

MEMO# 29680

January 29, 2016

Institute Draft Comment Letter on SEC's Transfer Agent Release; Comments Requested by February 4

[29680]

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TO: OPERATIONS COMMITTEE No. 3-16
TRANSFER AGENT ADVISORY COMMITTEE No. 6-16
SMALL FUNDS COMMITTEE No. 4-16 RE: INSTITUTE DRAFT COMMENT LETTER ON SEC'S
TRANSFER AGENT RELEASE; COMMENTS REQUESTED BY FEBRUARY 4

As you may recall, in late December, the Securities and Exchange Commission published an Advanced Notice of Public Rulemaking (“ANPR”) and a Concept Release seeking public comment on the Commission’s review of its transfer agent regulations. [\[1\]](#) According to the SEC Release, the ANPR is intended to identify a series of new and amended rules that the Commission intends to propose “as soon as is practicable, either individually or in groups or phases.” [\[2\]](#) The Concept Release is intended to provide the Commission commentary on “a number of additional transfer agent issues that primarily arise from the diverse array of transfer agent functions and services which (sic) have developed over time.” Comment on these issues will provide the Commission staff the ability “to evaluate the need for, and potentially develop, additional rulemaking proposals appropriately tailored to these complex areas.” [\[3\]](#)

The Institute has prepared the attached draft comment letter on the proposal. Comments are due to the Commission by Monday, February 29th. Persons with comments on the Institute’s draft should provide them to the undersigned by email no later than close of business on Thursday, February 4, 2016. In submitting comments, please provide a redlined version of your suggested edits to facilitate changes to the letter in the short amount of time we have to finalize and file it. If there are issues concerning the letter you would like to discuss, please contact either Tami Salmon in ICI’s Law Department (202-326-5825) or Joanne Kane in ICI’s Operations Department (202-326-5850) no later than Thursday, February 4th. The Institute’s draft letter consists of four parts, the three substantive parts of the letter are briefly summarized below.

I. Part I: Background

This section of the Institute’s letter notes that our comments only relate to mutual fund

transfer agents; we offer no comment on the Commission's regulation of transfer agents to operating companies. Our letter supports the Commission proposing revisions to its transfer agent rules to update and modernize them and conform them to today's transfer agent business. We express concerns, however, with the Commission proposing solutions to non-existent problems and contemplating unduly extensive and overly prescriptive regulatory requirements. To address these concerns, the letter includes a list of issues that should guide the Commission's rulemaking, and we recommend that the Commission conduct a rigorous cost/benefit analysis of any proposed rules or rule revisions. We also recommend that they enforce existing rules to assuage some of the concern discussed in the Release.

II. Part II: The ANPR

Part II of our letter contains a detailed discussion of the following issues raised in the ANPR: reforms to Forms TA-1, TA-2, and TA-W; requiring written agreements between an issuer and its transfer agent; safeguarding funds and securities; compliance with Federal securities laws; and cybersecurity. In connection with these issues, the letter:

- Supports the Commission revising Forms TA-1 and TA-2 to update their contents to ensure these forms both remain relevant in light of the evolution of the transfer agent industry and require disclosure of: the nature of the transfer agent's business; the types of clients the transfer agent services; and statistical information and data that would be meaningful to the Commission.
- Suggests the Commission revising Form TA-W to capture information to address the Commission's concerns regarding transfer agents failing to transfer shareholder records to a successor transfer agent in a timely and complete fashion.
- Supports the Commission revising Rule 17Ad-6, relating to recordkeeping, to supplement its existing requirements relating to contractual, fee, or financial information provided that the Commission can document, based upon its experience in regulating transfer agents under the current rule, how the current rule is deficient and, as a result, has impeded the Commission's access to this information as well as its ability to regulate transfer agents effectively in the interests of shareholders and the national clearance and settlement system.
- Opposes the Commission requiring transfer agents to disclose information on their clients, conflicts of interests, relationships, and fees; and requiring transfer agents to file financial statements and material contracts with the Commission.
- Supports the Commission requiring all transfer agents to have written agreements with each issuer serviced by the transfer agent and we support the Commission requiring these agreements to include specified "basic terms."
- Opposes the Commission defining the "basic terms" of the written agreement to include provisions: (1) beyond those necessary to document the terms and conditions of the relationship between the issuer and the transfer agent; (2) that impose affirmative regulatory responsibilities on the relationship between an issuer and its transfer agent; and (3) that would result in the Commission imposing regulatory requirements on persons outside of its jurisdiction.
- Supports the Commission adopting an anti-fraud rule for transfer agents provided the Commission documents why Rule 10b-5 is insufficient to sanction fraudulent conduct by transfer agents and determines it has legal authority to adopt such a rule.
- Supports the Commission requiring transfer agents to have written compliance

policies and procedures so long as such procedures either exempt or exclude mutual fund transfer agents that are subject to Rule 38a-1 from such a requirement. This exemption/exclusion is necessary to avoid any redundancy or inconsistency between requirements imposed on mutual fund transfer agents under the Exchange Act and those under the ICA.

