U.S. Securities and Exchange Commission

Staff Responses to Questions About the Custody Rule

The staff of the Division of Investment Management has prepared the following responses to questions about the rule 206(4)-2, the "custody rule" under the Investment Advisers Act of 1940 and expects to update from time to time our responses to additional questions. These responses represent the views of the staff of the Division of Investment Management. They are not a rule, regulation, or statement of the Securities and Exchange Commission, and the Commission has neither approved nor disapproved this information. The adopting release for the most recent amendments to the rule (dated December 30, 2009, the "Adopting Release") can be found at: http://www.sec.gov/rules/final/2009/ia-2968.pdf. These responses supersede the previously posted responses to questions regarding the 2003 amendments to the rule. The adopting release for those 2003 amendments ("2003 Release") can be found at http://www.sec.gov/rules/final/ia-2176.htm. (Answers that are indicated as modified from the prior version related to the 2003 amendments may have been either changed or clarified without substantive change.)

I. Compliance Dates (This section I is new and posted March 5, 2010.)

Question I.1

Q: An investment adviser that currently sends account statements to its clients in lieu of those from a qualified custodian now must arrange for the account statements to be delivered directly by a qualified custodian. When must the qualified custodian send the first account statements directly to the adviser's clients?

A: The compliance date is March 12, 2010. Accordingly, qualified custodians must deliver account statements for all periods ending on or after March 12, 2010. Thus, quarterly statements ending on March 31, 2010, must be sent by qualified custodians directly to clients. The account statement need only cover the period between the compliance date and March 31, 2010 (but may of course also cover periods before March 12).

Question I.2

Q: Some investment advisers have omnibus account arrangements with qualified custodians who have no client information and thus do not deliver client statements. Advisers are converting these relationships to meet the requirements of amended rule 206(4)-2, but such conversions require obtaining new account documentation from clients and system reprogramming, which may not be feasible in time for the qualified custodian to send account statements for the period ending March 31, 2010. May these advisers have more time to complete these conversions?

A: The Division would not recommend enforcement action to the Commission if an adviser modifying an omnibus arrangement as described above complies with rule 206(4)-2(a)(3) for those accounts no later than the delivery of the account statement for the third quarter of 2010, provided that (i) the adviser sends notice to each client no later than the time of sending the account statement for the period ending March 31, 2010, clearly describing the way in which the adviser intends to change the account arrangements to comply with the amended rule and the expected timing of those changes, and (ii) the adviser undergoes a surprise examination for 2010.

Question I.3

Q: Must the surprise examination required under rule 206(4)-2(a)(4) be completed before December 31, 2010?

A: No. The surprise examination must commence on or before December 31, 2010 but does not need to be completed until 120 days after the time chosen by the accountant performing the surprise examination. If the adviser itself maintains client assets as qualified custodian, the first surprise examination must commence no later than six months after obtaining the internal control report. For an adviser that becomes subject to the rule after the effective date, the surprise examination must commence within six months after it becomes subject to the rule. However, as a transitional matter, the Division would not recommend enforcement action to the Commission if an adviser that becomes subject to the rule after the effective date has its first surprise examination commence by the later of six months after the adviser becomes subject to the rule or December 31, 2010. (Modified March 15, 2010)

Question I.4

Q: Does the requirement that the accountant performing an annual audit on a pooled investment vehicle for purposes of compliance with the rule must be registered with and subject to regular inspection by the Public Company Accounting Oversight Board ("PCAOB") pursuant to rule 206(4)-2(b)(4)(ii) apply to the 2009 fiscal year?

A: This requirement applies to audits for fiscal years beginning on or after January 1, 2010.

Question I.5

Q: Section III.B.3. of the adopting release (transition section) indicates that for pooled investment vehicles, "[a]n investment adviser to a pooled investment vehicle may rely on the

annual audit provision if the adviser (or a related person) becomes contractually obligated to obtain an audit of the financial statements of the pooled investment vehicle for fiscal years beginning on or after January 1, 2010 by an independent public accountant registered with, and subject to regular inspection by, the PCAOB." Does this mean an adviser must be a party to a written engagement letter with the auditor?

A: No. The obligation to obtain an audit may be evidenced in a partnership agreement, disclosure statement, or engagement letter with the auditor. *See* 2003 Release, Footnote 47.

Question I.6

Q: Under rule 206(4)-2(b)(4), an independent public accountant performing an annual audit on a pooled investment vehicle in lieu of the required annual surprise examination must be registered with, and subject to, regular inspection by the PCAOB. The effective date of the rule is March 12, 2010. If an accountant is not currently subject to regular inspection by the PCAOB, may the adviser satisfy the requirement for exemption from the surprise examination if the accountant becomes subject to regular inspection by the PCAOB before the issuance of the audited financial statements for the pooled investment vehicle's 2010 fiscal year?

A: Yes.

Question I.7

Q: Rule 206(4)-2(a)(6) requires that an adviser or its related person that maintains client assets as a qualified custodian must obtain (or receive from the related person) a written internal control report (*e.g.*, Type II SAS 70 report) regarding the adviser's or its related person's custodial practices. What is the compliance date for the internal control report?

A: The compliance date for obtaining an internal control report is September 12, 2010 for advisers subject to the requirement on March 12, 2010. Advisers that are newly subject to Rule 206(4)-2(a)(6) (*e.g.*, newly maintaining, or having a related person maintaining, client assets as a qualified custodian after March 12, 2010) must obtain the internal control report within six months of becoming subject to the requirement.

Question I.8

Q: Rule 206(4)-2(a)(6) requires that an adviser or its related person that maintains client assets as a qualified custodian must obtain (or receive from the related person) a written internal control report (*e.g.*, Type II SAS 70 report) regarding the custodial services of the qualified custodian. Does the internal control report need to address the effectiveness of controls over custodial services prior to March 12, 2010, the effective date of the amended rule?

A: No, the internal control report does not need to address the effectiveness of controls over custodial services prior to March 12, 2010, the effective date of the amended rule, even if it results in a shortened examination period for the 2010 internal control report.

Question I.9

Q: Currently, qualified custodians often obtain custody-related SAS 70 reports prepared on a regular reporting cycle. If a qualified custodian obtained a SAS 70 report in 2009 and plans to obtain a SAS 70 report in 2010, is the qualified custodian expected to alter its reporting cycle to meet (or allow its related person investment adviser to meet) the initial September 12, 2010 compliance date?

