 2009 amendments. This approach replaced a more flexible approach under the staff's Crocker no-action letter, which considered an adviser not to have custody by virtue of an affiliate's possession or custody if specific factors indicated sufficient separation between the operations of the adviser and those of the affiliate that the adviser and its personnel could not direct the disposition of, or obtain access to, client assets. n324

[2] **Requirements of Adviser Custody Rule**

[a] Use of Qualified Custodian

If an investment adviser does have custody of client assets, the custody rule requires the adviser to maintain both cash and securities with a "qualified custodian" in a segregated account either under the client's name or under the adviser's name as agent or trustee for its client. n325 The term "qualified custodian" is defined to include banks, savings associations, registered broker-dealers, and registered futures commission merchants. n326 In addition, for securities for which the primary market is outside the United States, the rule treats as qualified custodians certain foreign financial institutions that customarily hold financial assets in that country and that segregate assets in customer accounts from their proprietary assets. n327

An adviser is not required to maintain with a qualified custodian assets that are not cash or securities. The qualified custodian requirement also has exceptions for mutual fund shares and certain privately offered securities. n328

If an adviser is affiliated with, or is itself, a qualified custodian as defined under the rule, the adviser or the affiliate may hold its advisory client assets, subject to the surprise exam and internal control report requirements discussed below.

[b] Notice to Clients

Once an adviser opens an account with a qualified custodian on behalf of a client, either under the client's name or under the adviser's name, the investment adviser promptly must notify the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained. n329 If the adviser sends account statements to a client to whom it must send that notice, the adviser must include a statement urging the client to compare

the account statements from the custodian to those from the adviser; this statement must go both in the initial notice and in any subsequent account statements. n330

The staff noted after the 2003 amendments that in some cases an adviser may use different custodians for different assets. In such circumstances, instead of sending a new notice each time that assets are moved to a custodian, it is sufficient for the adviser to give a one-time notice of all of the custodians it uses. n331

[c] Reporting: Statements to Clients

[i] Generally

The adviser must have a "reasonable basis, after due inquiry, for believing that the qualified custodian sends" at least quarterly account statements to each advisory client for whom it acts as custodian. n332 This account statement must identify the amount of funds and each security in the account, as well as set forth all the transactions in the account during the prior period. The SEC provided advisers with some flexibility to determine what will satisfy the "due inquiry" requirement, which was added in the 2009 amendments: "For instance, an adviser could form a reasonable belief after 'due inquiry' if the qualified custodian provides the adviser with a copy of the account statement that was delivered to the client." n333 The SEC cautioned, however, that it would not be sufficient if an adviser merely accessed statements on a custodian's Web site, because that would merely confirm that the statements were available, not that they were actually sent. n334

[ii] When Client is a Private Investment Fund

When a general partner of a limited partnership acts as investment adviser to the partnership, the custody rule requires either that the adviser or the qualified custodian send the required account statements directly to the limited partners or their independent representative. n335

Advisers need not comply with the rule's client notice and account statement requirements with respect to accounts of clients that are private pooled investment vehicles, such as limited partnerships or limited liability companies. n336 In order to qualify for this exception, the transactions and assets of pooled investment vehicles must be held at a qualified custodian, audited at least annually, and the adviser must distribute audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners, members, or other beneficial owners of the pooled vehicles within 120 days of the end of each fiscal year, and promptly upon liquidation. The exception also requires that the audit be performed by an accountant that meets the independence requirements set forth under Regulation S-X and is registered with, and subject to inspection by, the PCAOB. n337

In an October 2010 no-action letter, the staff of the Division of Investment Management clarified the circumstances in which an adviser to a private fund may use an auditor that performs audits for broker-dealers and is registered with the PCAOB, but not yet subject to regular inspections. n338 Specifically, an adviser to a private fund may use such an auditor to

comply with Rule 206(4)-2(b)(4): (i) the auditor was engaged to audit the financial statements of one or more of the private funds for the most recently completed fiscal year; (ii) the auditor was registered with the PCAOB and engaged to audit the financial statements of a broker or a dealer on July 21, 2010; (iii) the auditor is registered with the PCAOB and engaged to audit the financial statements of a broker or a dealer as of the issuance of audited financial statements used to satisfy the annual audit provision; and (iv) the adviser notifies each investor in each private fund prior to the distribution of the financial statements that the auditor is not subject to regular inspection by the PCAOB.

