September 12, 2023

Via Electronic Submission

Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549

Re: Negative Impacts of the Safeguarding Proposal on Investors, Market Participants, and the Financial Markets

Dear Chair Gensler:

We write to express our strong concerns regarding the U.S. Securities and Exchange Commission's (the Commission) proposed rule, Safeguarding Advisory Client Assets (the Proposal). We support the Commission's goal of ensuring high levels of investor protection, including the safety of client assets from potential misuse or loss. However, in its current form, the Proposal is in conflict with that goal as it will result in a myriad of negative impacts on investors including their access to various services, assets, and markets with well-established rules and procedures.

As such, we strongly urge the Commission not to adopt the Proposal in its current form. Further, we urge the Commission to gain a better understanding of the current custodial framework. Where the Commission can identify shortcomings that have failed to protect investors from loss or misappropriation of traditional assets, it should propose changes, based on a careful evaluation of the issues identified by commenters, that target any gaps in the current custodial framework while preserving that framework's many strengths. If those changes represent a material change from the approach in the Proposal, the Commission should withdraw and re-propose the Proposal. Finalizing a new rule of which significant portions have been materially changed from the version as proposed would deny the public the opportunity to provide invaluable feedback on those changes and deprive the Commission of the benefits of any such feedback, consequences that would undermine the integrity and quality of our securities markets and the regulations that govern them.

The Proposal makes four fundamental changes to today's well-established and demonstrably effective custody framework without a clear policy rationale. First, it would compel qualified custodians to segregate client assets, including cash deposits, variation margin,

and contractual obligations, in a manner that is at odds with the existing regulatory frameworks that cover the related institutions and instruments. Second, it would create an overly broad definition of "custody" that includes many adviser practices that are already heavily regulated, resulting in unnecessary burden and inefficiency. Third, it would expand the existing custody rule's application from "funds and securities" to all positions held in a client account, including loans, derivatives, and other financial contracts held for investment purposes and physical assets, such as physical commodities, real estate, artwork, and precious metals. Fourth, it would compel advisers to enter into contractual agreements with clients' custodians and would impose on those custodians a host of new commercial and operational requirements that may be impossible to fulfill and will disrupt today's system that works well.

A wide array of organizations, including many signatories of this letter, have submitted comments discussing in detail how the Proposal adversely affects the market participants we represent, in many cases by creating requirements that are inconsistent with, and duplicative of, existing safeguards enforced by the Commodity Futures Trading Commission (CFTC), federal banking agencies, and state insurance regulators, as well as certain preexisting Commission requirements. We are jointly submitting these supplemental comments to highlight the diverse range of investors and other end users, briefly summarized below, that stand to be harmed if the Proposal were adopted in its current form.

- The Proposal would result in higher fees for custodial services. This would diminish investment returns for any person or institution (i.e., public and private pension plans, insurance companies, and charities) who uses the services of registered investment advisers. Additionally, the Proposal could effectively restrict investors' access to certain assets and instruments (i.e., derivatives, personal property, bank loans, and commodities) that are already protected from misappropriation under existing law, regulation, and systems.

- Requiring qualified custodians to hold client cash in segregated, off-balance sheet accounts would fundamentally disrupt the core banking model of taking deposits, providing credit, and facilitating payments. For individuals, businesses, and communities, mandatory cash deposit segregation would reduce banks' ability to provide credit. For investors and other market participants, segregation would slow down payment and settlement cycles, increase cost of funding and credit, and increase operational risks and trade failures.

- Requiring individual transaction verification for assets that cannot be custodied could effectively prohibit advisory clients from investing in assets such as physical commodities, which would disrupt the orderly functioning of critical commodities markets and materially raise costs of agricultural and energy products for everyday American consumers.

- The individual transaction verification requirement creates substantial new obligations for independent accounting firms, disproportionately burdening smaller firms, that will drive up audit costs and could limit the availability of services that the Proposal requires.

- The Proposal's expansive scope and new obligations would impose substantial burdens on investment advisers and their personnel responsible for compliance. These burdens could have with a disproportionate impact on smaller and start-up advisers, ultimately raising costs and reducing the availability of advisory services for retail investors and retirement savers.

- The segregation of client assets requirement would effectively prohibit prime brokers from providing margin financing by rehypothecating client assets even when the prime broker has the client's consent to do so. This could result in repricing of these products for clients advised by registered investment advisers, materially impact liquidity in the market, and significantly reduce returns.