A: No, a qualified custodian that obtained a custody-related SAS 70 report in 2009 is not expected to alter its reporting cycle in 2010.

Question I.10

Q: When must advisers registered with the SEC begin using the amended Form ADV?

A: Advisers must provide responses to the additional questions in amended Form ADV in their first annual updating amendment after January 1, 2011. Advisers who file an initial Form ADV before the updated Form ADV is available in IARD may use their first annual updating amendment to provide answers to these additional questions.

II. Definition of Custody; Scope of the Rule

Question II.1

Q: If an adviser inadvertently receives securities from a client, under the amended rule may the adviser forward the securities to the qualified custodian instead of returning the securities to the client?

A: No. If the adviser does not return the securities to the sender within three business days, the adviser not only has custody but has also violated the amended rule's requirement that client securities be maintained in an account with a qualified custodian.[1] However, the Division would not recommend enforcement action to the Commission under certain circumstances if an adviser inadvertently receives tax refunds from tax authorities, or client settlement proceeds from administrators in connection with class action lawsuits and other legal actions, or stock certificates, dividends, or evidence of new debt from issuers in connection with class action lawsuits involving bankruptcy or business reorganization, and forwards these client assets within five business days of its receipt and maintains appropriate records. *See* Investment Adviser Association, SEC Staff Letter, (Sept. 20, 2007), available at http://www.sec.gov/divisions/investment/noaction/2007/iaa092007.pdf.

We understand that an adviser's personnel may be unable to access mail or deliveries at an office location due to the firm's business continuity plan in response to circumstances related to coronavirus disease 2019 (COVID-19). In such circumstances, the Division would not consider

the adviser to have received client assets at that office location until firm personnel are able to access the mail or deliveries at that office location. (Modified March 16, 2020.)

Question II.2

Q: If an employee of an advisory firm serves as a trustee to a firm client, does the firm have custody?

A: Generally, yes. The role of the supervised person as trustee is imputed to the advisory firm, thus causing the firm to have custody.

Footnote 139 of the Adopting Release explains, however, that the role of the supervised person as trustee will not be imputed to the advisory firm if the supervised person has been appointed as trustee as a result of a family or personal relationship with the grantor or beneficiary and not as a result of employment with the adviser. A similar analysis would apply where the supervised person serves as the executor to an estate as a result of a family or personal relationship with the deceased. A personal relationship developed as a result of providing advisory services to a client over many years is not the type of "personal relationship" contemplated by footnote 139. (Modified March 5, 2010.)

Question II.3

Q: If an adviser manages client assets that are not funds or securities, does the amended custody rule require the adviser to maintain these assets with a qualified custodian?

A: No. Rule 206(4)-2 applies only to clients' funds and securities. (Posted 2003.)

Question II.4

Q: Does an adviser have custody if it has authority to transfer client funds or securities between two or more of a client's accounts maintained with the same qualified custodian or different qualified custodians?

A: Under rule 206(4)-2(d)(2)(ii), an adviser has custody if it has the authority to withdraw client assets maintained with a qualified custodian upon the adviser's instruction to the custodian. We do not interpret the authority to withdraw assets to include the limited authority to transfer a client's assets between the client's accounts maintained at one or more qualified custodians if the client has authorized the adviser in writing to make such transfers and a copy of that authorization is provided to the qualified custodians, specifying the client accounts maintained with qualified custodians. In the staff's view, "specifying" would mean that the written authorization signed by the client and provided to the sending custodian states with particularity the name and account numbers on sending and receiving accounts (including the ABA routing number(s) or name(s) of the receiving custodian) such that the sending custodian has a record that the client has identified the accounts for which the transfer is being effected as belonging to the client. That authorization does not need to be provided to the receiving custodian. Moreover, in the staff's view, an adviser's authority to transfer client assets between the client's accounts at

the same qualified custodian or between affiliated qualified custodians that both have access to the sending and receiving account numbers and client account name (e.g., to make first-party journal entries) does not constitute custody and does not require further specification of client accounts in the authorization. (Modified February 21, 2017.)

Question II.5.A

Q: Does an adviser have custody if it has authority to instruct the qualified custodian that maintains a client's account to remit the funds or securities from the account to the same client at his or her address of record?

A: We do not interpret the authority to instruct the qualified custodian maintaining a client's account to remit the funds or securities from the account from time to time to the same client at his or her address of record as having custody if (1) the client has granted such authority to the adviser in writing and a copy of that authorization is provided to the qualified custodian, (2) the adviser has no authority to open an account on behalf of the client; and (3) the adviser has no authority to designate or change the client's address of record with the qualified custodian. (Modified September 9, 2010)

Question II.5.B

Q: Many qualified custodians are subject to regulatory requirements designed to protect against improper or unauthorized changes of address. For example, broker-dealers must send a customer who is a natural person a notification of a change of address to the customer's old address on or before the 30th day after receiving a notice of the requested change pursuant to Rule 17a-3(a)(17)(i)(B)(2) under the Securities Exchange Act of 1934. Similarly, banking regulators have issued guidance, such as Federal Reserve System Supervisory Letter SR 0-11 (April 26, 2001), Office of Comptroller of the Currency Advisory Letter 2001-4 (April 30, 2001), Federal Deposit Insurance Corporation Financial Institution Letter 39-2001 (May 9, 2001), Office of Thrift Supervision CEO Letter No. 139 (May 4, 2001), and National Credit Union Administration Letter No. 01-CU-09 (September 2001), providing that banks should send confirmation of a customer request for a change of address to both the old and new address on record. If an adviser has a reasonable belief that the qualified custodian, upon receiving the request for change of address, sends a notice of such change to the client at the client's old address of record, may the adviser change a client's address of record with the qualified custodian and still rely on the answer to Question II. 5. A?

A: Yes. (Posted September 9, 2010)

Question II.6

Q: If an adviser has the ID number and password to a client's pension fund account to rebalance and adjust investments in the account, does the adviser have custody?

A: The adviser has custody if password access provides the adviser with the ability to withdraw funds or securities or transfer them to an account not in the client's name at a qualified custodian. (Posted May 20, 2010)

Question II.7

Q: An adviser has a related natural person who is the owner of an account to which the adviser provides advisory services. The adviser otherwise does not have custody under the rule. Does the adviser have custody simply because the related natural person has the ability to withdraw his or her own assets by virtue of being the account holder?

