

## COMMENT LETTER

May 9, 2011

# ICI Files Comment Letter With SEC on Proposed "Missing Securityholder" Rules (pdf)

May 9, 2011 Elizabeth M. Murphy, Secretary U.S. Securities and Exchange Commission 100 F Street, NE Washington, D.C. 20549-1090 Re: Proposed Revisions to Rule 17Ad-17 Relating to Lost Securityholders; File No. S7-11-11 Dear Ms. Murphy: The Investment Company Institute<sup>1</sup> appreciates the opportunity to comment on the proposed revisions to Rule 17Ad-17 under the Securities Exchange Act of 1934.<sup>2</sup> This rulemaking initiative, which is required by Section 929W of the Dodd-Frank Act ("DFA"), will implement provisions in the DFA requiring "paying agents" to notify "missing securityholders" in the event the missing securityholder has failed to negotiate a check for \$25 or more.<sup>3</sup> The Institute supports the Commission's proposal, which tracks the statutory requirements of the DFA while providing paying agents maximum flexibility in providing the required notice. We recommend, however, that the Commission clarify in the adopting release some issues raised by this new requirement, which are discussed in detail below, and provide an ample compliance period to enable paying agents to retool their systems to accommodate the new requirements.

1 The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$13.1 trillion and serve over 90 million shareholders.

2 See Proposed Amendments to Rule 17Ad-17; Transfer agents', brokers', and dealers' obligation to search for lost securityholders; paying agents' obligation to search for missing securityholders, SEC Release No. 34-64099 (March 18, 2011).

3 The DFA also requires the Commission to extend to brokers and dealers the requirements of Rule 17Ad-17 to search for lost securityholders. Our comments are limited to the provisions in new Subsection (c), which impose a duty on paying agents to notify missing securityholders.

Elizabeth M. Murphy, Secretary May 9, 2011 Page 2 of 6 OVERVIEW OF THE COMMISSION'S PROPOSAL Consistent with Section 929W of the DFA, the Commission has proposed to add a new subsection (c) to Rule 17Ad-17 to require each paying agent to provide written notification to each missing securityholder of any check in the amount of \$25 or more that was sent to the securityholder and that has not been cashed. In addition to imposing this new duty, this subsection includes proposed definitions of "paying agent" and "missing securityholder"; it clarifies that the new notice requirement shall have no effect on state escheatment law; and it imposes a 3-year recordkeeping requirement. As stated above, while we support adoption of these provisions, we recommend the Commission address the following issues

either in revisions to the proposed rule or in the discussion in the adopting release.

**PARAGRAPH (C)(1) – THE DUTY TO PROVIDE WRITTEN NOTICE** Paragraph (c)(1) requires paying agents to “provide not less than one written notification to each missing securityholder stating that such securityholder has been sent a check that has not yet been negotiated.” It also provides that such notice “may be sent with a check or other mailing subsequently sent to the missing securityholder,” so long as it is sent within seven months after sending the check that remains uncashed. The Institute strongly supports the flexibility this provision will provide to paying agents by avoiding rigorous requirements on the form, content, and delivery of these notices. Paying agents need this flexibility to determine the most effective and cost-efficient means for providing the required notice, whether through a written disclosure included on a shareholder statement, an insert in a mailing, a letter sent to the securityholder or some other means. This approach will also minimize disruptions to current systems as required by DFA Section 929W. The Institute recommends that the Commission clarify various issues in connection with the required notice. First, we recommend that the Commission clarify that this provision does not require the sending of a separate notice in connection with each uncashed check. In other words, a paying agent may use a single generic notice to alert the securityholder to multiple checks sent within the six month period that remain uncashed. This clarification is particularly important for paying agents that are mutual fund transfer agents. This is because it is not uncommon for securityholders who receive monthly checks<sup>4</sup> from their mutual fund accounts to accumulate several such checks before cashing them. For securityholders receiving these monthly checks, the rule is likely to result in the transfer agent having to send notices to such clients with regular frequency. To avoid this result, we recommend that Commission clarify that a paying agent may satisfy the rule’s notice requirement by including generic disclosure with a notice sent to a securityholder who receives regularly scheduled checks<sup>5</sup> informing him or her that: (1) the securityholder’s regularly scheduled check was sent to them; (2) the check should be cashed within a specified period of time to avoid it expiring; and (3) to contact the 4 These regularly scheduled checks may, for example, be dividend checks or distributions from a retirement account. 5 See our recommended clarification of this term under the discussion of Paragraph (c)(3), below. Elizabeth M. Murphy, Secretary May 9, 2011 Page 3 of 6 paying agent if the securityholder believes the check was not received or has been misplaced.<sup>6</sup> This generic form of notice will ensure that securityholders are alerted the sending of the previous check or checks, the importance of timely cashing such checks, and what to do if a check was not received or misplaced. We believe this approach is appropriate for securityholders who have made arrangements to receive regularly scheduled checks because such securityholders would presumably be on the lookout for such checks and notice if they were delayed or failed to arrive. From the mutual fund’s perspective, such generic notice would facilitate their compliance with the rule and avoid having to send a separate distinct notice for each uncashed check. Along these same lines, we also recommend that the Commission clarify that a notice need not be sent to a person who becomes a missing securityholder under paragraph (c)(3)<sup>7</sup> by not cashing a check before the next regularly scheduled check is sent but who has cashed the check prior to the time notice of the uncashed check is required to be sent under paragraph (c)(1). So, for example, if a securityholder who receives monthly checks from a fund company fails to cash the January 15th check until March, because the check was cashed before the required notice must be sent (no later than July 15th), the notice is not required. We also recommend that the Commission clarify that “written notification” includes electronic notification (e.g., email) for those securityholders who have elected to receive account information electronically. Based on such election, these securityholders would expect to receive communications about their account electronically and they likely would prefer receiving such notice more quickly than they would via “snail