On July 21, 2011 the SEC issued a no-action letter expanding the relief granted to advisers with regard to the use of PCAOB-registered independent auditors. Accordingly, if an 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, an adviser may engage such an auditor to perform a surprise examination of an adviser who maintains or that has custody because a related person maintains client funds or securities as a qualified custodian in connection with advisory services provided to clients; prepare an internal control report; or audit the financial statements of a pooled investment vehicle in connection with the annual audit provision of the custody rule. n339

The no-action letter is valid until the earlier of the date the SEC approves a PCAOB-adopted final rule for the inspection of broker and dealer auditors, or December 31, 2013. In June 2011, the PCAOB adopted a temporary rule on this point, noting that it aims for proposing rules for a permanent program by 2013. n340

[iii] Electronic Delivery

Notices and account statements required under the custody rule may be delivered electronically if the delivery complies with the SEC's position on electronic delivery of information. n341

[d] Annual Independent Verification

[i] Generally

Registered advisers that have most forms of custody (themselves or through a related person) must undergo an annual surprise exam by an independent accountant. n342 The SEC extended the verification requirement in the 2009 amendments, because it believed that the surprise exam requirement will deter fraud, and if a fraud does occur, the exam will increase the likelihood that the fraud is uncovered. n343 It referred to enforcement cases where advisers had misappropriated client assets that were maintained by an independent qualified custodian. n344

Advisers that serve as trustee to a trust, have power of attorney or the ability to write checks on a client's account are deemed to have a significant level of control over clients' assets, even if the assets are held by an independent custodian. Such advisers--but not advisers that are deemed to have custody by their deduction of fees from client accounts--are required to undergo

a surprise exam. n345 The 2009 adopting release explained that the broad access that trustees typically have to trust assets makes the protections of the surprise examination important for those clients. n346

The rule requires the examination to be a surprise to the adviser: the timing of the examination must be chosen by the accountant without prior notice or announcement to the adviser and must be irregular from year to year. The accountant must conduct the exam pursuant to a written agreement with the adviser. Under the agreement, the accountant must file a certificate on Form ADV-E stating that it has performed the examination and describing the nature and extent of the examination. If the accountant finds missing assets or material discrepancies during the surprise exam, it must notify the SEC within one day by fax or e-mail, followed by first class mail. The accountant also must file a statement with the SEC upon resignation or dismissal. The SEC believes that it is important that the public have access to the termination statements, as disclosure of a termination could provide useful information to the clients and the staff. n347 The termination statement should include an explanation of any problems but is not required to state a reason for the termination or resignation. The SEC did not define or provide examples for the term "problem."

The SEC also issued new interpretive guidance about the scope of the surprise examination, replacing a 1966 release. n348 Of key importance, the release suggested a sampling approach for verification, in place of the prior accounting guidance's requirement to verify all client assets. The interpretive release stated that, to independently verify that client funds and securities are held properly, accountants should obtain records of accounts that detail funds and securities of which the adviser has custody and the identification of the qualified custodian of those funds and securities, as well as records of accounts that were closed during the period or have a zero balance. Accountants should obtain records or transactions in each selected client's account occurring since the date of the last examination. Accountants' procedures should include confirmation of funds and securities with the qualified custodian and the client, and reconciliation of confirmations received and other evidence obtained to the adviser's records. For privately offered securities, the accountant's verification procedures should include confirmation with the issuer of, or counterparty to, the security. Where confirmation replies are not received, the accountant should perform alternative procedures.