- Supports the Commission revising the recordkeeping rules to require transfer agents to maintain copies of their written compliance policies and procedures.
- Opposes the Commission requiring transfer agents to: file compliance reports with the Commission; designate a CCO; conduct background checks of or register their employees (aside from the current requirements of Rule 17f-2); and conduct due diligence on clients or the clients' shareholders.
- Supports the Commission adopting business continuity standards for transfer agents so long as it documents the need for such standards consistent with our Rulemaking Considerations and such standards are consistent with those imposed on broker-dealers pursuant to FINRA Rule 4370.
- Supports the Commission reforming the signature guarantee requirements to both ensure their continued use in an electronic environment and expand their use to include non-financial transactions to strengthen mutual funds' Identity Theft Red Flags programs.
- Supports the Commission requiring transfer agents to have fidelity bonds covering any larceny or embezzlement by their employees so long as the Commission has documented a need for such requirement consistent with our Rulemaking Considerations and conducted a cost/benefit analysis of this requirement.
- Opposes the Commission imposing on transfer agents: specific cybersecurity standards or protocols; operational capacity standards; minimum level of cyber protection; and "minimum" insurance requirements.

The letter also recommends:

- That, in lieu of rewriting the safeguarding rule, Rule 17Ad-12, to replace the rule's existing flexible standards with rigid prescriptive standards that usurp a transfer agent's business judgment, the Commission instead require transfer agents to have written policies and procedures that are reasonably designed to ensure that client funds and securities are safeguarded from risk of theft, loss, or destruction. [\[4\]](#) Such policies should apply without regard to whether the securities held by the transfer agent are certificated or uncertificated;
- To the extent necessary for a documented regulatory purpose, the Commission require transfer agents to create and maintain financial statements but we do not support the Commission requiring the filing of such financial statements;
- With respect to paying agents, that the Commission apply any new regulations involving the activities of paying agents to only those persons who are currently not registered with or regulated by the Commission as a transfer agent; and
- That the Commission adopt no rules relating to unclaimed property but, instead, revise Form TA-2 to capture statistical information or data relating to shareholder accounts that have escheated to the states under either a "returned mail" or "no contact" standard.;

III. Part III: The Concept Release

Our comments on the Concept Release discuss: the processing of book-entry securities; our support for the Commission establishing a separate rule set tailored to mutual fund transfer agents; the compensation structures and conflicts of interests of mutual fund transfer agents; issues relating to omnibus accounts and oversight of sub-transfer agents; registration and regulation of third-party administrators (“TPAs”); Rule 10b-10 under the Securities Exchange Act of 1934; proxy issues; and an SRO for transfer agents. This part of the letter recommends that the Commission:

- Update its rules to accommodate the treatment of book-entry securities. We additionally recommend that, in lieu of waiting to address this issue in connection with rulemaking in response to the Concept Release, it do so in connection with its rulemaking under the ANPR;
- Create a separate rule set specifically tailored to mutual fund transfer agents;
- Leave issues relating to the a mutual fund’s compensation of its transfer agent up to the discretion, business judgment, and fiduciary duty of a mutual fund’s board of directors;
- Refrain from adopting rules relating to a mutual fund’s omnibus accounts and, instead, address any issues relating to the lack of transparency associated with such accounts when necessary in connection with revising or adopting substantive rules;
- Take steps necessary to ensure that mutual funds have access to meaningful information that would enable them to oversee those intermediaries that provide sub-accounting services to owners of mutual fund shares so fund boards may fulfill their responsibilities to the fund and its shareholder rather than receiving volumes of data or a pass-through of securityholder information from intermediaries and omnibus account holders ;
- Recommends that the Commission require the registration and regulation of TPAs as transfer agents under the Securities Exchange Act of 1934. We also recommend that, when developing such rules, the Commission take into account ERISA and any applicable rules of the Department of Labor thereunder relating to retirement plan sponsors;
- For any mutual fund shareholder who holds a mutual fund account directly on the books and records of a mutual fund transfer agent and not through a financial intermediary, the Institute supports the Commission revising Rule 10b-10 to require the transfer agents that holds such account to send a confirmation to retail investors that fulfills the requirements of Rule 10b-10 under the Exchange Act.;
- In proposing any rules or rule amendments in response to the ANPR or Concept Release, we recommend that the Commission take a principles-based approach that will provide registrants and the Commission maximum regulatory flexibility and enable transfer agents to tailor the regulatory requirements to the transfer agent’s business;
- We recommend that the Commission refrain from adopting rules under Section 17A of the Exchange Act relating to proxies; and
- We oppose the Commission pursuing an SRO for transfer agents.

The letter also includes two appendices. Appendix I contains the items in Form TA-1 and

TA-2 that we recommend be revised to update and modernize them. Appendix II lists the Commission's rules under Section 17A of the Exchange Act that we recommend be revised, clarified, or deleted.

Joanne Kane
Director - Operations & Transfer Agency Tamara K. Salmon
Associate General Counsel
[Attachment](#)

endnotes

[1] See Transfer Agent Regulation, Advance notice of proposed rulemaking; Concept release; Request for comment, SEC Release No. 34-76743 (December 22, 2015), which is available at: <http://www.sec.gov/rules/concept/2015/34-76743.pdf>. The ANPR begins on page 109; the Concept Release begins on p. 151. Pages 159-187 focus on transfer agents to mutual funds. In this memo, the ANPR and Concept Release are referred to collectively as the "SEC Release."

[2] SEC Release at p. 8.

[3] Id.

[4] Should the Commission believe additional protection of shareholder records are warranted, it may also want to consider subjecting transfer agents to Regulation S-P. Currently, the rule only applies to broker-dealers, investment advisers, and investment companies. Due to the nature of their relationship with investment companies, mutual fund transfer agents are also subject to the regulation.