A: If the related person is a natural person and is both the legal and beneficial owner (*e.g.*, he or she is not the trustee of another person) of the account and the beneficial owner for purposes of the securities laws, this related person's access to his or her own account will not impute custody to the adviser. (Posted May 20, 2010)

Question II.8

Q: Under what circumstances does an independent public accountant engaged by an adviser for purposes of complying with the rule need to be registered with, and subject to regular inspection by, the PCAOB?

A: An accountant must be registered with, and subject to regular inspection by, the PCAOB if it is engaged to (1) perform an annual audit of a pooled investment vehicle in accordance with rule 206(4)-2(b)(4); (2) perform an annual surprise examination of an adviser that maintains client assets with a qualified custodian that is the adviser or a related person of the adviser in accordance with rule 206(4)-2(a)(4); or (3) prepare an internal control report in accordance with rule 206(4)-2(a)(6). (Posted March 15, 2010)

Question II.9

Q: Must a registered investment adviser comply with rule 206(4)-2 with respect to the funds and securities of a person to whom the adviser provides investment advisory services but from which the adviser receives no compensation?

A: Yes. Under rule 203(b)(3)-1(b)(4), an adviser relying on the exemption from registration provided by section 203(b)(3) of the Investment Advisers Act of 1940 need not count as a client any person for whom the adviser provides investment advisory services without compensation. However, rule 203(b)(3)-1 does not control the determination of when a person is considered the client of a registered investment adviser for purposes of rule 206(4)-2. (Posted March 15, 2010)

Question II.10

Q: If an adviser has custody of a client's assets that include a swap agreement with a counterparty and posts funds or securities as collateral in connection with the swap on behalf of the client, must the collateral be maintained with a qualified custodian?

A: Yes. Such collateral must be maintained with a qualified custodian. If the qualified custodian is a related person, the adviser must receive an internal control report from the custodian. In addition, the adviser must undergo a surprise examination unless the custodian is operationally independent. Both the surprise examination, if required, and internal control report must be performed by an accountant that is registered with, and subject to regular inspection by, the PCAOB. (Posted May 20, 2010)

Question II.11

Q: In February 2017, the staff of the Division of Investment Management issued IM Guidance Update 2017-01 "Inadvertent Custody: Advisory Contract Versus Custodial Contract Authority" ("Guidance Update," available at: https://www.sec.gov/investment/im-guidance-2017-01.pdf) in which the staff expressed its view that, depending on the facts and circumstances, certain custodial agreements could impute investment advisers with custody they otherwise did not intend to have ("Inadvertent Custody"). Specifically, the Guidance Update described circumstances where a custodial agreement between a client and qualified custodian, to which the client's adviser is not a party, might permit the adviser to instruct the custodian to disburse, or transfer, funds or securities. We are an advisory firm that does not know whether any of our clients' custodial agreements would give our firm Inadvertent Custody. Are we now required to comply with the custody rule for those client accounts?

A: An adviser that does not have a copy of a client's custodial agreement, and does not know, or have reason to know whether the agreement would give the adviser Inadvertent Custody, need not comply with the custody rule with respect to that client's account if Inadvertent Custody would be the sole basis for custody. The Division of Investment Management would not recommend enforcement action to the Commission under the custody rule or under Section 207 of the Advisers Act against any such investment adviser if that adviser neither complied with the requirements of the custody rule nor indicated it has custody in its Form ADV filing. We note, however, that this relief is not available where the adviser recommended, requested, or required a client's custodian. (Posted June 5, 2018)

Question II.12

Q: We are an advisory firm with 100 clients, and we have check-writing authority on 60 of our clients' accounts. Of the remaining 40 accounts, we deduct our advisory fee from 10 accounts. We do not know (or have reason to know) whether any of our clients' custodial agreements would give our firm Inadvertent Custody, as described in Question II.11 above, because, among other things, our firm does not have copies of our clients' custodial agreements and we did not recommend, request, or require the clients to use their chosen custodians. We have no basis for having custody other than the check-writing authority and fee deduction. We currently comply with the custody rule with respect to the 60 client accounts for which we have check-writing authority, and we rely on the exception from the surprise examination requirement for the 10 accounts from which we deduct our advisory fee. Should we comply with the custody rule for the remaining 30 client accounts?

A: Under the facts you posed, the Division would not recommend enforcement action for not complying with the custody rule or the custody-related ADV reporting requirements for the 30 accounts, consistent with the response to Question II.11 above. The Division would not recommend enforcement action to the Commission under the custody rule or under Section 207 of the Advisers Act if the adviser proceeded to rely on the exception in the custody rule for fee deduction, and completed Form ADV accordingly, for the 10 accounts from which the adviser deducts its advisory fee. In addition, the Division would, therefore, expect you to continue to comply with the custody rule with respect to the 60 client accounts for which you have check-writing authority, and we would expect you to continue to comply with all but the surprise examination requirement with respect to the 10 client accounts from which you deduct fees. (Posted June 5, 2018)

III. Fee Deductions

Question III.1

Q: A client has instructed its custodian to debit the client's account for advisory fees each quarter. The custodian makes all fee calculations, based on the advisory contract. The adviser does not calculate the fee, nor does it send a bill. Does the adviser have custody?

A: If the qualified custodian is not a related person of the adviser, the adviser does not have custody. Under these circumstances, the custodian is acting only as agent for the client, and the adviser does not have access to the client's funds. (Modified May 20, 2010.)

IV. Account Statements; Surprise Examinations

Question IV.1

Q: May account statements be delivered electronically?

A: Yes. Electronic delivery is permissible, if (1) the client has given informed consent to receiving the information electronically; (2) the client can effectively access the electronically delivered information; and (3) evidence of the delivery is received, such as an email return-receipt or other confirmation that the information was accessed. *See Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Release No. 33-7288 (May 9, 1996) [61 FR 24644 (May 15, 1996)]*. These guidelines are available at www.sec.gov/rules/concept/33-7288.txt.

Advisers whose clients receive electronic statements from qualified custodians must still form a reasonable belief after due inquiry that the clients are receiving those statements. The adviser may satisfy this requirement by, for example, being copied on the email notifications of account statement postings sent to clients in addition to having access to client statements on the custodian's website, although this is not the exclusive means of forming that reasonable belief (footnote 21 of the Adopting Release). (Modified March 5, 2010.)

Question IV.2

Q: Can an adviser voluntarily continue to send its own quarterly account statements to clients **in addition to** the statements that the clients receive directly from qualified custodians?