The 2009 amendments extended the surprise examination requirement to certain privately offered securities (which previously were excepted from all of the requirements of the custody rule). This change did not address concerns of commenters that it was unclear how the rule's requirements should be applied to certain assets such as loans or swaps (which may not be securities at all) or to certain other assets that did not meet all elements of the rule's definition of excepted privately placed securities. The SEC did not expand the custody rule to require accountants to test valuation as part of the surprise exam.

[ii] Pooled Investment Vehicles

An adviser need not separately comply with the surprise exam requirement with respect to assets of a pooled investment vehicle that is audited by a PCAOB registered accountant and provides its audited GAAP financials to all investors. n349 The 2009 amendments added the

requirement of an independent public accountant registered with, and subject to regular inspection by, the PCAOB, because the SEC has greater confidence in the quality of such audits. n350

[iii] Subadvisers

On April 25 2016, the staff of the Division of Investment Management issued a no-action letter expanding relief from the annual surprise exam requirement to certain advisers acting in a subadvisory capacity. n350.1 Specifically, if the subadviser is involved in an investment advisory program for which a related person qualified custodian is the primary adviser (or an affiliate of the primary adviser) and the primary adviser is responsible for complying with the Custody Rule, the subadviser may not be required to obtain a surprise examination. The SEC staff's position was based on the fact that: (i) the basis for the subadviser having custody is its affiliation with the qualified custodian and the primary adviser; (ii) the primary adviser will comply with the Custody Rule requirements; (iii) the subadviser does not hold client funds or securities itself, have authority to obtain possession of clients' funds or securities or have authority to deduct fees from clients' accounts; and (iv) the subadviser will still be required to obtain a written internal control report prepared by an independent public accountant from the primary adviser or qualified custodian annually.

[e] Custody by Adviser or Related Person

In addition to the surprise exam, if an adviser or a related person holds actual custody as a qualified custodian in connection with the adviser's advisory services, the entity that serves as custodian must obtain an annual written report on the internal controls of the custodian. n351 The report must include the accountant's opinion as to whether controls have been placed in operation and are suitably designed and operating effectively to meet control objectives relating to custodial services. The report must be prepared by an independent accountant registered with, and subject to inspection by, the PCAOB, and the accountant performing the verification for the adviser also must be registered with and subject to inspection by the PCAOB. n352 The SEC stated that a Type II SAS 70 report or an AT Section 601 Compliance Attestation would be sufficient to satisfy the requirement of an internal control report. n353 The internal control report need not extend to the adviser's or a related person's custody of assets (such as certain privately placed securities or non-securities) that are not required to be held by a qualified custodian.

The internal control report should address control objectives and associated controls related to the areas of client account setup and maintenance, authorization and processing of client transactions, and client reporting. n354 Control objectives should also include a reconciliation of funds and securities to depositories and other unaffiliated custodians by means of either direct confirmation on a test basis with the unaffiliated custodian, or other procedures to verify that the data used in reconciliations by the qualified custodian is unaltered. n355

The surprise exam is not required (but an internal control report is required) if assets are held by a related person that is operationally independent of the adviser (the exam is required in all cases if the adviser itself hold actual custody as a qualified custodian). n356 The conditions for being operationally independent are that: client assets are not subject to the claims of the

adviser's creditors; advisory personnel have no access to client assets; personnel of the two firms are not under common supervision; and advisory personnel do not hold any position with the related person or share premises with the related person. n357 Unlike the similar test under the old Crocker no-action letter, the test for operational independence is satisfied only if all of the specified criteria are met. Advisers relying on the operational independence exception are required to make and keep a memorandum describing the relationship with the related person, and the basis for determining that it has overcome the presumption that it is not operationally independent of the related person. n358 The "operationally independent" test appears to be unavailable in circumstances similar to those in the Madoff Ponzi scheme; thus, the adopting release emphasized in a footnote that the SEC would not consider a related person "that shared management persons" with the adviser to be operationally independent. n359

