

MEMO# 26805

December 24, 2012

SEC Adopts Missing Securityholder Rules as Required by the Dodd-Frank Act; Compliance Not Required Until 2014

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TO: TRANSFER AGENT ADVISORY COMMITTEE No. 81-12
BROKER/DEALER ADVISORY COMMITTEE No. 68-12
COMPLIANCE MEMBERS No. 29-12
INVESTMENT ADVISER MEMBERS No. 53-12
SMALL FUNDS MEMBERS No. 43-12 RE: SEC ADOPTS "MISSING SECURITYHOLDER" RULES AS REQUIRED BY THE DODD-FRANK ACT; COMPLIANCE NOT REQUIRED UNTIL 2014

The SEC has adopted revisions to Rule 17Ad-17 under the Securities Exchange Act of 1934 to require a "paying agents" to notify "missing securityholders" [\[1\]](#) of uncashed checks as required by the Dodd-Frank Act (the "DFA"). [\[2\]](#) Paying agents must also maintain records demonstrating their compliance with the new requirements.

The revisions to Rule 17Ad-17, which are discussed below, will be effective 60 days after their publication in the Federal Register and their compliance date will be 12 months after their effective date. The changes to the rule will apply only prospectively. Importantly, as discussed above under Paragraph (1) below, those missing securityholders who have established instructions for the paying agent to re-deposit uncashed checks in their account need not be provided the required notice as the redeposit will be considered negotiation of the checks. [\[3\]](#)

Background

As you may recall, in March 2011, the Securities and Exchange Commission published for comment revisions to Rule 17Ad-17 under the Securities Exchange Act of 1934 to implement Section 929W of the Dodd-Frank Act (the "DFA"). [\[4\]](#) This provision in the DFA requires the SEC to adopt rules under Section 17A of the Securities Exchange Act of 1940 that would require all "paying agents" to notify "missing securityholders" of uncashed checks in the amount of \$25 or more. As used in the DFA, the term "paying agent" includes mutual fund transfer agents, among others, and the term "missing securityholder" means a securityholder who has not cashed a check sent to him or her by a paying agent by the

earlier of six months from the sending of the check or, for regularly scheduled checks, [5] the time the next check is mailed to the securityholder. Any notice required by this provision must be sent within seven month of the time the check was sent to the securityholder.

The Institute's comment letter supported the proposed rule's flexibility but sought clarification of several issues relating to the sending of the notices. [6] We are pleased that, as adopted, the revisions to Rule 17Ad-17, which are found in new subdivision (c) of the rule, provide much of the clarification sought by the Institute.

Rule 17Ad-17(c): Sending Notice to Unresponsive Payees

New subdivision (c) of Rule 17Ad-17 consists of five paragraphs as follows:

Paragraph (1) – Duty to Send Notices

This paragraph imposes upon “paying agents” (as defined in paragraph (2) of the rule) a duty to provide “not less than one written notification to each ‘unresponsive payee’” (as defined in paragraph (3) of the rule) informing the payee of an unnegotiated check within 7 months, or 210 days, of the date the unnegotiated check was sent to the payee. A paying agent is not, however, required to send such notice to an unresponsive payee who would be considered a lost securityholder as defined in Rule 17Ad-17. [7] The rule does not mandate the notice's format. The Release clarifies the following issues relating to providing the required notice:

- One notice may cover several unnegotiated checks so long as the seven-month interval is met "with respect to each individual check" referenced in the notice;
- If used for multiple checks, the notice must "sufficiently identify each not yet negotiated check and . . . must be sent . . . no later than seven months after the sending of the oldest not yet negotiated check covered by the notice";
- While the rule mandates no format for the required notice, the periodic statements provided by broker-dealers to their customers that include all disbursements, will not satisfy the rule's notice requirement; [8] and
- Notice may be provided electronically "if the customer has affirmatively consented to receiving disclosures generally in such manner." [9]

As recommended by the Institute, the required notice is not required where the securityholder has established, prior to the transmittal of any check, arrangements with the paying agent that permit funds from an unnegotiated check to be redeposited into the securityholder's account. According to the Release, "to the extent a securityholder has established standing or other prior instructions for any check or checks to be deposited into its account in a particular manner, a check deposited in compliance with such instructions may properly be considered to have been negotiated by the securityholder for purposes of Rule 17Ad-17." [10] [Emphasis added.] Such instructions must, however, have been in place prior to the transmittal of the check: ". . . there is no evidence to suggest that it was Congress' intent to establish or encourage such a depository arrangements for a securityholder where one did not exist prior to the transmittal of the check or checks subject to redeposit." [11] [Emphasis added.]

Paragraph (2) – Definition of “Paying Agent”

Consistent with the DFA, this paragraph defines the term "paying agent," to expressly include issuers, transfer agents, brokers, dealers, investment advisers, and custodians, among others.