A: Yes. If an adviser voluntarily sends account statements, it must insert a legend required under paragraph (a)(2) of the rule urging the client to compare information provided in its statements with those from the qualified custodian in account opening notices and subsequent statements sent to the client for whom the adviser opens custodial accounts with the qualified custodian. (Modified March 5, 2010.)

Question IV.3

Redesignated as Question XVI.4.

Question IV.4

Q: Is there an example of a report that may be issued by the independent public accountant performing a surprise examination of the adviser?

A: Yes. As stated within the Commission's Guidance for Accountants (see Release No. IA 2969), the surprise examination is a compliance examination to be conducted in accordance with AICPA attestation standards. The AICPA has issued an illustrative surprise examination report to reflect the reporting specified in the Guidance for Accountants. The illustrative report is available on the AICPAs website at https://www.aicpa.org/content/dam/aicpa/interestareas/frc/industryinsights/downloadabledocuments/custody-report-september-1final.

Additionally, the AICPA published this illustrative surprise examination report in the May 2010 edition of the Audit and Accounting Guide — Investment Companies. (Posted September 9, 2010)

Question IV.5

Q: The Guidance for Accountants (http://www.sec.gov/rules/interp/2009/ia-2969.pdf) states that the accountant's surprise examination report must include an opinion as to whether the investment adviser had been complying with rule 204-2(b) since the prior examination date. When an investment adviser becomes subject to the surprise examination requirement for the first time, what period should such opinion cover?

A: The accountant should report on the investment adviser's compliance with rule 204-2(b) for a period beginning no later than the date the adviser became subject to the surprise examination requirement through the examination date. (Posted December 2, 2010)

Question IV.6.A

Q: Who must file Form ADV-E and the certificate of accounting (surprise examination report)?

A: Form ADV-E and the surprise examination report must be filed electronically through IARD by the independent public accountant performing the surprise examination. Paper filings are no longer accepted. (Posted December 2, 2010)

Question IV.6.B

Q: How does the independent public accountant file Form ADV-E and the surprise examination report?

A: This is a two-step process: (1) the adviser must submit a Form ADV-E in IARD that identifies the independent public accountant who will be performing the surprise examination (see the IARD Users Manual on http://www.iard.com/pdf/formADVE_guide.pdf), and (2) the independent public accountant receives an email from IARD providing a unique, secure link which allows the accountant to upload a surprise examination report to IARD (see http://www.iard.com/pdf/formADV-E.pdf for instructions). (Posted December 2, 2010)

Question IV.7

Q: Our firm is subject to the surprise examination requirement. We and the independent public accountant we have engaged to perform this service have experienced various logistical disruptions due to coronavirus disease 2019 ("COVID-19"). Would our firm be in violation of the rule if the independent public accountant did not complete the examination and submit Form ADV-E to file its certificate of accounting within 120 days after the date chosen by the independent public accountant?

A: The Division would not recommend enforcement action for a violation of rule 206(4)-2 against an adviser that reasonably believed that its independent public accountant would complete its examination and submit Form ADV-E to file its certificate of accounting by the 120-day deadline, but failed to do so due to the logistical disruptions described above, as long as the independent public accountant files such report as soon as practicable, but not later than 45 days after the original due date. (Posted March 30, 2020)

V. Notice to Clients

Question V.1

Q: An adviser uses three different custodians for one of its clients, and the assets are moved among them depending on the trading in the account. At any given moment, one or two of those custodians might not be holding that client's funds or securities. Must the adviser provide the client with a new notice each time the assets are moved, or can the adviser provide the client with notice at one time advising the client of all three custodians?

A: The adviser can give the client a one-time notice of all three custodians, and is not required to provide a new notice each time the assets move among the three. The purpose of the notice is to tell the client whom to contact to get his assets, if necessary, and this purpose is satisfied even if the client has to contact three custodians. (Posted 2003.)

VI. Pooled Investment Vehicles

Question VI.1

Q: How does an investment adviser to a pooled investment vehicle comply with the custody rule if it does not use the "audit provision"?

A: If the financial statements of the pooled investment vehicle are not audited and distributed to investors in accordance with paragraph (b)(4) of the rule, the exceptions provided in that paragraph will not be available to the adviser. As a consequence, the adviser, among other things, must have a reasonable basis, after due inquiry, for believing that the qualified custodian sends quarterly account statements to each investor in the pool and must obtain an annual surprise examination with respect to the pool's assets. We note that, because the privately offered securities exception provided in paragraph (b)(2) is not available with respect to assets of an unaudited pool, the adviser must maintain privately offered securities owned by the pool with a qualified custodian. (Posted May 20, 2010)

Question VI.2

Q: When a qualified custodian is required to send account statements directly to investors in a pooled investment vehicle, should each account statement be a statement of funds and securities held by the pool and transactions entered into by the pool, or a statement of the investor's ownership interest in the pool (*e.g.*, the investor's ending capital balance in a limited partnership)?

A: Each account statement sent should be a statement of funds and securities held by the pool and transactions entered into by the pool. (Modified May 20, 2010.)

Question VI.3

Q: Should the accountant's confirmation procedures for a surprise examination of a pooled investment vehicle include confirmation with investors of the pooled investment vehicle?

A: Yes. The accountant should obtain confirmation from investors of (i) funds and securities held by the pooled investment vehicle as of the date of the examination and (ii) contributions and withdrawals of funds and securities to and from the pooled investment vehicle by the investor since the date of the last examination. The quarterly account statements required to be sent by the qualified custodian[s] (see also Question VI.2) should provide investors with the information necessary to respond to the confirmation. (Posted May 20, 2010)

Question VI.4

Q: Does each limited partner need to have a separate independent representative or can one independent representative serve for all limited partners?

A: The representative can serve for all limited partners, so long as the representative is, in fact, independent and satisfies the definition in rule 206(4)-2(d)(4). (Modified March 5, 2010.)

Question VI.5

Q: To use the "audit approach" relying on rule 206(4)-2(b)(4), must the financial statements be prepared in accordance with U.S. GAAP?

A: Yes, the financial statements for pooled vehicles must be prepared in accordance with U.S. GAAP in order to meet the requirements of the rule, with some exceptions for non-U.S. funds and non-U.S. advisers.