[f] Independent Representative of Client

Recognizing that some clients may not wish to receive account statements, the SEC included a provision in the rule that permits clients to choose to have an independent representative receive on their behalf initial notices and periodic account statements. n360 An "independent representative" is defined as a person that: (i) acts as agent for an advisory client and by law or contract is obligated to act in the best interest of the advisory client; (ii) does not control, is not controlled by, and is not under common control with the adviser; and (iii) does not have, and has not had within the past two years, a material business relationship with the adviser. n361 If an accounting firm acts as the representative, it probably may not act also as independent auditor or surprise examiner for the adviser. n362

Either a client or the adviser may appoint an independent representative. n363 If an adviser appoints a representative, there is no specific rule requirement that the adviser obtain the client's consent, but the adviser's fiduciary duties may require it to do so. n364

[g] Exceptions for Mutual Funds and Privately Offered Securities

[i] Introduction

The rule provides an exception for advisers with custody over certain mutual fund shares. For mutual fund shares purchased directly from the fund's transfer agent rather than through another intermediary, the rule permits the mutual fund's transfer agent to maintain those securities for the client on the mutual fund's books, in lieu of a qualified custodian. n365

Similarly, ownership of certain uncertified, privately offered securities may be registered only on the books of the issuer. In these cases, the client may receive partnership agreements or subscription documents. The rule excepts such securities from the rule if ownership is recorded only on the books of the issuer or its transfer agent in the name of the client, and transfer of the securities is subject to prior consent of the issuer or other holders. n366

In such a case, the qualified custodian will not hold such securities, and its periodic statement will not include those securities. There is no requirement that the adviser send out its own account statements covering those securities. n367

[ii] Held by Private Partnerships

The exception is available for securities held for the account of a pooled investment vehicle, only if the vehicle is audited, and the audited financial statements are distributed in accordance with the requirements applicable to advisers wishing to qualify under the pooled investment vehicle exception. n368

If a pooled investment vehicle does not meet the audit requirement, the adviser may not use the exception for privately issued securities for that client. n369 The adviser may satisfy the requirements of rule 206(4)-2 by keeping the originally signed subscription agreement for that security (instead of the security itself) with a qualified custodian. n370

In August 2013, the Division of Investment Management issued a guidance update explaining that advisers to pooled investment vehicles are not required to maintain with a qualified custodian proof of the pool's ownership of non-transferable stock certificates or certified LLC interest obtained in a private placement, as these securities would fall under the exemption for privately issued securities. This relief is based on a number of conditions, including that the private stock certificate contains a legend restricting transfer, and that ownership of the security is recorded on the books of the issuer or its transfer agent in the name of the client.

[h] Exception for Registered Investment Companies

The custody rule contains an exception for advisers that have custody of the assets of registered investment companies. n371 The SEC reasoned that registered investment companies are afforded the protection of section 17(f) of the Investment Company Act and, therefore, do not need any of the protections afforded by the Advisers Act custody rule. n372 Accordingly, an adviser with custody (as defined under rule 206(4)-2) of a registered investment company's assets is not required to comply with any portion of rule 206(4)-2 with respect to those assets.

[3] **Form ADV Disclosure**

Until the 2003 revisions, Form ADV required advisers with custody of client assets to include in the disclosure brochures that are sent to clients a balance sheet, which must have been audited by an independent accountant. In addition to amending rule 206(4)-2, the SEC eliminated the balance sheet requirement in 2003 on the theory that it might provide an imperfect picture of the financial health of the advisory firm. n373

To provide additional information about affiliated custodians, advisers must report all related persons that are broker-dealers in response to Item 7 and Section 7.A of Schedule D of Part 1A of Form ADV. There is no comparable requirement, however, to report related persons that are banks or other categories of qualified custodian besides broker-dealers. Advisers that have found a related person to be operationally independent must report this finding in Section 7.A of Schedule D.