mail.” Finally, we recommend that the Commission make one minor change to this provision by replacing “seven months” with “210 calendar days.” In programming systems changes, it is far easier to accommodate periods consisting of calendar days than those consisting of months.

**PARAGRAPH (C)(3) – MISSING SECURITYHOLDERS** Paragraph (c)(3) would define “missing securityholder” to mean a securityholder who has failed to negotiate a check sent to the securityholder “before the earlier of the paying agent’s sending the next regularly scheduled check or the elapsing of six months after the sending of the not negotiated check.” Consistent with our recommended revision to paragraph (c)(1), we recommend that “180 calendar 6 So, for example, a paying agent might send a missing securityholder who has failed to cash three checks during the seven month period one notice containing this information so long as it was sent within seven months of the first uncashed check (e.g., the May check) being sent to the shareholder. 7 Pursuant to Paragraph (c)(3), a securityholder become a “missing securityholder” by failing to cash a check “before the earlier of the paying agent’s sending the next regularly scheduled check or the elapsing of six (6) months after the sending of the not yet negotiated check.” [Emphasis added.] Paragraph (c)(1) requires that a notice be sent “to each missing securityholder . . . no later than seven (7)months after the sending of the yet negotiated check.” Elizabeth M. Murphy, Secretary May 9, 2011 Page 4 of 6 days” replace “six months” in this provision. We also recommend that the Commission clarify that the term “missing securityholder” is limited to natural persons. This would be consistent with the provisions of 17Ad-17(a)(3)(iii), which limits a transfer agent’s duty to search for lost securityholders to those who are natural persons. As discussed below, to avoid confusion between the requirements of Subsections (a) and (b) of Rule 17Ad-17 and those of new Subsection (c), we recommend that these subsections be as consistent as possible in their application. We also recommend that the Commission exclude from the term “missing securityholder” any person who the paying agent knows is either deceased or who is treated by the paying agent as a “lost securityholder” pursuant to Rule 17Ad-17(a). This will avoid requiring paying agents to send notices to persons when the paying agent either knows the notice is for naught (i.e., when the notice is being sent to a decedent) or being sent to an address that the paying agent has reason to believe may be invalid (i.e., a lost securityholder’s former address). Requiring a paying agent to send information regarding a securityholder’s account in either instance would be needlessly expensive and inappropriately risky. It would also disrupt existing systems as paying agents would be forced to treat, for purposes of this required notice, accounts they have already tagged as being owned by a decedent or lost securityholder as active. We would expect any paying agent relying on this exclusion to maintain documents pursuant to paragraph (d)(1) documenting the basis for such reliance. As regards the phrase “regularly scheduled check,” we recommend that the Commission clarify that it refers to those checks that the securityholder has made arrangements with the paying agent to send to the securityholder on a pre-specified, regularly-scheduled basis. As such, any “ad hoc” check requested by the securityholder would not be considered a regularly scheduled check. We also recommend that the Commission affirm that, in accordance with the express language of Paragraph (c)(1), the notice is only required for those checks that are sent to the securityholder. So, for example, where the payee is the securityholder but the check is sent to someone other than the securityholder, pursuant to the language of proposed Paragraph (c)(1), written notice is not required if the check is not timely cashed. Similarly, if the payee on the check is someone other than the securityholder but the check is sent to the securityholder, notice will be required if the check is not timely cashed.