Pooled vehicles organized outside of the United States, or having a general partner or other manager with a principal place of business outside the United States, may have their financial statements prepared in accordance with accounting standards other than U.S. GAAP so long as they contain information substantially similar to statements prepared in accordance with U.S. GAAP. Any material differences with U.S. GAAP must be reconciled. The Division would not recommend enforcement action if that reconciliation is included only in the financial statements delivered to U.S. persons. *See generally* Goodwin, Proctor & Hoar, SEC Staff Letter, Feb. 28, 1997. The required audit of those financial statements must be by an independent public accountant and meet with requirements of U.S. generally accepted auditing standards ("U.S. GAAS").

In addition, offshore advisers registered with the SEC are not subject to the custody rule, with respect to offshore funds. See ABA Subcommittee on Private Investment Entities, SEC Staff Letter, Aug. 10, 2006 ("ABA Letter"), available at http://www.sec.gov/divisions/investment/noaction/aba081006.pdf. The terms "offshore adviser" and "offshore fund" are defined in the ABA Letter. (Modified March 10, 2010.)

Question VI.6

Q: To use the "audit provision" allowed under rule 206(4)-2(b)(4), must the audit meet the requirements of U.S. GAAS?

A: Yes. If the audit does not meet U.S. GAAS requirements, the adviser cannot rely upon the "audit provision." (Modified March 10, 2010.)

Question VI.7

Q: Does a fund of funds have to meet the 120-day deadline for sending out its audited financial statements?

A: The Division has issued a letter indicating that it would not recommend enforcement action to the Commission if an adviser relying on the "audit provision" for a fund of funds distributes the audited financials to investors within180 days from the end of the fund of funds' fiscal year. A fund of funds is a pooled investment vehicle that invests 10 percent or more of its total assets in other pooled investment vehicles that are not, and are not advised by, a related person of the pool, its general partner, or its adviser. A "related person" of an adviser includes officers, partners, directors, most employees, and anyone controlled by, controlling or under common control with the adviser. *See* Adopting Release at footnote 45 and the ABA Letter. (Modified March 5, 2010.)

Question VI.8A

Q: An adviser's client is a pooled investment vehicle that invests in a fund of funds, but the "top tier" pool is not a fund of funds as defined in the ABA Letter because it is affiliated with the fund of funds in which it invests — for example, the top tier pool is a feeder fund in a master-feeder structure where the master fund is a fund of funds. If the top tier pool wishes to rely on the "audit provision," must it distribute its audited financial statements within 120 days of its fiscal year end, or may it use the extended 180-day deadline available to the fund of funds?

A: In these circumstances, the auditors of the top tier pool, like the auditors to the fund of funds, might not be able to complete their work until the audit reports of the funds underlying the fund of funds are available. The Division would not recommend enforcement action for a violation of rule 206(4)-2 against an adviser to a top tier pool that invests 10 percent or more of its total assets in a fund of funds if the adviser distributes the top tier pool's audited financial statements within 180 days of the end of the fiscal year of the fund of funds. (Modified March 5, 2010.)

Question VI.8B

Q: An adviser's client is a "top tier" pooled investment vehicle that invests in one or more funds of funds. Such top tier pool invests 10 percent or more of its total assets in one or more funds of funds, as defined in the ABA Letter, that are not, and are not advised by, a related person of the top tier pool, its general partner, or its adviser. An audit of the top tier pool cannot be completed prior to the completion of the audits of the funds of funds in which it invests, whose advisers have up to 180 days after the end of their fiscal year to distribute audited financial statements. If the adviser to the top tier pool wishes to rely on the "audit provision," when must it distribute its audited financial statements?

A: The Division would not recommend enforcement action to the Commission under rule 206(4)-2 if the audited financial statements of the top tier pool are distributed to pool investors within 260 days of the end of the top tier pool's fiscal year. (Posted April 1, 2011)

Question VI.9

Q: If a pooled investment vehicle is subject to an annual audit and its adviser is relying on the "audit provision" under rule 206(4)-2(b)(4), would the adviser be in violation of the rule if the pooled vehicle fails to distribute its audited financial statements within 120 days, 180 days (in

the case of a fund of funds, in light of FAQ VI.7, or a pool investing in a fund of funds, in light of VI.8A), or 260 days (in the case of a “top tier” pooled investment vehicle investing in one or more funds of funds, in light of FAQ VI.8B) after the end of its fiscal year?

A: The Division would not recommend enforcement action for a violation of rule 206(4)-2 against an adviser that is relying on rule 206(4)-2(b)(4) and that reasonably believed that the pool's audited financial statements would be distributed within the 120-day, 180-day (in light of FAQ VI.7 or 8A), or 260-day (in light of FAQ VI.8B) deadlines, but failed to have them distributed in time under certain unforeseeable circumstances. (Modified April 27, 2020)

Question VI.10

Q: Some registered fund families have organized unregistered money market funds for investment exclusively by their registered investment companies, in compliance with rule 12d1-1 under the Investment Company Act of 1940.[2] The financial statements of the unregistered money market funds are audited, but are delivered to the registered investment companies, which may be related persons of the adviser. Under rule 206(4)-2(c), sending audited financial statements solely to pooled investment vehicle investors that are themselves pooled investment vehicles and related persons of the adviser does not satisfy the financial statement delivery requirement under rule 206(4)-2(b)(4). Must the financial statements of the unregistered money market funds be delivered to each shareholder in the registered investment companies investing in the unregistered fund?

A: The Division would not recommend enforcement action to the Commission under rule 206(4)-2 if the audited financial statements of the unregistered money market funds are not delivered to the shareholders of the registered investment companies, provided that the financial statements are delivered to each registered investment company's chief compliance officer, audit committee members and the members of the board of directors who are not interested persons of the adviser. (Posted March 5, 2010.)

Question VI.11

Q: Section 206(4)-2(b)(4) provides that an adviser may comply with the rule's requirements with respect to an account of a "limited partnership (or limited liability company, or another type of pooled investment vehicle)" by delivering audited financial statements of the limited partnership to investors. In some cases such pooled investment vehicles are formed where the general partner has only a nominal capital account and there is a single limited partner. Similarly, a limited liability company may have a single member. Is there a minimum number of investors that a limited liability company or other entity must have in order to come within the meaning of section 206(4)-2(b)(4)?

A: No. (Posted March 5, 2010.)

VII. Privately Offered Securities

Question VII.1

Q: If the client is a pooled investment vehicle that does not rely on the "audit provision" under the amended custody rule, may the adviser use the exception for privately offered securities for that client?