Item 9.A of Part 1A of Form ADV inquires whether an adviser has custody. The instructions to that item specify that an adviser may answer "No" to that question if it has custody only because it has authority to deduct fees, or because an operationally independent related person maintains client assets. Items 9.C and D ask for additional details about an adviser's custody arrangements in order to enhance the SEC's ability to identify compliance risks associated with an adviser's custody arrangements. n374 If an adviser or a related person has custody, the adviser must list in Schedule D to Part 1A the accountants that are engaged to perform an audit of pooled investment vehicles, the surprise exam of the adviser, or the internal control report for the custodian.

FOOTNOTES:

(n1)Footnote 309. Inv. Adv. Act Rel. No. 2968, 2009 SEC LEXIS 4308 (Dec. 30, 2009).
(n2)Footnote 310. Available at https://www.investor.gov/news-alerts/investor-alerts.
(n3)Footnote 310.1. U.S. GAO, Investment Advisers--Requirements and Costs Associated with the Custody Rule, July 2013, http://www.gao.gov/assets/660/655754.pdf.
(n4)Footnote 311. Rule 206(4)-2(c)(1).
(n5)Footnote 312. Inv. Adv. Act Rel. No. 2044, 2002 SEC LEXIS 1851 (July 18, 2002).
(n6)Footnote 313. Staff Responses to Questions about Amended Custody Rule (last updated January 10, 2005), http://www.sec.gov/divisions/investment/custody_faq.htm ("Custody Q&A"), Question II.6. The Q&A related to the 2003 revisions and, as of January 2010, had not been revised to reflect the 2009 revisions.
(n7)Footnote 314. Custody Q&A, Question II.5.
(n8)Footnote 315. Rule 206(4)-2(c)(1)(i).
(n9)Footnote 316. Custody Q&A, Question II.1.
(n10)Footnote 317. Investment Adviser Association, SEC No-Action Letter (Sept. 20, 2007).
(n11)Footnote 318. Rule 206(4)-2(d)(2)(ii).
(n12)Footnote 319. Custody Q&A, Question III.3.
(n13)Footnote 320. Rule 206(4)-2(d)(2)(iii).
(n14)Footnote 321. Release 2176, n. 15. See also Custody Q&A, Question II.4.
(n15)Footnote 322. Rule 206(4)-2(d)(2). "The 'in connection with' limitation of the proposed rule is designed to prevent an adviser from being deemed to have custody of client assets held by a related person broker-dealer (or other qualified custodian) regarding which the adviser does not provide advice." Release 2876 at sec. II.B.1.
(n16)Footnote 323. Rule 206(4)-2(d)(7).
(n17)Footnote 324. Release 2176 at n. 4 (citing the Crocker letter).
(n18)Footnote 325. Rule 206(4)-2(a)(1).
(n19)Footnote 326. Rule 206(4)-2(d)(6).
(n20)Footnote 327. Rule 206(4)-2(d)(6)(iv).
(n21)Footnote 328. Rule 206(4)-2(b)(1) & (2).
(n22)Footnote 329. Rule 206(4)-2(a)(2).
(n23)Footnote 330. Rule 206(4)-2(a)(2).
(n24)Footnote 331. Custody Q&A, Question V.1.