**PARAGRAPH (C)(4) – EXCLUSION FOR CHECKS LESS THAN \$25 IN VALUE** Paragraph (c)(4) provides an exception from the notice requirement where the value of the uncashed check is less than \$25. We recommend that the Commission recognize an additional exception from the notice requirement. In

particular, we recommend that the Commission exclude from the notice any uncashed check, regardless of amount, that is redeposited into the securityholder's account within six months of its issuance so long as (1) the paying agent has an established procedure for dealing with uncashed checks in this manner and (2) this procedure is disclosed to the securityholder, in the issuer's prospectus or otherwise. This exception will accommodate current policies and procedures of mutual funds, which are disclosed to investors, to redeposit uncashed checks. As such, it should minimize disruptions to existing systems. In such instances, the redeposited check Elizabeth M. Murphy, Secretary May 9, 2011 Page 5 of 6 transaction appears on the securityholder's next account statement. As such, in essence the exclusion we are seeking would not totally relieve the paying agent from providing notice to the securityholder of the uncashed check; instead, such notice would be provided by listing the redeposited check on the securityholder's next account statement.<sup>8</sup>

**PARAGRAPH (C)(5) – THE RULE'S IMPACT ON STATE ESCHEATMENT LAWS** The Commission has expressly sought comment on whether the new term "missing securityholder" will be confused with the rule's existing term "lost securityholders" and its related requirements. We believe there will be confusion between these terms and the inter-play between the provisions of Subsections (a) and (c) of Rule 17Ad-17. We recommend that the Commission revise Paragraph (c)(5) to clarify that its provisions shall also have no effect on the obligations imposed on transfer agents, brokers, and dealers under Rule 17Ad-17(a). As discussed above, the addition of Subsection (c) to Rule 17Ad-17 necessitates reconciling certain provisions of Subsections (a) and (c) relating to lost and decedent securityholders. To avoid additional confusion regarding how these two provisions are to be read in tandem, we recommend the above amendment to clarify, for example, that merely because a securityholder is "missing" for purposes of Subsection (c) because it has failed to cash a check, this will not result in such person being deemed a "lost securityholder" under Subsection (a) unless such person otherwise meets the definition of "lost securityholder" in Subsection (b). To avoid any confusion in the terminology between "missing" and "lost" securityholders, we also recommend that the Commission replace the term "missing securityholder" with "securityholder with an uncashed check."<sup>9</sup>

**COMPLIANCE DATE** The Commission has sought comment on its proposal to establish a compliance date one-year following final action by the Commission. While we recommend a compliance date of at least one year, our members would prefer a compliance date of 18 months following the rule's adoption. With respect to our members' business, the onus of the rule will fall on the mutual fund's transfer agent. This longer period is to accommodate a variety of competing priorities pursuant to recent Federal regulations that have recently been imposed on such persons and that necessitate dedicating significant resources to implementing such initiatives. Two of the more pressing initiatives our members are currently working 8 If the Commission elects not to include this exclusion in the rule text, we instead recommend that it clarify in the adopting release that, for those paying agents with a policy of redepositing uncashed checks into the securityholder's account, so long as an account statement (or other notice) is sent to the securityholder within six months of the date of the uncashed check and reflects that the check amount has been redeposited into the securityholder's account, the paying agent will be deemed to have satisfied the notice requirement of proposed Paragraph (c)(1). 9 While this recommended term may be longer and more awkward, it is a more accurate description. Also, aside from the definition of the term in Paragraph (c)(3), this term is only used twice in the rule and once in the heading so use of the longer, more accurate term should not be problematic. Elizabeth M. Murphy, Secretary May 9, 2011 Page 6 of 6 to implement are the Commission's pay-to-play rule and cost-basis reporting mandated by the Internal Revenue Service (IRS) and the Treasury Department. With respect to the former, on behalf of each mutual fund's investment adviser, mutual fund transfer agents are having to do extensive searches of all accountholders to determine

which are government entities meeting certain conditions. While the compliance date for this requirement is September 2011, we expect the initial implementation of this rule to extend far into 2012. After this initial implementation phase, which involves existing accounts, transfer agents must have systems in place to identify new accounts that must be captured under the rule. This initiative is requiring significant resources and necessitating major systems changes. At the same time, transfer agents are having to develop systems to accommodate the new cost- basis tracking and reporting requirements imposed by the IRS and Treasury Department. Pursuant to these requirements, mutual fund transfer agents must have systems in place to track and report cost- basis information for mutual fund shares acquired on or after January 1, 2012. To avoid imposing further strains and resource challenges on these transfer agents, we strongly recommend that the Commission delay the compliance date for the proposed rule for at least 18 months from its adoption. ♦ ♦ ♦ ♦ The Institute appreciates the opportunity to share these comments with you. If you have any questions concerning them or would like additional information on these issues, please contact the undersigned by phone (202-326-5825) or email (tamara@ici.org). Regards, /s/ Tamara K. Salmon Senior Associate Counsel

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