A: No. The exception provided under paragraph (b)(2) of the rule is only available for an adviser to a pool that is audited pursuant to rule 206(4)-2(b)(4). (Modified March 5, 2010.)

Question VII.2

Q: The limited partnership an adviser manages does not undergo an annual audit, and the amended custody rule therefore requires that privately offered securities owned by the limited partnership be maintained with qualified custodians. Some of these securities, however, are recorded only on the books of their issuers that are not qualified custodians. May the adviser satisfy this requirement of rule 206(4)-2(a)(1) by keeping the subscription agreement for the security with a qualified custodian or having the custodian act as nominee for the limited partnership?

A: Yes. Under this circumstance, an adviser may satisfy the requirements of rule 206(4)-2(a)(1) by keeping the originally signed subscription agreement (instead of the security itself) with a qualified custodian or having the custodian act as nominee for the limited partnership. (Modified March 5, 2010.)

Question VII.3

Q: When does an adviser have custody when it advises a client with respect to the purchase of privately offered uncertificated securities, *i.e.*, the securities described in paragraph (b)(2)(i) of the rule?

A: Whether an adviser has custody of client funds and securities depends upon whether the adviser directly or indirectly holds the securities or has any authority to possess them. Custody does not turn on whether the securities are maintained with a qualified custodian. Thus, an adviser that is a general partner of a limited partnership or a trustee of a trust would always have custody of such securities held by the partnership or the trust. An adviser that does not have such legal authority to obtain possession of such securities would generally not have custody, for example if the client must sign a subscription agreement to purchase a privately offered security, and the adviser has no authority to transfer or redeem those securities without client consent to the issuer. (Posted March 5, 2010.)

Question VII.4.

Q: Certain of our clients have recently invested in privately issued securities, such as collateralized loan obligations, that are evidenced by physical certificates, such as certificated notes. These physical certificates are non-transferable – they cannot be used to effect a change in beneficial ownership of the security for which they are issued without the prior consent of the issuer or holders of the outstanding securities of the issuer. The physical certificates technically do not meet the criteria for "privately offered securities" in rule 206(4)-2 due to the existence of a "certificate," and we therefore cannot rely on the exception in rule 206(4)-2(b)(2) from the requirement to maintain securities at a qualified custodian for certain privately offered securities.

The physical certificates evidencing our clients' investments generally are vaulted at a custodian that announced that in response to circumstances related to coronavirus disease 2019 ("COVID-19"), it would not be accepting physical certificates for a period of time. As a result, newly acquired physical certificates are not able to be placed immediately with a qualified custodian, and may not be able to be placed with a qualified custodian for the foreseeable future, unless investors have custodial arrangements in place with qualified banks that continue to receive and process certificates at this time. Deals that are expected to close imminently also will not be able to transition the physical certificates into global or uncertificated form. May we rely on the privately offered securities exception from the requirement to keep these physical certificates with a qualified custodian under these circumstances?

A: Yes. For the duration of this closure due to COVID-19 and until such time as physical certificates can reasonably be placed with a qualified custodian or similar securities can reasonably be issued using an approach that complies with the privately offered securities exception, the Division would not recommend enforcement action to the Commission under Advisers Act rule 206(4)-2 if an adviser does not maintain the certificates with a qualified custodian, provided that: (1) the physical certificates can only be used to effect a transfer or to otherwise facilitate a change in beneficial ownership of the security with the prior consent of the issuer or holders of the outstanding securities of the issuer; (2) ownership of the security is recorded on the books of the issuer or its transfer agent (or person performing similar functions) in the name of the client; (3) the physical certificates contain a legend restricting transfer; (4) the physical certificates are appropriately safeguarded by the adviser and can be replaced upon loss or destruction; and (5) the adviser makes and keeps (in accordance with the terms of Advisers Act Rule 204-2) a record of the custodian's closure. (Posted April 2, 2020.)

VIII. Independent Representatives

Question VIII.1

Q: If an adviser appoints an independent representative for a client, must the adviser obtain the client's consent?

A: The rule does not address this point. However, an adviser's fiduciary duties, client contract or limited partnership contract may require it to obtain client consent for the appointment.

Appointment of a representative without consent of the client suggests that the representative may be controlled by the adviser and is not truly independent. (Posted 2003.)

Question VIII.2

Q: If an accounting firm acts as the independent auditor (or independent surprise examiner) of an adviser, may the accounting firm also act as the independent representative for the limited partners of a pooled investment vehicle run by the adviser?

A: Likely not. The accounting firm would have to meet the definition of "independent representative" set out in the rule. We note that the concept of independence for purposes of the definition of "independent representative" under the rule is distinct from the concept of independence for purposes of the Commission's auditor independence rules. (Posted 2003.)

Question VIII.3

Q: If an accounting firm acts as the independent auditor of a pooled investment vehicle, may the accounting firm also act as the independent representative for the investors in the pool?

A: Likely not. The accounting firm would have to meet the definition of "independent representative" set out in the amended custody rule. As noted in the previous question, the concept of independence for purposes of the definition of "independent representative" under the amended custody rule is distinct from the concept of independence for purposes of the Commission's auditor independence rules.

In addition, if the audited financial statements are intended to be delivered to the independent representative rather than to the investors in the pooled vehicle, then the accounting firm would be receiving its own audit results; in those circumstances, we believe that the accountant may not be able to act solely in the limited partners' interests. (Posted 2003.)

Question VIII.4

Q: If an adviser is a trustee for a client's trust, can a co trustee be the "independent representative" to receive statements for the trust?

A: The co-trustee can be the independent representative provided it meets the tests for independence set out in the rule. (Posted 2003.)

Question VIII.5

Q: Can someone who is an advisory client of an adviser act as an independent representative for other clients of that adviser?

A: Yes, if it meets the tests for independence set out in the rule. If the client relationship is a "material business relationship" (or the person has another material business relationship) with the advisory firm, the person will not meet the tests for independence. (Posted 2003.)

IX. Sub-Custodians

Question IX.1

Q: If an adviser that is a qualified custodian uses a sub-custodian (that is also a qualified custodian) to hold some book-entry securities, may the adviser send its advisory clients consolidated account statements that incorporate the sub custodian's account statements, or must the sub-custodian send separate account statements?

A: If the adviser/custodian's account includes the assets maintained with the sub custodian, the adviser/custodian can send a consolidated statement. (Posted 2003.)