(n25)Footnote 332. Rule 206(4)-2(a)(3)(i).
(n26)Footnote 333. Release 2968 at text accompanying note 21.
(n27)Footnote 334. Release 2968 at text accompanying note 21.
(n28)Footnote 335. Rule Rule 206(4)-2(a)(5).
(n29)Footnote 336. Rule 206(4)-2(b)(4).
(n30)Footnote 337. Rule 206(4)-2(b)(4)(ii) & (d)(3). See section 2(d) of Article 1 and Article 2 of Regulation S-X (17 C.F.R. 210.1-02(d) and 17 C.F.R. 210.2).
(n31)Footnote 338. Seward & Kissell LLP, SEC No-Action Letter, 2010 SEC No-Act. LEXIS 521 (Oct. 12, 2010) .
(n32)Footnote 339. Request for no-action relief under the Investment Advisers Act of 1940 Section 206(4) and Rule 206(4)-2, SEC No-Action Letter (July 21, 2011).
(n33)Footnote 340. PCAOB Release No. 2011-001 (June 14, 2011).
(n34)Footnote 341. See Custody Q&A, Question IV.1 (citing Sec. Act Rel. No. 7288 (May 9, 1996).
(n35)Footnote 342. Rule 206(4)-2(a)(4).
(n36)Footnote 343. Release 2968 at text accompanying note 35.
(n37)Footnote 344. Release 2968 at text accompanying note 35.
(n38)Footnote 345. Rule 206(4)-2(b)(3).
(n39)Footnote 346. Release 2968 at note 38.
(n40)Footnote 347. Release 2968 at § II.B.2.
(n41)Footnote 348. Inv. Adv Act Rel. No. 2969, 2009 SEC LEXIS 4309 (Dec. 30, 2009) .
(n42)Footnote 349. Rule 206(4)-2(b)(4).
(n43)Footnote 350. Release 2968 at text accompanying note 49.
(n44)Footnote 350.1. Investment Adviser Association, SEC No-Action Letter (Apr. 25, 2016).
(n45)Footnote 351. Rule 206(4)-2(a)(6)(ii).
(n46)Footnote 352. Rule 206(4)-2(a)(6)(i) & (ii)(C).
(n47)Footnote 353. Release 2969 at note 6.
(n48)Footnote 354. Release 2969.
(n49)Footnote 355. Release 2969.
(n50)Footnote 356. Rule 206(4)-2(b)(6).
(n51)Footnote 357. Rule 206(4)-2(d)(5).
(n52)Footnote 358. Rule 204-2(b)(5).
(n53)Footnote 359. Release 2968 at notes 111 and 112.
(n54)Footnote 360. Rule 206(4)-2(a)(7).
(n55)Footnote 361. Rule 206(4)-2(d)(4).
(n56)Footnote 362. Custody Q&A, Question VIII.3 (noting that the concept of independence for purposes of the definition of independent representative is distinct from the concept of independence under SEC auditor rules).
(n57)Footnote 363. Custody Q&A, Question VIII.1.
(n58)Footnote 364. Custody Q&A, Question VIII.2.
(n59)Footnote 365. Rule 206(4)-2(b)(1).
(n60)Footnote 366. Rule 206(4)-2(b)(2).
(n61)Footnote 367. Custody Q&A, Question VII.3.
(n62)Footnote 368. Rule 206(4)-2(b)(2)(ii). See Alpha Titans, LLC, Inv. Adv. Act Rel. No. 4073 (Apr. 29, 2015); Simon Lesser, CPA, CA, Inv. Adv. Act Rel. No. 4072 (Apr. 29, 2015).
(n63)Footnote 369. Custody Q&A, Question VII.1.

(n64)Footnote 370. Custody Q&A, Questions VII.1 and VII.2.
(n65)Footnote 371. Rule 206(4)-2(b)(4).
(n66)Footnote 372. Release 2176, section II.D.1.
(n67)Footnote 373. Release 2176.
(n68)Footnote 374. Release 2968 at text accompanying note 143.