- The Proposal's range of new custodial requirements would create significant operational and practical challenges to the custody of real estate, despite the fact that these assets cannot be misappropriated and are easily tracked by deeds and mortgages recorded by municipalities. These challenges would materially inhibit adviser clients' access to investment strategies relating to real estate, compounding the pressures that high interest rates and vacancies are placing on commercial and residential markets.

- The Proposal's expanded definitions of "custody" and "assets" creates conflicts with state insurance laws governing annuities, which could impede retirement savers' access to protected lifetime income products for clients of registered investment advisers.

- Similarly, the Proposal's expanded definitions of "custody" and "assets" are incompatible with both the CFTC's existing regulatory framework applicable to futures commission merchants and the Commission's margin regulations for uncleared security-based swaps.

- The Proposal's array of new requirements for qualified custodians could significantly reduce the availability of custodial services for futures and derivatives. If custody is unavailable for these instruments, this would effectively prevent advisory clients from investing in these instruments, restricting access to critical risk-management tools relied on by end users.

- Requiring accounting firms that audit 529 plans and ABLE plans to register with the Public Company Accounting Oversight Board (PCAOB) will raise costs on families participating in those plans, which provide tax-advantaged savings vehicles for educational expenses and ensure people with disabilities maintain eligibility for means-tested public benefits.

- The Proposal would restrict investors' ability to invest in emerging and frontier markets through investment advisers, which could reduce expected returns and inhibit investors' ability to diversify their portfolios.

- The Proposal's many stringent requirements could result in investors choosing to use fewer investment advisers, leading more retail investors to invest without the benefit of a professional adviser.

Since the initial comment period closed, Commission staff have had productive meetings with many industry associations, and we believe that the Commission may not have intended for the Proposal to apply to some of the areas, services, and products discussed above. However, because these flaws are fundamental and rooted throughout core elements of the Proposal, material changes to substantial components of the Proposal are necessary to avoid the potential negative outcomes described above. Such changes would alter the Proposal to the point that it would no longer meaningfully resemble its current form. Should the Commission decide to make such changes and move forward with rulemaking, we strongly recommend withdrawing and re-proposing the Proposal. And before re-proposing, the Commission should gain a better understanding of the custodial market to develop a more tailored proposal.

In addition, the potential harmful effects of the Proposal would likely be compounded by the impacts of many other new rules that the Commission has recently proposed or finalized. Regulations, especially those with interconnections and dependencies between them, do not operate in isolation. The Commission acknowledged this fact on August 23, 2023, when it re-opened the comment period on the Proposal to give the public 60 days to provide additional feedback in light of the final rules that it adopted regarding the regulation of private fund advisers. However, there are many other recently proposed rules that would potentially interact or conflict with the Proposal, the cumulative effects of which the Commission has made no attempt to assess, either in the Proposal or through a separate holistic analysis, despite the obvious need to do so.

For these reasons, we urge the Commission not to adopt the Proposal in its current form. Further, any future proposed rulemaking should be based on an updated economic analysis that accounts for all relevant costs, narrowly tailored to specific instances where the current custody framework has demonstrably failed to protect investors from loss or misappropriation of traditional assets, and developed in close consultation with the primary regulators of the impacted entities, markets, and products.

We agree with the Commission's assertion that appropriate safeguarding of client assets is critical to investor protection, but the Proposal creates a wide range of negative consequences across the U.S. financial markets. We appreciate the opportunity to provide these comments, and we stand ready to work with the Commission as it carefully considers how best to protect investors while minimizing negative unintended consequences.

Sincerely,

ABA Securities Association (ABASA)

American Bankers Association (ABA)

Alternative Investment Management Association (AIMA)

American Council of Life Insurers (ACLI)

Association for Financial Markets in Europe (AFME)

Bank Policy Institute (BPI)

Commercial Real Estate Finance Council (CREFC)

Committee of Annuity Insurers

Committee on Capital Markets Regulation (CCMR)

Commodity Market Council (CMC)

Financial Services Forum (FSF)

Financial Services Institute (FSI)

Futures Industry Association (FIA)

Institute for Portfolio Alternatives (IPA)

Insured Retirement Institute (IRI)

International Swaps and Derivatives Association (ISDA)

Investment Company Institute (ICI)

Loan Syndications and Trading Association (LSTA)

Managed Funds Association (MFA)

Money Management Institute (MMI)

Nareit

National Society of Compliance Professionals (NSCP)

Securities Industry and Financial Markets Association (SIFMA)

Securities Industry and Financial Markets Association Asset Management Group (SIFMA AMG)

The Real Estate Roundtable (RER)

U.S. Chamber of Commerce Center for Capital Markets Competitiveness (CCMC)

cc: The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
William Birdthistle, Director, Division of Investment Management