X. Auditing Non-Pool Accounts

Question X.1

Q: Can an adviser use the audit approach under the rule with respect to the account of a client that is not a pooled investment vehicle (*e.g.*, an endowment, an individual, or a pension fund)? What if the client co-invests alongside an audited private pool?

A: No. The audit approach is not available if the client is not a pooled investment vehicle; account statements must be sent to the client by a qualified custodian. The answer does not change if the client co-invests alongside an audited pool. (Modified March 5, 2010.)

XI. Balance Sheet

Question XI.1

Q: Under what circumstances must an adviser still provide an audited balance sheet to its advisory clients?

A: Although having custody no longer causes SEC-registered advisers to be subject to the balance sheet requirement, Item 18 of Form ADV Part 2A requires an SEC-registered adviser that receives the prepayment of fees exceeding $1,200 per client and six or more months in advance to include an audited balance sheet in its brochure to clients from whom the adviser has received such prepayments. (Modified December 2, 2010.)

XII. Trustees

Question XII.1

Q: A related person of an investment adviser (*e.g.*, an officer or director of the adviser) may act as the trustee of the participant-directed defined contribution plan established for the benefit of the adviser's employees. As trustee of the plan, the related person selects the service providers

for the plan, such as an administrator and may select the investment options available under the plan, *e.g.*, mutual funds. Must the adviser treat the assets of the plan as client assets of which it has custody?

A: The Division will not recommend enforcement action to the Commission against an investment adviser that does not treat the assets of a participant-directed defined contribution plan established for the benefit of adviser's employees as those of a client of which it has custody in these circumstances solely because a related person of the adviser is trustee which may select service providers and investment options for the plan, provided that (i) neither the investment adviser nor a related person otherwise acts as an investment adviser to the plan or any investment option available under the plan and (ii) the investment adviser and the related person trustee are, to the extent applicable, in compliance with the Employee Retirement Income Security Act of 1974 (ERISA) and rules and regulations issued thereunder with respect to the plan. (Posted March 5, 2010.)

Question XII.2

Q: In some trusts, co-trustees are required either by law or the trust instrument in order to protect the trust beneficiaries from the actions of a single trustee acting alone. In these situations, no co-trustee is able to withdraw assets without the prior written consent of the other co-trustee(s). Would an adviser acting as trustee in this type of arrangement have custody of the trust's assets for purposes of the rule?

A: The Division would not consider an adviser to have custody in such circumstances, provided that (i) the trust has a co-trustee that is a bank or a trust company that meets the definition of a qualified custodian under rule 206(4)-2(d)(6) and is not a related person of the adviser, (ii) the qualified custodian delivers account statements directly to each co-trustee that is not itself the custodian, and (iii) under the trust instrument or by law the withdrawal of any assets of the trust by the adviser requires the prior written consent of all of its co-trustee(s). (Posted March 10, 2010.)

Question XII.3

Q: For estate planning and other purposes, some people form revocable grantor trusts. With these trusts, the person who establishes and funds the trusts (the grantor) may revoke or modify the trust at will, including changing beneficiaries. If an adviser is co-trustee along with the grantor, would the adviser have custody of the trust's assets for purposes of the rule?

A: The Division would not consider an adviser to have custody under rule 206(4)-2 in such circumstances if (i) the adviser is prohibited by the trust instrument or by law from withdrawing any assets from the trust without the prior written consent of all of its co-trustees, (ii) each grantor who has contributed assets to the trust acts as co-trustee, and (iii) the qualified custodian delivers account statements directly to each co-trustee. (Posted March 10, 2010.)

XIII. Internal Control Report

Question XIII.1

Q: Is an adviser required to undergo a surprise examination and receive an internal control report from a related person that has custody of client assets, but does not serve as a "qualified custodian" for purposes of the rule of those assets?

A: An adviser must obtain an internal control report only if the adviser or its related person is acting as a qualified custodian of client assets. See Rule 206(4)-2(a)(6). For example, an adviser to a private fund the general partner of which is a related person of the adviser would not need to receive an internal control report from (i) the general partner if the general partner is not serving as a qualified custodian and (ii) the prime broker that is serving as qualified custodian but is not a related person of the adviser. However, the adviser would be required to obtain a surprise examination unless the fund qualified for the audit provision. See Rule 206(4)-2(b)(4). (Posted March 10, 2010)

Question XIII.2

Q: Rule 206(4)-2(b)(6) provides an exception to the surprise examination requirement to an adviser when a related person is acting as qualified custodian for the adviser's clients if the related person is "operationally independent" (as defined in paragraph (d)(5)) from the adviser. In such case, must the adviser receive an internal control report from the related person?

A: Yes. An adviser must receive an internal control report from the related person that acts as a qualified custodian for the adviser's clients, even if that person is operationally independent. (Posted March 10, 2010)

Question XIII.3

Q: Within the Guidance for Accountants contained in Release IA-2969, the Commission indicated that two types of reports issued under the AICPA professional standards (Type II SAS 70 or AT 601 compliance attestation) would be sufficient to satisfy the requirements of the internal control report. Are there other report formats that can be used to satisfy the custody rule?

A: Yes. The AICPA recently developed a report that under AT 101, Attest Engagements, of the AICPA's professional standards that would be acceptable under the custody rule. An illustrative report is currently available on the AICPA's website at https://www.aicpa.org/content/dam/aicpa/interestareas/frc/industryinsights/downloadabledocuments/custody-report-september-1final. (Posted October 10, 2017)

XIV. Introducing Broker

Question XIV.1

Q: An investment adviser may also act as an introducing broker or have a related person acting as an introducing broker for its clients. Introducing brokers may have a variety of different relationships with a carrying broker with respect to matters such as the handling of customer funds and securities and sending customer account statements. In some cases, an introducing broker may maintain some client funds or securities, on a temporary and/or on-going basis (*e.g.*, introducing brokers subject to paragraph (a)(2)(iv) of Rule 15c3-1 under the Securities Exchange Act of 1934). Is the introducing broker subject to the internal control report requirement in these circumstances?

A: Yes. An internal control report is required whenever an adviser or its related person is acting as a qualified custodian for client assets. (Posted March 10, 2010)

Question XIV.2

Q: If an introducing broker that is also an adviser or an adviser's related person is not acting as a qualified custodian under the rule for funds or securities of the adviser's clients, is the introducing broker subject to the internal control report requirement?