Paragraph (3) – Definition of “Unresponsive Payee”

This paragraph defines “unresponsive payee” to mean a payee who has not negotiated a check before the earlier of the paying agent’s sending the “next regularly scheduled check or the elapsing of six (6) months (or 180 days) [12] after the sending of the not yet negotiated check.” According to the Release, the term is not limited to natural persons. [13] Also, an unresponsive payee shall cease to be an unresponsive payee upon the unnegotiated check being negotiated. The Release clarifies that the phrase “regularly scheduled check” does not refer to a check that the securityholder has scheduled to be sent on a regular basis. Instead, it "includes not only checks for interest and dividend payments but also any other regularly scheduled period payments from an issuer of securities to be distributed to securityholders as a class." [14][Emphasis added.]

Paragraph (4) – Checks Less than \$25

Paragraph (4) affirms the de minimis exception from the DFA – i.e., a paying agent is not required to send notice if the value of the unnegotiated check is less than \$25.

Paragraph (5) – Clarification Regarding State Escheatment Law

Paragraph (5) expressly provides and clarifies, as recommended by the Institute, that the requirements of this rule "shall have no effect on state escheatment laws."

Paragraph (6) – Recordkeeping Requirements

Requires all paying agents to maintain records demonstrating compliance with the rule, including “written procedures that describe the [paying agent’s] methodology” for complying with the rule. Such records must be maintained in accordance with Rule 17Ad-7(i), which imposes a 3-year retention period, the first of which must be in an easily accessible place.



Tamara K. Salmon
Senior Associate Counsel

endnotes

[1] To avoid confusion with the "lost securityholder" provisions in Rule 17Ad-17, the Commission has determined to replace the term "missing securityholder" with "unresponsive payee."

[2] See Lost Securityholders and Unresponsive Payees, SEC Release No. 34-[] (the “Release”), which was published by the SEC on December 21, 2012, and which is available at: <http://www.sec.gov/news/press/2012/2012-277-draft-lost-securityholders-release.pdf>. According to the prefatory language to the Release, it was "approved by the Commission and is being issued in draft form while pending review at the Office of Management and Budget of the 'Major Rule Analysis' under the Small Business Regulatory Enforcement

Fairness Act." The revisions adopted to Rule 17Ad-17 also extend the provisions in the current rule relating to "lost securityholders" to broker-dealers as required by the DFA. As a result, revised Rule 17Ad-17 now extends to broker-dealers the duty that transfer agents have long had to identify and search for lost securityholders.

[3] Release p. 24.

[4] See Institute Memorandum No. [25035](#) (dated March 21, 2011), which summarized the SEC's proposal, Proposed Amendments to Rule 17Ad-17; Transfer agents', brokers', and dealers' obligations to search for lost securityholders; paying agents' obligations to search for missing securityholders, SEC Release No. 34-64099 (March 18, 2011), which is available at <http://www.sec.gov/rules/proposed/2011/34-64099.pdf>.

[5] See discussion of regularly scheduled checks under Paragraph (3), below.

[6] See Institute Memorandum No. [25176](#), dated May 9, 2011, which summarized the Institute's comment letter.

[7] The Release also clarifies, in response to a concern raised in the ICI's comment letter, that "the rule as amended would not require a person to be deemed a lost securityholder just because he has been classified as an unresponsive payee." Release at p. 18. Also: (1) a paying agent is not required to send the notice required by subdivision (c) to an unresponsive payee who is also a lost securityholder "until such time as the paying agent obtains a good address to send the notice" and (2) with respect to an unresponsive payee who is deceased, "the paying agent would still have the obligation to send the notice of an unnegotiated check" because the payee's death "in and of itself does not mean that there is not a good address to send the notice, and such notice could be of benefit to the deceased securityholder's estate." Release at pp. 18-19.

[8] According to the Release, "[w]hile the Commission recognizes that generally all transactions, including checks, are detailed in brokers' periodic statements, we do not believe that such all-inclusive statements in their present form would present the kind of focused notifications of uncashed checks that Congress intended in" enacting this requirement in the DFA. Release at p. 25.

[9] Release at pp. 23-25. Emphasis in original.

[10] Release at p. 24. The Release distinguishes situations in which uncashed checks are deposited by the payee into the securityholder's account in the absence of such redeposit arrangement agreed to by the securityholder. As stated in the Release, "there is no evidence to suggest that Congress intended to allow paying agents to avoid the notification requirements of Rule 17Ad-17 simply by depositing the monetary equivalent of the uncashed check into an account for the unresponsive payee." *Id.*

[11] Release at p. 24.

[12] As proposed, the rule required the sending of the notice within "six months." The Institute's letter recommended permitting paying agents to use "180 days" to facilitate system programming and eliminate confusion.

[13] Cf. the term "lost securityholder" in Rule 17Ad-17(b)(2), which is limited to natural persons. Release at pp. 17-18.

[\[14\]](#) Release at p. 20. The Release continues: "Accordingly, the term 'regularly scheduled check' would not include checks for payment solely to an individual securityholder and not to a class of securityholders pursuant to a specific arrangements established at the request of the securityholder or to third parties on behalf of the securityholder." Release at p. 21.

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