Exhibit 4. Materials Provided By The Division

- July 2, 2013 Letter from Michael Robinson to Debra Newman
- Forms ADV filed by EACM on 01.04.2016, 02.26.2013, 03.31.2015, 04.1.2013, 05.16.2014, 09.14.2012, 09.27.2012, 3.31.2014 and EACM's ADVW filed on 2.23.2016
- EACM's Due Diligence Questionnaire
- Discretionary Line Agreement Between Donald F. Lathen and Eden Arc Capital Partners
- May 30, 2013 Email re "Eden Arc Benchmark Plus Questions" (Investigation Exhibit 101) (SEC-EDENARC-E-0212454)
- May 2, 2011 Investment Management Agreement
- Draft Account Control Agreement (Investigation Exhibit 105) (SEC-ProtassH-E-0080355, plus attachment)
- September 26, 2013 Email from Michael Robinson to Trevor Simon re "Due Diligence Questions from Hiltop" (SEC-ProtassH-E-0095454)
- Eden Arc Capital Partners, LP Limited Partnership Agreement
- Private Placement Memorandum, Offering by Eden Arc Capital Partners, LP, dated March 2011 and July 2013
- Profit Sharing Agreement between Donald F. Lathen, Eden Arc Capital Partners, LP and Eden Arc Capital Management, LLC
- Promissory Note dated January 31, 2013 executed by Donald F. Lathen, Jr. (Borrower) and Eden Arc Capital Partners (Lender)
- UCC Financing Statement Filing Number -201306098236929
- Audited Financial Statements for the Fiscal Years 2011, 2012, 2013 and 2014 for Eden Arc Capital Partners, LP
- Lathen and EACP Tax Returns for the years 2012, 2013 and 2014
- September 9, 2016 Letter from Harlan Protass to The Honorable James E. Grimes
- Division of Enforcement's Memorandum of Law in Opposition to Respondents' Motion to Leave to Move for Summary Disposition dated September 16, 2016
- Investigative Testimony of Donald F. Lathen, Jr. in the Matter of Eden Arc Capital Management, LLC (NY-9197) (Four Volumes) and Related Exhibits
- EndCare Brochure (file dated 7.24.2012) (Investigation Exhibit 88c)
- January 15, 2016 Wells Submission of Eden Arc Respondents
- Order Instituting Administrative and Cease-and-Desist Proceedings (File No. 3-17387)
- Answer and Affirmative Defenses of Respondents (File No. 3-17387)
- Account Details (Donald F. Lathen and David E. Jungbauer and Angela Sermeno JTWROS) (Investigation Exhibit 61B)
- Participant Agreements and Related Limited Power of Attorney Agreements, and General Durable Power of Attorney Effective Upon Execution Agreements
- Investigative Testimony of Stephen Mazzotti in the Matter of Eden Arc Capital Management, LLC (NY-9197) and Exhibits
- Eden Arc Compliance Manual dated March 2013
- Various Discretionary Line Agreements Executed in 2015, including between (a) Donald Lathen, (b) Eden Arc Capital Partners, and (c) (individual) Doreen Shelley, Mary Johnson, Marcelleus Brown, Richard Gilks, Stephen Wilcox, Patricia Kleinow.
- Email from Jay Lathen to Michael Robinson dated February 3, 2015 re "Discretionary Line Agreement" (SEC-EDENARC-E-0072362 -77)

- Brokerage and Account Statements for Donald Lathen, Jr., Eden Arc Capital Partners, and other Individuals for 2011 through 2015 from CL King, FirstSouthwest, Wedbush, SecureVest, Grace Financial and HSBC

Exhibit 5

List of Expert Testimony

Witness for Hale and Dorr as Plaintiff against the Boston Safe Deposit Company in Orphans Court for Boston, in Boston, Massachusetts, in or around February 1981 -- topic was industry practice on investing more than 5% of a common trust fund's assets in any particular issuer of securities

Witness for Paul Hastings on behalf of First Pacific Advisors against ICMARC in First Pacific Advivors, Inc. v. Vantagepoint Investment Advisors, 01-civ-821, S.D. Cal., filed 10/24/2001 -- topic was whether First Pacific Advisors was entitled to compensation for the last 30 days of its investment advisory contract with ICMARC where ICMARC has terminated its ability to give instructions to the custodian of a mutual fund before the contract expired

I have not testified as an expert witness at trial or in deposition in the past four years.