A: No. We would not consider an introducing broker to be acting as a qualified custodian under the rule if all client funds and securities are maintained with a carrying broker (which is not a related person of the adviser). Such an introducing broker must not receive client funds or securities other than checks drawn by clients and made payable to third parties such as the carrying broker. (Posted March 10, 2010)

Question XIV.3

Q: Does an adviser that meets the conditions above in Question XIV. 2 have custody of client funds or securities?

A: It depends. An adviser or its related person may have custody of client funds and securities without maintaining those funds or securities as qualified custodian for purposes of paragraph (a)(6) of the rule. For example, if the adviser or its related person has authority to withdraw client funds or securities maintained by the carrying broker, the adviser has custody of those assets. In that case, the adviser would be subject to all the applicable requirements of the rule, including the surprise examination requirement under paragraph (a)(4) of the rule. (Posted March 10, 2010)

XV. Transfer Agents

Question XV.1

Q: A transfer agent to a mutual fund is permitted to be used in lieu of a qualified custodian with respect to that mutual fund's shares under rule 206(4)-2(b)(1). If the mutual fund transfer agent is a related person of the adviser, must the adviser undergo a surprise examination and receive an internal control report from the transfer agent?

A: Yes. (Posted March 15, 2010)

XVI. Auditor Independence

Question XVI.1

Q. Pursuant to the custody rule, an accountant performing a surprise examination must meet the standards of independence described in rules 2-01(b) and (c) of Regulation S-X. Rule 2-01(b) provides the general standard of independence. Rule 2-01(c) provides a non-exclusive list of circumstances, including specific relationships and services, which would be inconsistent with the general standard. How should an accountant who performs a surprise examination under the custody rule consider the propriety of non-audit services specified in rule 2-01(c)(4)(i)-(v) if such services are not subject to the accountant's procedures during the surprise examination?

A. When engaged to issue an audit or attest report to satisfy a requirement in the custody rule, the accountant should consider the application of the general standard of independence to such engagements. The Commission's 2003 adopting release (Release No. 33-8183 (January 28, 2003), *Strengthening the Commission's Requirements Regarding Auditor Independence*), states that there is a rebuttable presumption that certain prohibited non-audit services (e.g., bookkeeping, financial information systems design and implementation) will be subject to audit procedures during an audit of the audit client's financial statements. Rule 2-01(c)(4) provides that these non-audit services are prohibited unless "it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements." Therefore, it is the staff's position that, subject to Rule 2-01(b) of Regulation S-X, an accountant performing a surprise examination under the custody rule would be able to perform certain non-audit services as long as it is reasonable to conclude that: (1) the results of the non-audit service will not be subject to attest procedures which might be performed during the surprise examination; and (2) the results of the non-audit service would not be subject to audit procedures if the accountant had been engaged to perform a financial statement audit. For example, if a pooled investment vehicle is included in the scope of an adviser's surprise examination under the custody rule, the accountant performing the surprise examination would be prohibited from compiling the pooled investment vehicle's financial statements. (Posted December 13, 2011.)

Question XVI.2

Q. The custody rule requires that an accountant performing a surprise examination of an adviser, preparing an internal control report of an adviser's related person qualified custodian or performing an audit of a pooled investment vehicle's financial statements for purposes of the adviser's compliance with the custody rule must be an "independent public accountant" and thus comply with the applicable provisions of rule 2-01 of Regulation S-X, including the term "audit and professional engagement period" as defined in rule 2-01(f)(5). How should the term "audit and professional engagement period" be applied for accountants performing surprise examinations, preparing internal control reports, and auditing pooled investment vehicles' financial statements pursuant to the custody rule?

A. Under the provisions of rule 2-01 of Regulation S-X, for a surprise examination, the audit and professional engagement period begins the earliest of: (1) the date the accountant signs an initial written agreement to perform the surprise examination as required by rule 206(4)-2(a)(4); (2) the date the accountant begins attest procedures; or (3) the beginning of the period subject to the surprise examination.

For the preparation of an internal control report or an audit of a pooled investment vehicle's financial statements, the audit and professional engagement period begins the earliest of: (1) the date the accountant signs an engagement letter or other agreement to prepare the qualified custodian's internal control report or audit the pooled investment vehicle's financial statements; (2) the date the accountant begins attest or audit procedures; or (3) the beginning of the period covered by the internal control report or pooled investment vehicle's financial statements.

In general, the audit and professional engagement period for the surprise examination ends when the accountant notifies the Commission of its termination pursuant to rule 206(4)-2(a)(4)(iii). While neither the accountant nor the audit client is required to notify the Commission of the termination of an engagement to prepare an internal control report or to audit a pooled investment vehicle's financial statements under the custody rule, consistent with the provisions of rule 2-01 of Regulation S-X, the audit and professional engagement period for these engagements ends when the audit client or the accountant, as applicable, notifies the other that the client is no longer the accountant's client for such engagement. See also Question XVI.3. (Posted December 13, 2011.)

Question XVI.3

Q. The definition of "audit and professional engagement period" in rule 2-01(f)(5) of Regulation S-X provides that the professional engagement period ends when the audit client or the accountant notifies the Commission that the client is no longer that accountant's audit client. How is the end date affected if the notification of termination of the engagement period is not effective until some future date or event? For example, where the client notifies the accountant that the relationship terminates with the conclusion of the engagement for the current fiscal year, when does the "audit and professional engagement period" end?

A. In this situation (absent any subsequent notice of termination), the professional engagement period ends with the issuance of the accountant's report for that particular engagement. It is important to note, however, that even where the termination of the professional engagement period is not effective until a future date or event, the obligation to make a filing under Commission regulations (e.g., on Form 8-K, Form ADV-E, or pursuant to rule 17a-5 of the Securities Exchange Act of 1934, as applicable) upon notification is not affected. (Posted December 13, 2011.)

Question XVI.4

Q. If an accounting firm regularly audits an advisory firm's books or the books of a limited partnership run by the advisory firm, can that accounting firm also be an "independent" public accountant for purposes of performing the surprise examination under the custody rule?

A. Yes, provided that the accounting firm meets the definition of "independent public accountant" in section (d)(3) of the rule. (Modified March 5, 2010.)

Endnotes

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[1] *See also* Section II.A. of the 2003 Release. An adviser that is also a qualified custodian would not necessarily have violated the rule if it places the securities in an appropriate account and identifies them in quarterly statements to the client.

[2] Pursuant to rule 12d1-1 under the Investment Company Act, a registered investment company may invest in an affiliated unregistered money market fund.